

This Opinion is Not a  
Precedent of the TTAB

Mailed: March 24, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Fetal Life, LLC*

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Serial No. 87938891

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Joan L. Simunic, Law Office of J L Simunic  
For Fetal Life, LLC.

April L. Rademacher, Trademark Examining Attorney, Law Office 108,  
Kathryn E. Coward, Managing Attorney.

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Before Cataldo, Kuczma and Larkin,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Fetal Life, LLC, seeks registration on the Principal Register of the  
mark FETAL LIFE (in standard characters), identifying

Sensors for medical use to be worn by a human to gather human biometric data and also including a tocodynamometer sold as a unit; Medical apparatus, namely, fetal and maternal vital sign and physical distress monitors; Medical instruments for measuring and displaying fetal activity, namely, fetal movement or fetal heart rate; Medical products, namely, biofeedback sensors; Patient monitoring sensors and alarms; Portable medical devices with sensors to monitor the physical

movements of a patient wearing or carrying the device, in International Class 10.<sup>1</sup>

The Trademark Examining Attorney 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 FETAL LIFE merely describes a function or purpose of the identified goods. Applicant and the Examining Attorney filed briefs.

### **I. Evidentiary Matter**

In its brief, Applicant argues:

Entering the phrase "fetal life" on a Bing search generates over 7 million results, including websites that provide information about pregnancy from inception through delivery. "Fetal life" may refer to fertilized ovum implantation, fetal viability, fetal cardiac activity, development of the fetal brainstem, fetal movement, or to maternal physical conditions while pregnant. Moreover, "fetal life" may refer to a human being's physical condition prior to conception, including conditions and/or behaviors that could impact pregnancy. Because of access to information via the worldwide web, each of these significances, meanings, and interpretations are readily apparent to consumers.<sup>2</sup>

However, Applicant did not introduce into evidence any of the putative search results referenced in its brief.

In her brief, the Examining Attorney raises the following objection to Applicant's reference to the putative search results:

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<sup>1</sup> Application Serial No. 87938891 was filed on May 29, 2018, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant's allegation of a bona fide intent to use the mark in commerce.

<sup>2</sup> Applicant's brief, 4 TTAVUE 9.

Page references herein to the application record refer to the .pdf version of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs refer to the Board's TTABVUE docket system.

Applicant indicates that an internet search of the term “fetal life” discloses results that provide “information about pregnancy from inception through delivery.” Applicant’s internet materials have not been properly made of record and are objected to. Although applicant has discussed the contents of webpages as evidence against the refusal, applicant provided only references to these webpages, which is not sufficient to introduce the underlying webpages into the record.<sup>3</sup>

As we stated in *In re Planalytics Inc.*, 70 USPQ2d 1454, 1457 (TTAB 2004), “[a] mere reference to a website does not make the information of record.” Material obtained through the internet generally is acceptable as evidence in ex parte proceedings. See Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 1208.03 and authorities cited therein. Proper submission of website evidence must include a copy of the page itself, the URL of the website and the date the excerpt was accessed. See *In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1733 (TTAB 2018) Cf. *Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1550 (TTAB 2012) (webpages inadmissible because they did not include the URL).

In addition, even if Applicant had properly submitted web pages with its brief, any evidence submitted with Applicant’s appeal brief that was not previously submitted during prosecution would be untimely and would not be considered.<sup>4</sup> See Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d); TBMP §§ 1203.02(e) and 1207.01 and authorities cited therein.

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<sup>3</sup> Examining Attorney’s brief, 6 TTABVUE 3.

<sup>4</sup> The proper procedure for an applicant or examining attorney to introduce evidence after an appeal has been filed is to submit a written request with the Board to suspend the appeal and remand the application for further examination. See Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d). See also TBMP § 1207.02 and authorities cited therein.

Accordingly, the putative search results are not of record and will be given no consideration.

