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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Mario Dedivanovic

Serial No. 86777733

John P. Bostany and Samantha B. Welborne of The Bostany Law Firm LLC,
for Mario Dedivanovic.

Andrew Leaser, Trademark Examining Attorney, Law Office 117,
Hellen M. Bryan-Johnson, Managing Attorney.

Before Bergsman, Hightower and Larkin,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Mario Dedivanovic ("Applicant") seeks registration on the Principal Register of the mark THE MASTER CLASS (in standard characters) for "providing educational demonstrations in the field of make-up application; providing seminars, workshops, and training in the field of beauty," in Class 41.[1]

[1] Application Serial No. 86777733 was filed on October 5, 2015, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant's claim of first use anywhere and first use in commerce since at least as early as January 2011.

The Trademark Examining Attorney refused registration of Applicant's mark under Sections 1, 2, 3, 23(c) and 45 of the Trademark Act, 15 U.S.C. §§ 1051-53, 1091(c) and 1127, on the ground that the term applied for is generic and, in the alternative, that it is merely descriptive and has not acquired distinctiveness.

When the refusals were made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusals to register.

I. Whether THE MASTER CLASS used in connection with "providing educational demonstrations in the field of make-up application; providing seminars, workshops, and training in the field of beauty" is generic?

In Applicant's September 11, 2017 Request for Reconsideration, he amended his application to seek registration on the Supplemental Register.[2] Because Applicant contends that THE MASTER CLASS is not merely descriptive and, in the alternative, that it has acquired distinctiveness, we find that Applicant has amended his application to the Supplemental Register in the alternative.[3]

"In order to qualify for registration on the Supplemental Register, a proposed mark 'must be capable of distinguishing the applicant's goods or services.' 15 U.S.C. § 1091(c)). Generic terms do not so qualify." *In re Emergency Alert Sols. Grp., LLC*, 122 USPQ2d 1088, 1089 (TTAB 2017). When a proposed mark is refused registration

[2] 4 TTABVUE 2.

[3] An applicant may respond to a refusal under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1) (merely descriptive) on the merits and, in the alternative, request registration on the Supplemental Register. Trademark Manual of Examining Procedure ("TMEP") § 816.04 (Oct. 2017).

as generic, the examining attorney has the burden of proving genericness by clear and convincing evidence. *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016). The critical issue is to determine whether the record shows that members of the relevant public primarily use or understand the term sought to be registered to refer to the genus of goods or services in question. *In re Central Sprinkler Co.*, 49 USPQ2d 1194, 1196-97 (TTAB 1998) (citing *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986)).

Our primary reviewing court has set forth a two-step inquiry to determine whether a mark is generic: First, what is the genus (category or class) of goods or services at issue? Second, is the term sought to be registered understood by the relevant public primarily to refer to that genus of goods or services? *Marvin Ginn*, 228 USPQ at 530. The relevant public's perception is the chief consideration in determining whether a term is generic. *See Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1833 (Fed. Cir. 2015). Evidence of the public's understanding of a term may be obtained from "any competent source, such as consumer surveys, dictionaries, newspapers and other publications." *Id.* at 1830 (quoting *In re Northland Aluminum Prods., Inc.*, 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985)).

With respect to the first part of the *Marvin Ginn* inquiry, the genus may be defined by the services identified in the application: "providing educational demonstrations in the field of make-up application; providing seminars, workshops, and training in the field of beauty." *See In re Reed Elsevier Props. Inc.*, 482 F.3d 1376, 82 USPQ2d

1378, 1380 (Fed. Cir. 2007); *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991) (a proper genericness inquiry focuses on the identification set forth in the application or certificate of registration). In essence, the genus is educational services in the fields of makeup application and beauty.

The second part of the *Marvin Ginn* test is whether the term sought to be registered is understood by the relevant public primarily to refer to that genus of services. The relevant public is the purchasing public for the identified services. *Sheetz of Del., Inc. v. Doctor's Assocs. Inc.*, 108 USPQ2d 1341, 1351 (TTAB 2013). In this case, the relevant consumers are cosmeticians as well as ordinary consumers interested in learning about the proper application of cosmetics.

