

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Oral Hearing:  
September 12, 2017

Mailed:  
September 28, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Apparatus LLC*

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Serial No. 86443209

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Marc P. Misthal, Jonathan A. Malki, Donna L. Mirman, of Gottlieb Rackman &  
Reisman PC for Apparatus LLC.

Karen K. Bush, Trademark Examining Attorney, Law Office 108,  
Andrew Lawrence, Managing Attorney.

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Before Kuhlke, Cataldo and Wolfson, Administrative Trademark Judges.  
Opinion by Wolfson, Administrative Trademark Judge:

Apparatus LLC (“Applicant”) seeks registration of the proposed mark

APPARATUS (stylized) for the goods and services set forth below:<sup>1</sup>

Desk lamps; Electric lamps; Electric lighting fixtures;  
Electric lighting fixtures, namely, sconces; Fixtures for

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<sup>1</sup> Application Serial No. 86443209 was filed on November 3, 2014 under Trademark Act Section 1(b), 15 U.S.C. § 1051(b), based on Applicant’s asserted *bona fide* intention to use the mark in commerce. Applicant originally sought registration for additional goods in classes 24 and 27. Following a request to divide the application, the class 24 and 27 goods were placed in child application Serial No. 86980885, which registered under No. 5179487 on April 11, 2017. Applicant claims acquired distinctiveness of the mark in classes 11, 21, 37 and 42 under Trademark Act Section 2(f), 15 U.S.C. § 1052(f).

incandescent light bulbs; Floor lamps; Incandescent lamps and their fittings; Lamp bases; Lamp shades; Lamps; LED (light emitting diode) lighting fixtures; LED (light emitting diodes) lighting fixtures for use in display, commercial, industrial, residential, and architectural accent lighting applications; Lighting fixtures for sports arenas; Lighting fixtures for theatres, clubs and discotheques; Lighting fixtures, namely, lighting installations; Lighting fixtures; Sconce lighting fixtures; Stands for electric lighting fixtures; Wall lamps, in International Class 11;

Candle holders; Candle holders not of precious metal; Votive candle holders, in International Class 21;

Electrical repairs, maintenance, and installation of electrical wiring, and light fixtures; Repair or maintenance of electric lighting fixtures; Technical consultation in the field of installation of lighting designs, lighting instruments and lighting systems; Wallpaper hanging; Wallpaper removal services; Wallpapering services, in International Class 37; and

Lighting design and technology specification services pertaining to permanent or temporary architectural, theatrical, entertainment, commercial and/or residential applications, in International Class 42.

The Trademark Examining Attorney refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the ground that Applicant's mark is merely descriptive in connection with its goods and services. Applicant argued against the refusal and, in the alternative, filed an amendment alleging that its mark has acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. §1052(f).<sup>2</sup> Finding Applicant's evidence of acquired distinctiveness insufficient, the Examining Attorney continued the refusal to register on the ground of mere

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<sup>2</sup> Applicant concurrently filed an amendment to allege use of its mark, claiming December 1, 2010 as the date of first use and first use in commerce.

descriptiveness and, further, refused Applicant's claim of acquired distinctiveness on the ground that the mark is generic in connection with Applicant's goods and services and, thus, incapable of acquiring distinctiveness. The Examining Attorney also refused registration to Applicant on the ground that the submitted specimen for services in International Class 37 does not show use of the mark in relation to the stated services under Trademark Act Sections 1 and 45, 15 U.S.C. §§1051, 1127.

When the Examining Attorney made the refusals final, Applicant filed a request for reconsideration and appealed to this Board. The Examining Attorney denied Applicant's request for reconsideration and proceedings resumed. The case is fully briefed.

