

This Opinion is not a
Precedent of the TTAB

Mailed: April 7, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re NuGeneration Technologies, LLC

—
Serial No. 88852858
Serial No. 88866690
—

Brian M. Kaufman of Patent Law Group: Atkins and Associates, P.C.

Andrew Crowder-Schaefer, Trademark Examining Attorney, Law Office 104,
Zachary B. Cromer, Managing Attorney.

—
Before Taylor, Goodman and Heasley,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

NuGeneration Technologies, LLC dba Nugentec (“Applicant”) seeks registration on the Principal Register of the mark DESIGNED, SOURCED, AND BUILT IN THE USA (in standard characters) for the following goods:

A wide variety of chemicals for a wide variety of industrial uses in International Class 1;

Hand-sanitizing preparations; disinfectants in International Class 5¹; and for

Face masks for use by health care providers; surgical masks; human face protectors, namely, transparent face shields for use in the medical and dental fields; sanitary masks for medical wellness purposes; respiratory masks for medical purposes; masks for use by medical personnel in International Class 10; and

Freestanding sneeze guards, namely, plastic shields for protection between retail clerks and customers; plastic shields to isolate retail clerks from customers; plastic shields to guard retail clerks against sneezes and coughs of customers; plastic dividers for protection between retail cashiers and customers in International Class 20.²

The Trademark Examining Attorney has refused registration of Applicant's mark under Trademark Act Sections 1, 2, and 45, 15 U.S.C. §§1051-1052, 1127 for failure to function as a mark because the "wording is merely informational and constitutes a commonplace phrase that is widely used in the marketplace." 8 TTABVUE 2 (Serial No. 88858858); 10 TTABVUE 2 (Serial No. 88866690).

In application Serial No. 88852858, after the refusal was made final, Applicant appealed to this Board. In application Serial No. 88866690, after the refusal was made final, Applicant appealed and requested reconsideration. After the Examining

¹ Application Serial No. 88852858 was filed on March 30, 2020, based upon Applicant's assertion of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

² Application Serial No. 88866690 was filed on April 9, 2020, based upon Applicant's assertion of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Page references to the application record refer to the online database of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal refer to the Board's TTABVUE docket system.

Attorney denied the request for reconsideration, the appeal was resumed. On October 27, 2021, the Board granted the Examining Attorney's request to consolidate these appeals.³

We affirm the refusals to register.

I. Failure to Function as a Mark

“The Trade-Mark Act is not an act to register words but to register trademarks. Before there can be registrability, there must be a trademark (or a service mark) and, unless words have been so used, they cannot qualify for registration.” *In re Standard Oil Co.*, 275 F.2d 945, 125 USPQ 227, 229 (CCPA 1960). A “trademark” is defined as “any word, name, symbol, or device or any combination thereof ... to identify and distinguish [a person's] goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.” Trademark Act Section 45, 15 U.S.C. § 1127.

Not every word, phrase, or slogan identifies and distinguishes one brand from another. *See D.C. Wholesaler v. Chien*, 120 USPQ2d 1710, 1713 (TTAB 2016) (citing *In re Eagle Crest Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010)) (“not every designation adopted with the intention that it perform a trademark function necessarily accomplishes that purpose.”). Slogans and other terms that are considered to be merely informational in nature, or to be common laudatory phrases or commonly

³ We decide these appeals in this single decision. *See, In re Binion*, 93 USPQ2d 1531, 1533 (TTAB 2009); TBMP § 1214 (2021). We refer to the record in application Serial No. 88852858 unless otherwise indicated. In application Serial No. 88852858, Applicant's brief is at 4 TTABVUE; the Examining Attorney's brief is at 8 TTABVUE.

expressed concepts or sentiments that would ordinarily be used in business or in the particular trade or industry, are not registrable. *In re Texas With Love, LLC*, 2020 USPQ2d 11290, at *3 (TTAB 2020) (affirming refusal to register TEXAS LOVE for hats and shirts because “it would be perceived not as a source identifier, but instead as a widely-used phrase that merely conveys a well-recognized and commonly expressed concept or sentiment, specifically love for or from Texas”); *In re Eagle Crest, Inc.*, 96 USPQ2d at 1229 (affirming refusal to register “Once a Marine, Always a Marine” for clothing because it would be perceived as an informational slogan “to express support, admiration or affiliation with the Marines”).

“A critical element in determining whether a term or phrase is a trademark is the impression the term or phrase makes on the relevant public.” *In re Volvo Cars of N. Am. Inc.*, 46 USPQ2d 1455, 1459 (TTAB 1998). “[E]vidence of the public’s perception may be obtained from ‘any competent source, such as consumer surveys, dictionaries, newspapers and other publications.’” *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1833 (Fed. Cir. 2015) (quoting *In re Northland Aluminum Prods., Inc.*, 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985)). Internet evidence is relevant to show consumer perception. *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007).