Now we turn to how the relevant consumers perceive the term THE MASTER CLASS when it is used in connection with "providing educational demonstrations in the field of make-up application; providing seminars, workshops, and training in the field of beauty." At the outset, we note that the word "the" in the proposed mark is a definite article specifying or particularizing the noun it precedes[4] and does not affect our analysis because it does not have any trademark significance. *See Conde Nast Publ'ns Inc. v. Redbook Publ'g Co.,* 217 USPQ 356, 357 (TTAB 1983) ("the" cannot serve as an indication of origin even if applicant's magazine was the only magazine for young women); *In re Computer Store, Inc.,* 211 USPQ 72, 74-75 (TTAB 1981) (THE

[4] *Dictionary.com* based on the Random House Dictionary (2018). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd,* 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

COMPUTER STORE is the common descriptive name for computer-related services); *cf. In re Thor Tech Inc.,* 90 USPQ2d 1634, 1635 (TTAB 2009) (the word "the" in THE WAVE simply emphasizes the word "wave); *In re Narwood Prods., Inc.*, 223 USPQ 1034, 1035 n.2 (TTAB 1984) (noting the insignificance of the word "the" in comparison of THE MUSIC MAKERS and MUSICMAKERS). In this case, it denotes a particular "Master Class."

The dictionary definition of "Master Class" is "a lesson for advanced students given by someone who is an expert."[5] This definition is corroborated by the Wikipedia entry for the term "Master Class":

> A master class is a class given to students in a particular discipline by an expert of that discipline – usually music, but also painting, drama, any of the arts, or on any other occasion where skills are being developed.[6]

The Trademark Examining Attorney also submitted five third-party registrations where the registrant disclaimed the exclusive right to use MASTER CLASS:

- Registration No. 3995563 for the mark ECLIPSE MASTER CLASS for providing classes, seminars and instruction in field of music as a part of culture and music appreciation;

- Registration No. 3889222 for the mark HOT YOGA MASTER CLASS and design for yoga instruction;

- Registration No. 4254574 for the mark ROCK THE AUDITION A MASTER CLASS IN AUDITIONING FOR POP, ROCK AND R&B MUSICALS for classes in auditioning for musicals;

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[5] **MacMillian Dictionary** (*macmilliandictionary.com*) attached to the January 26, 2016 Office Action (TSDR 4).

Citations to the TSDR database are to the .pdf format.

[6] March 11, 2017 Office Action (TSDR 7).

- Registration No. 4704505 for the mark MASTER CLASS and design for cycling and indoor cycling classes; and

- Registration No. 4821238 for the mark MASTER CLASS ELITE for instruction in loan origination.[7]

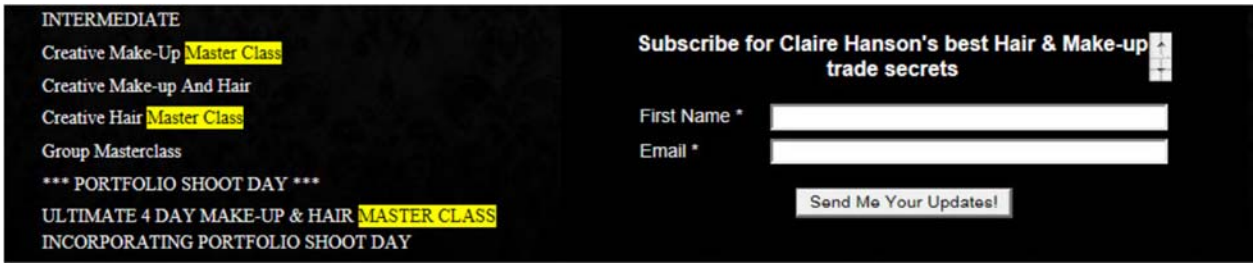
Third-party registrations can be used in the manner of a dictionary definition to illustrate how a term is perceived. *Institut Nat'l Des Appellations D'Origine v. Vintners Int'l Co.,* 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992) ("Such third party registrations show the sense in which the word is used in ordinary parlance and may show that a particular term has descriptive significance as applied to certain goods or services."); *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 153 (CCPA 1978) ("we find no error in the citation of nine third-party registrations 'primarily to show the meaning of * * * ['zing'] in the same way that dictionaries are used'") (quoting *Conde Nast Publn's, Inc. v. Miss Quality, Inc.*, 507 F.2d 1404, 184 USPQ 422, 425 (CCPA 1975)).

The Trademark Examining Attorney submitted 53 examples of third parties using the term "Master Class" to identify their educational services in the field of makeup.[8] The following examples are illustrative:

[7] January 26, 2016 Office Action (TSDR 5-19).