I. Mere Descriptiveness

Because Applicant expressly made its claim of acquired distinctiveness pursuant to Section 2(f) of the Trademark Act in the alternative, we first consider whether APPARATUS is merely descriptive in connection with the identified goods and services. Section 2(e)(1) prohibits the registration of a mark which, when used in connection with the goods or services of the applicant, is merely descriptive of them. A term is merely descriptive if it immediately conveys knowledge of a significant quality, characteristic, function, feature or purpose of the goods or services it identifies. *See, e.g., In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). Determining the descriptiveness of a mark is done "not in the abstract or on the basis of guesswork," but in relation to an applicant's identified

goods and/or services, the context in which the mark is being used, and the possible significance the mark would have to the average purchaser because of the manner of its use or intended use. *In re Well Living Lab Inc.*, 122 USPQ2d 1777 (TTAB 2017) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); see also *In re Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219 (citing *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 963-64, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). The question is whether someone who knows what the services or products are will understand the mark immediately to convey information about them. *In re MBNA Am. Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003); *In re Am. Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985) (“Whether consumers could guess what the product is from consideration of the mark alone is not the test.”).

The term “apparatus” has several relevant meanings. Its definition, from Merriam Webster, includes: “a set of materials or equipment designed for a particular use” and “an instrument or appliance designed for a specific operation.”<sup>3</sup>

Along these same lines, the Free Dictionary by Farlex defines “apparatus” as an “appliance or device for a particular purpose” and “an integrated group of materials or devices used for a particular purpose.”<sup>4</sup> While Vocabulary.com<sup>5</sup> suggests that the term may refer to a single item (“a breathing apparatus”) or a group of items (“sports

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<sup>3</sup> At <http://www.merriam-webster.com/dictionary/apparatus>, attached to February 18, 2015 Office Action, TSDR 3.

<sup>4</sup> September 28, 2015 Office Action, TSDR 2.

<sup>5</sup> *Id.*, TSDR 3.

apparatus”), the common thread throughout the definitions is that the term refers to an item or a collection of items forming a unified whole to accomplish a single purpose.

Applicant’s identification of goods includes different types of lamps, such as desk lamps, electric lamps, sconces and wall lamps, as well as lamp bases and stands. Each of these items has been designed for the specific purpose of providing light. In addition, the identification includes:

lighting fixtures for use in display, commercial, industrial, residential, and architectural accent lighting applications; Lighting fixtures for sports arenas; Lighting fixtures for theatres, clubs and discotheques; Lighting fixtures, namely, lighting installations.

These goods are groups of items, namely lighting fixtures, designed for specific purposes. The term “lighting” itself is defined as “the apparatus for supplying artificial light effects to a stage, film or television set.”<sup>6</sup> The proposed mark APPARATUS describes the nature and function of Applicant’s lamps, lamp stands and lighting fixtures. The term is merely descriptive for Applicant’s class 11 goods. *See In re Analog Devices Inc.*, 6 USPQ2d 1808, 1810 (TTAB 1988), *aff’d without pub. op.*, 871 F.2d 1097, 10 USPQ2d 1879 (Fed. Cir. 1989) (“[R]egistration is properly refused if the subject matter for registration is descriptive of any of the goods [or services] for which registration is sought.”).

Applicant’s goods in class 21 include candle holders; these are devices for a particular purpose, namely they are designed to hold candles. Thus, the proposed mark is merely descriptive of the purpose or function of the goods. Further, the broad

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<sup>6</sup> *Id.*, COLLINS ENGLISH DICTIONARY, TSDR 4.

nature of the identification as written includes candle holder assemblies, that is, those made of several parts (such as in a chandelier) unified for the particular purpose of holding candles. It is not necessary that a term describe all of the properties of the goods in order for it to be considered merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or feature about them. *In re Am. Greetings*, 226 USPQ at 366 (APRICOT identifies significant feature of scent of toy dolls). Here, a main feature of the goods is described by APPARATUS. The proposed mark is descriptive of Applicant's class 21 goods.