## **II. Supplemental Register**

In its brief, Applicant also argues:

Applicant believes that its mark is not merely descriptive, and therefore requests that the statutory refusal be reversed. In the alternative, Applicant is entitled to registration of its mark on the Supplemental Register so the Applicant would be protected against conflicting marks in later-filed USPTO applications.<sup>5</sup>

However, the Examining Attorney is correct that the involved application, based upon Applicant's assertion of its bona fide intent to use the mark in commerce under Trademark Act Section 1(b), is not eligible for registration on the Supplemental Register. Applicant has not alleged that its FETAL LIFE mark is in lawful use in commerce, as required by Trademark Act Section 23, 15 U.S.C. §1091(a); *see also* 37 C.F.R. §2.47(a); and TMEP §714.05(a)(i) and authorities cited therein. Nor has Applicant submitted an amendment to allege use under 37 C.F.R. §2.76; *see also* 37 C.F.R. §§2.47(d), 2.75(b); and TMEP §§815.02, 1102.03.

Accordingly, Applicant's proposed amendment to seek registration on the Supplemental Register will be given no consideration.

We turn now to the merits of this appeal.

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<sup>5</sup> 4 TTABVUE 5.

### III. Mere Descriptiveness

In the absence of acquired distinctiveness,<sup>6</sup> Section 2(e)(1) of the Trademark Act prohibits registration on the Principal Register of “a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . . of them.” 15 U.S.C. § 1052(e)(1). A term is “merely descriptive” within the meaning of Section 2(e)(1) if it “immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.” *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); see also *In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015); *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). “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.” *In re Tennis in the Round, Inc.*, 199 USPQ 496, 498 (TTAB 1978); see also *In re Gyulay*, 3 USPQ2d at 1009.

A term need only describe a single feature or attribute of the identified goods to be descriptive. *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1812 (Fed. Cir. 2001). Whether a mark is merely descriptive cannot be determined in the abstract or on the basis of guesswork. Descriptiveness must be evaluated “in relation to the particular goods for which registration is sought, the

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<sup>6</sup> Applicant has not made a claim of acquired distinctiveness. Accordingly, the question of whether Applicant’s FETAL LIFE mark has acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f), is not before us.

context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use.” *Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219 (quoting *In re Bayer AG*, 82 USPQ2d at 1831). The question is not whether a purchaser could guess the nature of the goods from the mark alone. Rather, we evaluate whether someone who knows what the goods are will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. 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). To be merely descriptive, a term must forthwith convey an immediate idea of a quality, feature, function, or characteristic of the relevant goods or services with a “degree of particularity.” *The Goodyear Tire & Rubber Co. v. Cont’l Gen. Tire, Inc.*, 70 USPQ2d 1067, 1069 (TTAB 2008) (citing *In re TMS Corp. of the Americas*, 200 USPQ 57, 59 (TTAB 1978) and *In re Entenmann’s Inc.*, 15 USPQ2d 1750, 1751 (TTAB 1990)).

In her brief,<sup>7</sup> the Examining Attorney argues (internal cites omitted):

As seen from applicant’s identification of goods, its goods are used to monitor fetal movement, vital signs, heart rate and activity.

As seen from the attached evidence from oxforddictionaries.com, the term “life” refers to “[t]he existence of an individual human being.”<sup>8</sup>

Therefore, the proposed mark merely describes a function or purpose of the applicant’s goods, namely, they monitor or sense the existence of a fetal human being.

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<sup>7</sup> 6 TTABVUE 5.

<sup>8</sup> September 27, 2018 first Office Action at .pdf 4-9.

In further support of this contention, the Examining Attorney introduced into the record screenshots from the following four websites from medical and medical-technical trade journals utilizing the term “fetal life” in the context of various aspects of prenatal health:<sup>9</sup>

Journal of Health & Medical Informatics

[micsonline.org/openaccess/prenatal-fetal-life-in-the-mother](http://micsonline.org/openaccess/prenatal-fetal-life-in-the-mother)

“We must know intrauterine fetal life not only for the fetal monitoring, but also for the care of mother and fetus as an integrated life, and particularly for the incubation of preterm infant, where the reproduction of intrauterine environment is desired.”

Hindawi Computational and Mathematical Methods in Medicine  
[hindawi.com/journals/cmmm](http://hindawi.com/journals/cmmm)

“Moreover, the intrinsic complexity which characterizes fetal life and the possible associated diseases complicates the prediction and control of fetal development.”