[8] August 17, 2016 Office Action (TSDR 7-33), March 11, 2017 Office Action (TSDR 3, 11-34), and September 14, 2017 Denial of Request for Reconsideration (5-8 TTABVUE). Although the Chestnut Hill Patch website did not include the URL, the Trademark Examining Attorney provided it in the body of the March 11, 2017 Office Action at TSDR 3.

- MACH MGMT website (machmanagement.com)[9]



- Gina Badhen (ginabadhen.com)[10]

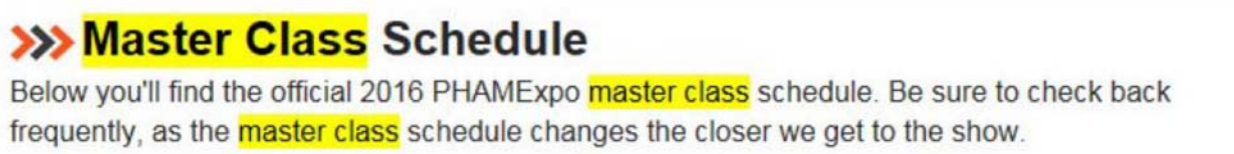
> THE ULTIMATE LOS ANGELES CELEBRITY MAKE-UP MASTER CLASS
>
> * * *
>
> The Ultimate LA Celebrity Make-up Master Class is suitable across the stylist spectrum, for not only the ambitious beginner wanting to take their first steps into the industry or just for fun! This master class is also perfect for the insightful experianced [sic] intermediate.
>
> The master class does not require any entry requirements, as we are hear [sic] to help shape and mould you into qualified professionals in your own right!

[9] August 17, 2017 Office Action (TSDR 7-9).

[10] August 17, 2016 Office Action (TSDR 14-16).

> This masterclass would allow you to brush up on your already budding skills or introduce a beginner wanting to learn how to work with their own face as well as clients.

- PHAM EXPO (phamexpo.com)[11]



The instruction includes, *inter alia,* "Mastering Makeup of Instagram," Mastering Contour + Highlight," and "Red Carpet Beauty."

Finally, the Trademark Examining Attorney submitted copies of 16 news articles from various publications retrieved from the LexisNexis database referring to the term "Master Class" in connection with educational services relating to makeup application and beauty prior to Applicant's January 2011 claimed date of first use.[12] The following examples are illustrative:

[11] August 17, 2016 Office Action (TSDR 24-28).

[12] September 14, 2017 Denial of Request for Reconsideration (7 TTABVUE 11-18 and 8 TTABVUE 2-11).

- Sun-Sentinel (Fort Lauderdale, Florida) (November 18, 2009)[13]

> Nov. 24 & 25: Saks Fifth Avenue in Bal Harbour will hold two Dior makeup application master classes. One session at 2 p.m. and the other at 5 p.m. each day.

- The Orange County Register (California) (November 4, 2008)[14]

> Take a master class with Madonna's makeup artist, Gina Brooke, at the Shu Uemura boutique at South Coast Plaza on Nov. 5.
>
> * * *
>
> Brooke, who doubles as the artistic director of Japanese-based Shu Uemura, will hold a master class from 10 a.m. to 1 p.m. at the Shu Uemura boutique at South Coast Plaza. … Brooke's students will get consultations, techniques and makeup tips and get a peek at Madonna's on-stage look dubbed "Eye Candy."

- The Record (Bergen County, NJ) (June 6, 2009)[15]

> Makeup guru Trish McEvoy makes a special appearance at Bloomingdale's on Wednesday. Call to get on the guest list to attend McEvoy's master class; her team of makeup experts will also be available from 3 to 7 p.m.

The evidence discussed above shows that the relevant public perceives "Master Class" as a generic term for educational services in the field of makeup application and beauty. That is, the designation "Master Class" "tell[s] you *what the thing is." In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 219 (CCPA 1978) (Rich, J., concurring).

[13] September 14, 2017 Denial of Request for Reconsideration (TTABVUE 2).

[14] September 14, 2017 Office Action (8 TTABVUE 3).

[15] September 14, 2017 Office Action (8 TTABVUE 5).