Applicant's class 37 services include "repairs, maintenance, and installation" of light fixtures and "technical consultation in the field of installation of lighting designs, lighting instruments and lighting systems." In class 42, Applicant's services are "lighting design and technology specification services pertaining to permanent or temporary architectural, theatrical, entertainment, commercial and/or residential applications." A mark that consists of a term that is descriptive for a product is considered merely descriptive of the services providing such product. *See In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807 (Fed. Cir. 2001) (proposed mark "1-888-M-A-T-R-E-S-S" is merely descriptive of applicant's telephone shop-at-home mattress retail services); *In re Pencils, Inc.*, 9 USPQ2d 1410 (TTAB 1988) (term "pencils," when applied to applicant's retail stationery and office supply services, is merely descriptive). Because the term APPARATUS describes a feature of the lighting fixtures and systems that Applicant provides, the term is also merely descriptive of Applicant's services pertaining to the design, installation and upkeep

of such lighting fixtures, systems, and applications, as well as Applicant's consulting services in connection with these goods.

Applicant argues that the Office has registered three marks containing the term APPARATUS without requiring the term to be disclaimed, and one mark for the term APPARATUS alone, thus showing that it is only suggestive of the goods and services herein involved.<sup>7</sup> None of the registrations, however, are for goods or services related to Applicant's goods or services and one (Reg. No. 1355291) is registered under Section 2(f) based on a showing of acquired distinctiveness. Accordingly they are of little probative value in showing whether the term is merely descriptive of the involved goods and services.

In considering whether Applicant's applied-for mark is merely descriptive, we have taken into account the fact that the mark is applied for as a stylized mark. "[A] display of descriptive, generic or otherwise unregistrable matter is not registrable on the Principal Register unless the stylization of the words or the accompanying design features of the asserted mark create an impression on purchasers separate and apart from the impression made by the words themselves, or unless it can be shown by evidence that the particular display which applicant uses has acquired

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<sup>7</sup> The registrations are: Reg. No. 5052709 for the mark THE RED JUMPSUIT APPARATUS for clothing; Reg. No. 4509123 for the mark G APPARATUS SEMPER VOLVENTES and design for advertising and graphic design services; Reg. No. 3150768 for the mark APPARATUS for computer consultation; Reg. No. 1355291 for the mark ELECTRICAL APPARATUS for magazine[s]. Attached to November 3, 2016 Response, Exhibits D-F, TSDR 20-27. In addition, Applicant submitted a copy of a pending application for the mark APPARATUS for "public policy consultancy services." *Id.*, Exhibit G, TSDR 28-9. Aside from these being far different services than those of Applicant, third-party applications are evidence only of the fact that they have been filed. *Interpayment Services Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003).

distinctiveness.” *In re Am. Acad. of Facial Plastic and Reconstructive Surgery*, 64 USPQ2d 1748, 1753 (TTAB 2002). Here, the stylization is so minimal that it does not create a separate and inherently distinctive commercial impression apart from the word APPARATUS, such that the mark as a whole is not merely descriptive.<sup>8</sup> See, e.g., *In re Guilford Mills Inc.*, 33 USPQ2d 1042 (TTAB 1994); *In re Pollio Dairy Products Corp.*, 8 USPQ2d 2012, 2014 (TTAB 1988); *In re Grande Cheese Co.*, 2 USPQ2d 1447, 1449 (TTAB 1986); *In re Couriaire Express Int'l, Inc.*, 222 USPQ 365, 366 (TTAB 1984).

### III. Genericness

In view of our finding that the applied-for mark APPARTUS is merely descriptive in connection with the identified goods and services, we now consider, further, whether it is a generic name for such goods and services. A mark is a generic name if it refers to the class, genus, or category of goods or services on or in connection with which it is used. *In re La. Fish Fry*, 116 USPQ2d at 1267 (citing *In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987)); see also *In re Dial-A-Mattress Operating Corp.*, 57 USPQ2d at 1810 (Fed. Cir. 2001); *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986).

The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question. (internal citations omitted). Determining whether a mark is generic therefore involves a two-step inquiry: First, what is the genus of goods or

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<sup>8</sup> We discuss *infra* Applicant's contention that its mark has acquired distinctiveness.



services at issue? Second, is the term sought to be registered or retained on the register understood by the relevant public primarily to refer to that genus of goods or services?