JOGNN Journal of Obstetric, Gynecological & Neonatal Nursing  
[jognn.org/article/S0884-2175\(15\)34148-4/abstract](http://jognn.org/article/S0884-2175(15)34148-4/abstract)

“Because fetal monitoring technology cannot detect a difference between a fetal and maternal signal source, the user of the fetal monitor is responsible for confirming fetal life prior to monitor use and then continuing to confirm that the fetus is the signal source.” and

Cooper Surgical Medical Devices

[coopersurgical.com/medical-devices/detail/medasonics-tria-fetal-vascular-doppler](http://coopersurgical.com/medical-devices/detail/medasonics-tria-fetal-vascular-doppler)

“Detect fetal life early in pregnancy. Assess the rate and rhythm of the fetal heart.”

Applicant essentially argues that its FETAL LIFE mark may have several meanings and only suggests a function, feature or characteristic of its goods.

The Examining Attorney’s evidence, excerpted above, includes only four uses of the term “fetal life” in medical journals or journals discussing medical devices. The

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<sup>9</sup> February 9, 2019 final Office Action at .pdf 6-53.

website excerpt from the Journal of Health & Medical Informatics uses the term “fetal life” in the context of intrauterine fetal monitoring, care of a mother and fetus, and preterm infant incubation, which suggests the term has some significance in connection with the identified goods. The excerpt from the Hindawi Computational and Mathematical Methods in Medicine article uses the term “fetal life” in the context of the difficulties in assessing fetal health and development. The excerpt from the JOGNN Journal of Obstetric, Gynecological & Neonatal Nursing discusses “fetal life” in the context of the challenges of differentiating between fetal and maternal signal sources when using fetal monitoring devices. Finally, the Cooper Surgical Medical Devices article discusses the capacity of a product to detect “fetal life” early in pregnancy. This evidence shows use of the term “fetal life” in connection with the challenges of detecting, monitoring and assessing health signals from fetuses. Further, we agree with the Examining Attorney that Applicant’s goods may be used, inter alia, to detect and monitor various fetal health signals.

However, the evidence of record, consisting of a dictionary definition of “life” and pages from four medical and scientific internet websites, falls short of demonstrating that FETAL LIFE merely describes a function, feature or characteristic of Applicant’s fetal health signal monitors and related goods with the required degree of particularity. We acknowledge that the evidence shows four instances of fetal health signals being referred to generally as “fetal life.” However, we agree with Applicant that the Examining Attorney’s evidence is insufficient to show that FETAL LIFE merely describes a particular function or feature of Applicant’s goods. The four

journal articles are technical in nature and there is no indication regarding the extent of their circulation or readership, even among medical professionals who might be the purchasers or end users of some of the identified goods. “Fetal life” is a nebulous term in these four articles. It is impossible to determine whether its use in them simply represents use of the term in context, or indicates use of the term to describe some particular aspect of neonatal health. As a result, the Examining Attorney’s slim record evidence fails to demonstrate that “fetal life” describes a significant feature, aspect or characteristic of the recited goods or their purpose such that the mark FETAL LIFE as a whole may be merely descriptive of thereof. To the extent that Applicant’s goods may be used, inter alia, to detect or monitor “fetal life,” imagination or additional thought is required to reach that conclusion.

To the extent that any “doubts exist as to whether [the] term is descriptive as applied to the . . . [goods] for which registration is sought, it is the practice of this Board to resolve doubts in favor of the applicant and pass the mark to publication with the knowledge that a competitor of applicant can come forth and initiate an opposition proceeding in which a more complete record can be established.” *In re Stroh Brewery Co.*, 34 USPQ2d 1796, 1797 (TTAB 1994); *see also In re Merrill Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.3d 1567, 4 USPQ2d 1141, 1144 (Fed. Cir. 1987) (citing *In re Gourmet Bakers, Inc.*, 173 USPQ 565 (TTAB 1972)).”

**Decision:** The refusal to register Applicant’s mark under Section 2(e)(1) on the basis that the mark FETAL LIFE is merely descriptive of the identified goods, is reversed.