Applicant argues that THE MASTER CLASS is not generic for "providing educational demonstrations in the field of make-up application; providing seminars, workshops, and training in the field of beauty" because there is no definition of "Master Class" that refers to makeup or beauty.[16]

> Respectfully, the word "make up application demonstration" would be generic for this service. Alternatively, "make up application demonstrations' can also be generic for this service.[17]
>
> * * *
>
> A generic term for the said services would likely be "beauty classes", "beauty training", "beauty workshops", "beauty seminars".[18]

First, our analysis is unaffected by the availability of multiple terms for the genus of Applicant's services because services may have more than one generic name. *In re Nat'l Shooting Sports Found., Inc.,* 219 USPQ 1018, 1020 (TTAB 1983) (citing *In re Sun Oil Co.,* 426 F.2d 401, 165 USPQ 718, 719 (CCPA 1970) (Rich, J., concurring)); *see also Roselux Chem. Co. v. Parsons Ammonia Co.*, 299 F.2d 855, 132 USPQ 627, 632 (CCPA 1962). As Judge Rich wrote in *Sun Oil*: "*All of the* generic names for a product belong in the public domain." *Id.; see also In re Trek 2000 Int'l Ltd.*, 97 USPQ2d 1106, 1109 (TTAB 2010) ("It is well established that the availability of other words for competitors to use does not, by itself, transform a generic term into capable matter."). Any term that the relevant public understands to refer to the genus is

[16] Applicant's Brief (10 TTABVUE 4).

[17] Applicant's Brief (10 TTABVUE 4).

[18] Applicant's Brief (10 TTABVUE 5).

generic. *In re 1800Mattress.com IP LLC*, 586 F.3d 1359, 92 USPQ2d 1682, 1685 (Fed. Cir. 2009); *see also In re Meridian Rack & Pinion*, 114 USPQ2d 1462 (TTAB 2015) (holding BUYAUTOPARTS.COM generic for on-line retail store services featuring auto parts after finding that the relevant members of the public use and understand the words "buy auto parts" as referring to the purchase and sale transactions that are the central focus of retail sales of auto parts and that third-party retailers advertise "Buy Auto Parts Online").

Second, in determining whether a term is generic, we consider whether the services fall not only into a broad category, but also into a narrower category within the broader category. *See In re Web Commc'ns,* 49 USPQ2d 1478, 1480 (TTAB 1998) (citing *In re Central Sprinkler Co.,* 49 USPQ2d at 1197 (the relevant public will understand the term "Attic" as referring to sprinklers for fire protection of attics)). Thus, while the broad category of services in this appeal may be educational services, there are clearly narrower categories within this broad category directed to a particular field. The significance of the term "Master Class" is not restricted to Applicant's field of endeavor. *See In re Northland Aluminum Prods., Inc.,* 227 USPQ2d at 964. Here, "The Master Class" serves as a generic designator of Applicant's educational services in the field of makeup application and beauty and, therefore, we find that THE MASTER CLASS is the name of a category of educational services. *See Micro Motion Inc. v. Danfoss A/S,* 49 USPQ2d 1628 (TTAB 1998).

Applicant has likened this appeal to the facts in *In re Seats, Inc.*, 757 F.2d 274, 225 USPQ 364 (Fed. Cir. 1985), and *Marvin Ginn*, 228 USPQ 528. In *Seats,* the court

found that the mark SEATS for "ticket reservation and issuing services for various events by means of a computer" was not generic for reservation services because applicant was selling reservation services, not seats, and there was no evidence that the relevant public refers to reservation services as "seats." *Seats*, 225 USPQ at 367-68.

In *Marvin Ginn,* the Court found that FIRE CHIEF for a "magazine directed to the field of firefighting" was not generic because there was no evidence that the relevant public refers to firefighting publications as "Fire Chief." *Marvin Ginn,* 228 USPQ at 532.

Applicant's analogy fails because Applicant is using the term THE MASTER CLASS for educational services in the field of makeup application and beauty and the evidence shows that the term "Master Class" is defined as and is perceived as a category of educational services. In other words, Applicant is using the term THE MASTER CLASS in connection with its commonly understood meaning.

We find that the term THE MASTER CLASS is a generic term for "providing educational demonstrations in the field of make-up application; providing seminars, workshops, and training in the field of beauty" and affirm the refusal to register on this ground.

II. Whether THE MASTER CLASS for "providing educational demonstrations in the field of make-up application; providing seminars, workshops, and training in the field of beauty" is merely descriptive?