*Marvin Ginn*, 228 USPQ at 530.

The test for determining whether a mark is generic is its primary significance to the relevant public. *In re Emergency Alert Sols. Grp., LLC*, 122 USPQ2d 1088, 1089 (TTAB 2017); *In re Am. Fertility Soc’y*, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999). “A registration is properly refused if the word is the generic name of any of the goods or services for which registration is sought.” *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1638 (Fed. Cir. 2016) (quoting 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 12:57). The Examining Attorney has the burden of establishing by clear evidence that a proposed mark is generic. *In re Emergency Alert*, 122 USPQ2d at 1090.

A. What is the Genus of Goods and Services?

Our first task is to determine the proper genus of goods and services. Applicant’s goods are essentially lamps, lighting fixtures and candle holders. Its services include repair and maintenance of lighting fixtures and lighting design and technical consultation. In defining the genus, we commonly look to the identification of goods and services as they appear in the application. *See Magic Wand, Inc. v. RDB, Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991) (“[A] proper genericness inquiry focuses on the description of [goods or] services set forth in the [application or] certificate of registration.”) (citing *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)); *In re Reed Elsevier Prop.*,

*Inc.*, 77 USPQ2d 1649, 1654 (TTAB 2005) (“we consider applicant’s identification as largely defining the genus of services involved in this case”), *aff’d* 482 F.3d 1376, 82 USPQ2d 1378 (Fed. Cir. 2007). We find that the genus of goods and services at issue here is adequately described by the amended identification of goods and services in the application.

B. Does Applicant’s Mark Primarily Refer to the Genus?

We next consider whether APPARATUS would be understood by the relevant public to refer to lamps and lighting fixtures, candle holders, and services related to the design, repair, maintenance and installation of lighting fixtures and technical consultation in connection therewith. The Examining Attorney contends that the relevant public comprises “general consumers.”<sup>9</sup> Applicant has not argued against this characterization. In addition to the relevant dictionary definitions that are of record, the Examining Attorney has made of record a copy of a page from the USPTO’s *U.S. Acceptable Identification of Goods and Services Manual* (the “ID Manual”) showing usage of the term “apparatus” in connection with “lighting apparatus”<sup>10</sup> as well as copies of several patents in which a device for a particular purpose such as providing light or holding a candle is referred to as an “apparatus.”<sup>11</sup>

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<sup>9</sup> Examining Attorney’s brief, 13 TTABVUE 9.

<sup>10</sup> December 9, 2016 Final Office Action, TSDR 2.

<sup>11</sup> For example, Patent No. 6,022,122 relates to a decorative lamp apparatus that allows a back-lit image to be displayed; Patent No. 8,506,289 B2 is for a candle holder apparatus that contains a heat shield for deflecting heat generated by the electric candle; and several patents relate to “lighting apparatus,” such as Patent No. 8,714,787 B2 for a “low bay lighting apparatus” that is designed to be detachable from its installation mounting. December 9, 2016 Final Office Action, TSDR 8-9, 10-12, and 19-21.

The ID Manual does not independently list “apparatus” as an acceptable entry. An applicant seeking to register a mark for an apparatus must qualify that term by a modifier, such as “lighting” or “lighting control [apparatus],” inasmuch as the term “apparatus” is considered indefinite. However, the general public is unaware of the USPTO’s official categories for identifying goods and services in trademark and service mark applications. Likewise, the public is unaware of terminology used to describe inventions in patent applications. The fact that “apparatus” is widely used to describe different types of lights, light fixtures, or candle holders in a patent application does not, without more, prove that the public uses the term “apparatus” to refer to these goods.