Turning to the alternative refusal under Section 2(e)(1), implicit in our holding that the evidence before us establishes that THE MASTER CLASS is generic for

Applicant's services is a finding that THE MASTER CLASS is at least merely descriptive of Applicant's services under Section 2(e)(1). "The generic name of a thing is in fact the ultimate in descriptiveness." *Bellsouth Corp. v. DataNational Corp.* 60 USPQ2d 1565, 35 USPQ2d 1554, 1557 (Fed. Cir. 1995); *Weiss Noodle Co. v. Golden Cracknel & Specialty Co.*, 290 F.2d 845, 129 USPQ 411, 413 (CCPA 1961)

III. Whether THE MASTER CLASS has acquired distinctiveness?

For purposes of completeness, we address whether the term THE MASTER CLASS used in connection with "providing educational demonstrations in the field of make-up application; providing seminars, workshops, and training in the field of beauty" has acquired distinctiveness. This scenario presupposes that the Board's decision is appealed and the reviewing court finds that the term THE MASTER CLASS is not generic. For purposes of this discussion, we treat Applicant's THE MASTER CLASS as highly descriptive but not generic.

Applicant has the burden of establishing a prima facie case that THE MASTER CLASS has acquired distinctiveness. *See In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 227 USPQ 417, 422 (Fed. Cir. 1985); *In re Gammon Reel, Inc.*, 227 USPQ 729, 730 (TTAB 1985); *see also Yamaha Int'l v. Hoshino Gakki*, 840 F.2d 1572, 6 USPQ2d 1001, 1006 (Fed. Cir. 1988) (the ultimate burden of persuasion on the issue of acquired distinctiveness is on applicant). Additionally, the greater the degree of descriptiveness, the greater the evidentiary burden on the user to establish acquired distinctiveness. *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005); *In re Merrill Lynch, Pierce, Fenner, & Smith Inc.*, 4 USPQ2d

1141, 1143 (Fed. Cir. 1987); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 13 cmt. e (1993). The record shows that "Master Class" has a dictionary meaning and that third parties have used "Master Class" in connection with educational services in the fields of makeup application and beauty, and the term is thus highly descriptive. *See Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.,* 123 USPQ2d 1844, 1851 (TTAB 2017); *Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1765 (TTAB 2013), *aff'd mem.,* 565 Fed. Appx. 900 (Fed. Cir. 2014).

We also bear in mind that "[t]he ultimate test in determining whether a designation has acquired distinctiveness is applicant's success, rather than its efforts, in educating the public to associate the proposed mark with a single source." TMEP § 1212.06(b) (Oct. 2017); *see also In re ActiveVideo Networks, Inc.,* 111 USPQ2d 1581, 1606 (TTAB 2014).

Applicant has submitted the evidence listed below to show that THE MASTER CLASS has acquired distinctiveness:

- Applicant's declaration that THE MASTER CLASS has become distinctive of Applicant's services through 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 the declaration.[19]
- Applicant's declaration attesting to the revenues amounting to approximately $1,725,400 generated from 11 events conducted in 2013

[19] Applicant's February 17, 2017 Response to Office Action (TSDR 11).

through 2016.[20] Subsequently, Applicant testified that he conducted a class in August 2017 which generated an additional $944,000 in revenues.[21]

- Applicant's declaration attesting to his advertising through Twitter (in excess of 150,000 followers), Instagram (in excess of 2 million followers), and Facebook (in excess of 43,000 followers);[22]
- Applicant's declaration attesting that he placed at least three advertisements on his above-identified social media accounts before each of the 11 events noted above;[23] and
- Media coverage.[24]

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[20] Applicant's February 17, 2017 Response to Office Action (TSDR 14). We have not considered the four events held outside of the United States. Applicant's activities in foreign countries have little, if any, probative value in showing recognition by the U.S. consuming public, especially where there is no evidence regarding the extent to which U.S. consumers are exposed to Applicant's foreign activities. *See First Niagara Ins. Brokers Inc. v. First Niagara Fin. Grp. Inc.,* 77 USPQ2d 1334, 1342 (TTAB 2005) (insurance brokerage services rendered in Canada do not establish use of the mark in connection with insurance brokerage services rendered in the United States); *Linville v. Rivard*, 41 USPQ2d 1731, 1736 (TTAB 1996) ("activity outside the United States does not create rights in marks within the United States"), *aff'd*, 133 F.3d 1446, 45 USPQ2d 1374 (Fed. Cir. 1990); *cf. Blue Man Prods. Inc. v. Tarmann,* 75 USPQ2d 1811, 1814 (TTAB 2005), *rev'd on other grounds*, No. 05-2037, 2008 WL 6862402 (D.D.C. Apr. 3, 2008) (citing *Hard Rock Cafe Licensing Corp. v. Elsea,* 48 USPQ2d 1400, 1405 (TTAB 1998) ("The renown of opposer's marks outside the United States or exposure of the foreign public to opposer's marks is irrelevant.")); *cf. All England Tennis Club (Wimbledon) Ltd. v. Creations Aromatiques, Inc.,* 220 USPQ 1069, 1072 (TTAB 1983) (Opposer acquired rights to the mark WIMBLEDON for tennis championships held annually in England because opposer proved that the championships have been widely reported in U.S. media).