The record is devoid of such indicia of consumer awareness as news items or third-party web pages from the internet, from which we might deduce that APPARATUS is commonly understood to refer to a type of lighting fixture or candle holder, or a category of design, repair, maintenance, installation or technical consultation services. In short, there is insufficient evidence from which to determine whether relevant purchasers would view the applied-for mark APPARATUS as the name of the class of services to which Applicant’s services belong, or that it would similarly name the class of goods which are the subject of Applicant’s services. Therefore, we must conclude that the Examining Attorney has fallen far short of meeting the difficult burden of establishing genericness herein.<sup>12</sup>

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<sup>12</sup> We note, however, that in reaching our decision we did not find persuasive Applicant’s argument regarding the vagueness of the involved term. *See In re Analog Devices*, 6 USPQ2d

III. Has Applicant's Mark Acquired Distinctiveness?

Having determined that the mark is merely descriptive in connection with the identified goods and services, but that genericness has not been established on this record, we now consider Applicant's claim of acquired distinctiveness under Section 2(f) of the Trademark Act. The burden is on Applicant to show that APPARATUS has acquired distinctiveness as a trademark for the goods listed in Applicant's application. *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1264 (Fed. Cir. 2015); *Yamaha International Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1004 (Fed. Cir. 1988). The type and amount of evidence that is required to show acquired distinctiveness varies with the nature of the mark. In some cases a declaration that the mark has been in substantially exclusive and continuous use as a mark for the five years before the claim of distinctiveness is made is sufficient. *See* Section 2(f). However, "[t]he greater the descriptiveness or non-distinctiveness of the proposed mark, the greater the burden is on an applicant to demonstrate acquired distinctiveness." *In re Lorillard Licensing Co.*, 99 USPQ2d 1312, 1316 (TTAB 2011); *see also Yamaha*, 6 USPQ2d at 1008 ("the greater the degree of descriptiveness the term has, the heavier the burden to prove it has attained secondary meaning"). "[C]opying, advertising expenditures, sales success, length and exclusivity of use, unsolicited media coverage, consumer studies (linking the name to

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at 1810 ("even nebulous terms ... may not be exclusively appropriated but must be left for all to use in their ordinary generic sense").

a source)” may be relevant. *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005).

Applicant’s evidence of acquired distinctiveness consists of a declaration under Section 2(f), submitted on November 3, 2016, that “the mark has become distinctive of the goods/services through the applicant’s substantially exclusive and continuous use of the mark in commerce that the U.S. Congress may lawfully regulate for at least the five years immediately before the date of this statement.” In addition, Applicant submitted a copy of the results of a Google search, purportedly showing that Applicant is the only entity using the proposed mark to indicate the source of lighting design or candle holders, and pages from its website showing how its mark is used.

Applicant argues with respect to the Google search:

Applicant conducted an Internet search showing the results of searching apparatus and lighting designs. See evidence submitted as Exhibits B - C. Upon looking at the search results, one can see that the first nine (9) search listings identify Applicant as the source of lighting designs being manufactured, marketed and sold under the name APPARATUS. This evidence serves to support that Applicant’s Mark is not generic but rather, has acquired distinctiveness as used on and in connection with Applicant’s Goods and Services.<sup>13</sup>

Contrary to Applicant’s contention, the Google search results do not clearly point to Applicant or demonstrate that the proposed mark has acquired distinctiveness. In the first place, they are merely excerpts, and not complete web pages. The search inquiry used to obtain the results is not provided; thus we do not know whether the

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<sup>13</sup> November 3, 2016 Response, TSDR 5.

search specifically asked for “apparatus studio” or combined “apparatus” with another term. While about six excerpts appear to refer to Applicant, none contain reliable identifying information and most bear different web addresses, vague references to lights or furniture; one relates to “extinguishing apparatus.”<sup>14</sup> As the results do not provide us with sufficient information upon which to make a clear finding, they have very little probative value. *See Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, \_\_\_ USPQ2d\_\_\_ (TTAB 2017) (citing *In re Bayer Aktiengesellschaft*, 488 F.2d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007) (“Search engine results — which provide little context to discern how a term is actually used on the web page that can be accessed through the search link — may be insufficient to determine the nature of the use of a term or the relevance of the search results to registration considerations.”); *see also Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1759 (TTAB 2013) (results from search engine introduced by testimony admissible but of limited probative value because they lacked sufficient context), *aff’d*, 565 F. App’x 900 (Fed. Cir. 2014) (*mem.*).