[21] 4 TTABVUE 7.

[22] Applicant's February 17, 2017 Response to Office Action (TSDR 15). Subsequently, Applicant testified that as of March 2017, his Instagram account now has 3.7 million followers. 4 TTABVUE 6.

[23] Applicant's February 17, 2017 Response to Office Action (TSDR 15).

[24] Applicant's July 26, 2016 Response to Office Action (TSDR 18-113). In the text of the July 26, 2016 Response, Applicant asserts that his "work has graced the pages of countless magazines including *Bazaar, Elle, Glamour, Vogue, L'uomo Vogue, Allure, Cosmpolitan,* and

Because THE MASTER CLASS is highly descriptive, Applicant's five-year use declaration is insufficient, in and of itself, to make a prima facie showing of acquired distinctiveness. *See In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1265 (Fed. Cir. 2015) (Board has discretion not to accept an applicant's allegation of five years of substantially exclusive and continuous use as prima facie evidence of acquired distinctiveness when the proposed mark is "highly descriptive").

Moreover, the 53 examples of third parties using the term "Master Class" to identify their educational services in the field of makeup application and beauty and the 16 news articles from the LexisNexis database discussed *supra* show that Applicant's use of THE MASTER CLASS has not been substantially exclusive. In this case, the widespread use of "Master Class" demonstrated by the record would itself be sufficient to dispose of Applicant's claim of acquired distinctiveness:

> In respect of registration, there must be a trademark, i.e., purchasers in the marketplace must be able to recognize that a term or device has or has acquired such distinctiveness that it may be relied on as indicating one source of quality control and thus one quality standard.

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many others." However, Applicant did not submit copies of such works and did not indicate whether those magazines referred to THE MASTER CLASS. *Cf. In re Planalytics Inc.*, 70 USPQ2d 1453, 1457 (TTAB 2004) ("If an applicant has relevant information, it is incumbent on applicant to make this information of record. A mere reference to a website does not make the information of record. In order to review the facts in this case, there should be evidence in the record.") (footnote omitted).

We did not consider the webpages from *Cosmopolitan* magazine (cosmopolitan.co.uk) (TSDR 28-32) or *Grazia Magazine* (incomplete URL) (TSDR 38-44) because they are foreign publications and Applicant did not provide any evidence regarding their circulation in the United States or whether U.S. consumers would read these foreign publications. *See Luxco, Inc. v. Consejo Regulador del Tequila, A.C.,* 121 USPQ2d 1477, 1491 n.92 (TTAB 2017); *Stuart Spector Designs, Ltd. v. Fender Musical Instruments Corp.*, 94 USPQ2d 1549, 1552 (TTAB 2009) (striking from evidence excerpts from foreign publications which were not shown to be in general circulation in the United States); *In re Hines,* 31 USPQ2d 1685, 1687 n.4 (TTAB 1994); *In re Bel Paese Sales Co.,* 1 USPQ2d 1233, 1235 (TTAB 1986).

> When the record shows that purchasers are confronted with more than one (let alone numerous) independent users of a term or device, an application for registration under Section 2(f) cannot be successful, for distinctiveness on which purchasers may rely is lacking under such circumstances.

Levi Strauss & Co. v. Genesco, Inc., 742 F.2d 1401, 222 USPQ 939, 941 (Fed. Cir. 1984); *see also Ayoub, Inc. v. ACS Ayoub Carpet Serv.*, 118 USPQ2d 1392, 1404 (TTAB 2016) (finding that, because of widespread third-party uses of the surname Ayoub in connection with rug, carpet and flooring businesses, applicant's use of the applied-for mark, AYOUB, was not "substantially exclusive" and thus the mark had not acquired distinctiveness in connection with applicant's identified carpet and rug services).

Finally, because dates of publication of the 16 LexisNexis news articles showing third-party use of the term "Master Class" in connection with educational services in the field of makeup application and beauty precede Applicant's claimed date of first use, his attestation that he "was the first one to ever use the term MASTER CLASS to relate to educational demonstrations in the field of makeup application" is incorrect.[25]

Over the past five years, Applicant has conducted 12 classes generating approximately $2,669,400 or an average of two classes per year generating approximately $222,450 per class. While Applicant's services have achieved commercial success, sales success is not necessarily indicative of acquired distinctiveness, but may be attributed to many other factors, the most likely being

[25] 4 TTABVUE 7.

Applicant's claims that he "has secured a place among the world's best and most well-known makeup artists"[26] with an elite celebrity clientele, whose "work has graced the pages of countless magazines."[27] *See Cicena, Ltd. v. Columbia Telecomms. Group,* 900 F.2d 1546, 14 USPQ2d 1401, 1406 (Fed. Cir. 1990); *see also In re Boston Beer Co. L.P.,* 198 F.3d 1370, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999) (claim based on annual sales under the mark of approximately $85 million, and annual advertising expenditures in excess of $10 million, not sufficient to establish acquired distinctiveness in view of highly descriptive nature of mark); *In re Ennco Display Sys. Inc.,* 56 USPQ2d 1279, 1285 (TTAB 2000) (applicant's sales, while impressive, may only demonstrate the growing popularity of the product, not consumer recognition of the trademark).

The media coverage submitted by Applicant is modest both in terms of quantity and quality recognizing THE MASTER CLASS as pointing uniquely and exclusively to Applicant. For example,

1. The Jacqueline Gellner, Makeup Artist, blog (jacquelinegellner.com) (January 13, 2015) uses "Master Class" (not THE MASTER CLASS) both generically and arguably as a trademark.

JACQUELINE GELLNER

MAKEUP ARTIST

CELEBRITY MAKEUP ARTIST MARIO DEDIVANOVIC'S MASTER CLASS WITH KIM KARDASHIAN IN NEW YORK CITY

[26] July 26, 2016 Response to Office Action (TSDR 11).

[27] July 26, 2016 Response to Office Action (TSDR 12).

> … This past Sunday, I had the pleasure of attending his sold out Master Class in New York City at the Helen Mills Event Space and Theater.[28]

One of the people who posted a comment on the blog used "Master Class" in its generic/descriptive sense: "I was wondering how one goes about getting to attend a Master Class with Mario and other talented artists?"[29]

2. Bustle.com (August 4, 2015)

> 7 Things I Learned From Kim Kardashian & Mario Dedivanovic's Masterclass
>
> After watching a full-on, four-hour-long makeup session, I can confidently say that there were many things I learned from Mario Dedivanovic and Kim Kardashian's masterclass. Other than discovering the items that Kim and Mario swear by, I learned many different ways of applying makeup. It was seriously life-changing.[30]

3. Eventbrite website (eventbrite.com) appears to be an event website where people, promoters, etc. can advertise their events. On this website, Applicant uses "Master Class," not THE MASTER CLASS, generically to promote his services as follows: "Mario Dedivanovic NYC Master Class – September 19, 2015."[31]

4. Instagram posting (bestofinsta.org)[32]

> Ready for THE MASTER CLASS WITH CELEBRITY MAKEUP ARTIST MARIO DEDIVANOVIC AND KIM KARDASHIAN WEST @kimkardashian @makeupbymario #masterclass #rosegold #makeup #

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[28] July 26, 2016 Response to Office Action (TSDR 23).

[29] July 26, 2016 Response to Office Action (TSDR 25).

[30] July 26, 2016 Response to Office Action (TSDR 33).

[31] July 26, 2016 Response to Office Action (TSDR 45); *see also* TSDR 59 ("The Masterclass by Mario Dedivanovic NYC").

[32] July 26, 2016 Response to Office Action (TSDR 54).

5. Allure (allure.com) (May 26, 2016)[33]

> Daily Beauty Reporter
>
> I Took a Class With Kim Kardashian's Makeup Artist – Here's What I Learned
>
> I'll be honest, when I got the chance to attend Mario Dedivanovic's Master Class, I kind of flipped out with excitement. …

6. The Haute Mess (thehautemess.com) (August 17, 2015)

> What I Learned From Makeup By Mario's Master Class[34]
>
> * * *
>
> So I bet you were wondering how and why I attended Mario Dedivanovic's Master Class and took a pic with Kim K., so I thought I'd give you guys the low-down.[35]

7. DIVAlicious (divalicious.nyc), a blog, (June 8, 2016) featured an article entitled "The Dish with DDR: Masterclass with Mario Dedivanovic."[36] The photographs of the class featured a background displaying Applicant's name, not THE MASTER CLASS, as shown below:[37]

[33] July 26, 2016 Response to Office Action (TSDR 69).