Because Applicant’s proposed mark is highly descriptive of the goods and services named in the application, five years’ use alone is insufficient to establish acquired distinctiveness. *See In re La. Fish Fry*, 116 USPQ2d at 1265 (holding that the Board acted within its discretion when it chose not to find applicant’s allegation of five years’ use sufficient, given the highly descriptive nature of the mark). In this case, the declaration of use and the Google search results are inconclusive, and Applicant has

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<sup>14</sup> November 3, 2016 Response, Exhibits B-C, TSDR 14-9.

not demonstrated acquired distinctiveness by means of other evidence. While Applicant argues that it has used its mark since 2010,<sup>15</sup> Applicant has not submitted any evidence corroborating this assertion or demonstrating the extent of that use. We find that Applicant has failed to meet its burden of proving acquired distinctiveness of the applied-for mark.

#### IV. Specimen Refusal

Registration was refused in class 37 on the additional ground that the specimen submitted in connection with Applicant's amendment to allege use does not show the applied-for mark in use in commerce in connection with any of the services specified in the class.

An application initially based on Trademark Act Section 1(b) must, upon the filing of an allegation of use under Section 1(c) or a statement of use under Section 1(d), include one specimen showing the applied-for mark in use in commerce, on or in connection with those goods or services identified in the application, for each international class identified in the allegation or statement of use. Trademark Act Sections 1(c) and 1(d)(1), 15 U.S.C. §§ 1051(c) and 1051(d)(1); *see also* Trademark Rules 2.76(b)(2) and 2.88(b)(2), 37 CFR §§ 2.76(b)(2) and 2.88(b)(2). In the case of a service mark application, the specimen of use "must show the mark as used in the sale or advertising of the services." Trademark Rule 2.56(b)(2), 37 CFR § 2.56(b)(2). In addition, the specimen must show a direct association between the mark and the

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<sup>15</sup> Appeal Brief, 11 TTABVUE 25.

services. *See* Trademark Manual of Examining Procedure (TMEP) § 1301.04(f)(ii) (April 2017) and cases cited therein.

Here, Applicant submitted two specimens purporting to show use of its mark in association with class 37 services. The first was described by Applicant as a “page downloaded from social media.”<sup>16</sup> The page does not display the mark. The second specimen was described as “page[s] downloaded from applicant’s website www.apparatusstudio.com.”<sup>17</sup> There are three pages; each bears the mark. The first is titled “FAQS” and includes two questions with answers. The other two do not relate to any services. The questions on the first page are: “How do I place an order for lighting?” and “How do I buy replacement light bulbs?” The answers discuss how to obtain lighting fixtures and replacement bulbs but do not contain sufficient information from which we may infer that Applicant provides any of the services recited in class 37. Accordingly, the specimens do not support Applicant’s amendment to allege use and registration of APPARATUS in class 37.

#### V. Summary

Applicant’s mark, while not generic, is highly descriptive of the goods and services for which application has been made. The showing of acquired distinctiveness is far below that which would be required to show that the applied-for mark should be registered under Section 2(f) of the Act. In addition, Applicant’s specimens purporting

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<sup>16</sup> Submitted March 28, 2016, Amendment to Allege Use.

<sup>17</sup> Submitted November 3, 2016, Response to Office Action.



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to show use of its mark do not show the mark being used in association with any class 37 services.

**Decision:**

The refusal to register Applicant's proposed mark on the ground that the mark is generic is reversed.

Applicant's evidence of acquired distinctiveness is insufficient to support a finding that the mark should be registered under Section 2(f) of the Act. Accordingly, the refusal based on the ground that the mark is merely descriptive is affirmed.

The refusal to register the mark in class 37 based on inadequate specimens is affirmed.