[34] July 26, 2016 Response to Office Action (TSDR 75).

[35] July 26, 2016 Response to Office Action (TSDR 76).

[36] July 26, 2016 Response to Office Action (TSDR 83).

[37] July 26, 2016 Response to Office Action (TSDR 84); *see also* TSDR 18, 23, 24, 75, 83.

Also, we note that the gift bag given to attendees featured Applicant's name rather than THE MASTER CLASS, as shown below:[38]

Simply put, we are not convinced that relevant purchasers associate THE MASTER CLASS, without the accompanying MD or MARIO DEDIVANOVIC "house marks," solely with Applicant. *Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.*, 123 USPQ2d 1844, 1855 (TTAB 2017) (appearance of applicant's claimed mark MEDICAL EXTRUSION TECHNOLOGIES "[a]lmost without exception" in connection with prominently displayed acronym MET left Board unconvinced that "relevant purchasers associate the designation MEDICAL EXTRUSION TECHNOLOGIES, without the accompanying MET, solely with Applicant.").

[38] July 26, 2016 Response to Office Action (TSDR 87); *see also* TSDR 20.

8. Inquisitr.com, a news aggregator that reports the latest stories posted on the Internet, posted the following on May 29, 2015:

> KIM KARDASHIAN'S INSTAGRAM ANNOUNCES NEW MAKEUP 'MASTER CLASS' WITH MARIO DEDIVANOVIC – TICKETMASTER TICKETS GOING FOR $1,000-PLUS
>
> Just about everything Kim Kardashian does makes history, therefore, when Kardashian announced via Instagram her latest plans for a make-up class called "The Master Class," it got attention.
>
> > "I'm soooooo excited for this Master Class! Mario & I are going to share every secret & trick on how to do flawless make up! I took a make up [sic] class when I was 14 & it changed my life! Go to Marioandkim.com for all the details."[39]

The media coverage does not demonstrate that the term THE MASTER CLASS has acquired distinctiveness because the news articles use the terms "Master Class" or "Masterclass" generically, not as a trademark. In other words, the third parties perceive "Master Class" as identifying a class, demonstration, or seminar rendered by an expert rather than as a service mark uniquely and exclusively identifying Applicant's educational services, and we can infer from their use that relevant purchasers will similarly understand the term. *In re Empire Tech. Dev. LLC*, 123 USPQ2d 1544, 1565 (TTAB 2017).

We find that Applicant has failed to establish that the designation THE MASTER CLASS has acquired distinctiveness as a source-indicator for Applicant's educational services in the fields of makeup application and beauty. That is, Applicant has not

[39] July 26, 2016 Response to Office Action (TSDR 97).

established that, "in the minds of the public, the primary significance of [THE MASTER CLASS] is to identify the source of the product rather than the product itself." *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1729 (Fed. Cir. 2012). Rather, the record establishes that THE MASTER CLASS is a highly descriptive designation that identifies a significant feature of the services, namely, Applicant's services are an educational service rendered by an expert in the field. The evidence of acquired distinctiveness must be weighed against the highly descriptive nature of the wording comprising Applicant's proposed mark. Given that the proposed mark is highly descriptive, much more evidence, especially in the quantity of direct evidence from the relevant purchasing public, than what Applicant has submitted is necessary to show that the designation THE MASTER CLASS has become distinctive for Applicant's educational services. *See, e.g., In re Country Music Ass'n Inc.*, 100 USPQ2d 1824, 1834 (TTAB 2011) ("Teflon" consumer survey showed 85% of respondents believed term COUNTRY MUSIC ASSOCIATION is a brand name and, thus, is probative evidence of acquired distinctiveness).

Decision: The refusal to register Applicant's mark THE MASTER CLASS is affirmed on the ground that it is a generic term.

In the event that Applicant's proposed mark should be found not to be generic in any appeal of this decision, we further find that the mark is merely descriptive and that it has not acquired distinctiveness and is not entitled to registration under Section 2(f) but it would be registrable on the Supplemental Register.