We must assess whether Applicant’s proposed mark, DESIGNED, SOURCED, AND BUILT IN THE USA, functions as a mark based on whether the relevant public, i.e., purchasers or potential purchasers of Applicant’s goods, would perceive DESIGNED, SOURCED, AND BUILT IN THE USA as identifying the source or

origin of Applicant's goods. *See e.g. In re TracFone Wireless, Inc.*, 2019 USPQ2d 222983, at *1-2 (TTAB 2019) ("The key question is whether the asserted mark would be perceived as a source indicator for Applicant's [goods or] services."); *In re Aerospace Optics, Inc.*, 78 USPQ2d 1861, 1862 (TTAB 2006) (same). Because there are no limitations to the channels of trade or classes of purchasers of the goods identified in the applications, the relevant consuming public comprises all potential purchasers of the identified Class 1, 5, 10 and 20 goods. *See CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); *University of Kentucky v. 40-0, LLC*, 2021 USPQ2d 253, at *25 (TTAB 2021).

Applicant filed the applications under Section 1(b) of the Act asserting its intention to use the identified goods, and there is no evidence in the record of Applicant's actual use. Nonetheless, we may consider the evidence of record showing how the designation is actually used by others in the marketplace. *See D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d at 1716 (failure to function found where "the marketplace is awash in products that display the term"); *In re Eagle Crest*, 96 USPQ2d at 1229 (considering specimens and evidence in the record showing how the designation is actually used in the marketplace).

A. The Examining Attorney's Evidence

In application Serial No. 88852858, the Examining Attorney provided web pages that show "designed in the USA", "built in the USA" and "sourced in the USA" separately for the following goods:

Phrase	Goods
Designed in the USA	hand sanitizer ⁴
Built in the USA	sanitizing stands/stations ⁵
Sourced in the USA	hand sanitizer ⁶

In application Serial No. 88866690, the Examining Attorney provided web pages that show “designed in the USA”, “built in the USA,” and “sourced in the USA” separately for the following goods:

Phrase	Goods
Designed in the USA	face shield, face masks and portable partition or wall ⁷
Sourced in the USA	face shield, masks, sneeze guard ⁸
Built in the USA	masks, face shield, germ shields, face masks, portable partition-divider, and sleeping pads. ⁹

⁴ Serial No. 88852858, June 24, 2020 Office Action at TSDR 2-4.

⁵ *Id.* at TSDR 11-14.

⁶ *Id.* at TSDR 6-10.

⁷ Serial No. 88866690, July 1, 2020 Office Action at TSDR 2-9.

⁸ *Id.* at TSDR 10-15.

⁹ *Id.* at TSDR 16-21.

The Examining Attorney submitted evidence to show use of the combined phrase “designed, sourced and built in the USA” for goods other than the types identified in the involved applications.¹⁰



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¹⁰ As indicated, references to overlapping evidence in both applications will be to Serial No. 88852858.

¹¹ January 25, 2021 Office Action at TSDR 3.

¹² *Id.* at TSDR 8.

The Syncro3D S100 provides high-duty cycle operation, reliability, durability, precision, speed, accuracy, and repeatability. The system allows the user to customize print parameters using profiles and macros, enabling a highly customizable print process. Our printers are 100% designed, sourced and built in the USA.

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THE LAST GRILL YOU'LL EVER NEED.

Each MAK Grill is designed, sourced, and built in the USA to strict standards. All materials and parts are chosen for durability. The most cutting edge technology is used to engineer every part. Our expert machine operators and fabricators construct each grill.

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SPARO 20

SPARO 20 is PDW's first offering in the squad-level tactical drone class born out of intensive customer assessments to ensure we deliver the very best in class, American-made cutting edge tech in the areas that matter to the warfighter: endurance, ISR payloads, ease of use, portability, reliability, and ruggedness.

Designed, sourced, and built in the USA

Optimized for 40+ Minute Flight Time

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Handcrafted, heirloom-level quality you can see and feel, from the first and only Native American-owned denim company

Ginew is rooted in the Native American traditions of its founders, husband and wife Erik and Amanda—their first leather goods were made from the leather of their wedding buffalo that was hunted, tanned, hand-dyed by them and their family. They use meticulously sourced materials and craft them in the traditions of their Ojibwe, Oneida, and Mohican heritage. The Rider Jacket is Inspired by Erik's grandfather's motorcycle club jacket from the '60s, but updated with a modern fit and a tough waxed canvas that'll take on your personal wear pattern every time you wear it.

- Classic riding jacket design with a modern cut and extra length for riding comfort
- 10.10 oz Army Duck waxed canvas that resists weather, abrasion, and wear—sourced in the US
- Waxed canvas takes on every fold, crease, and bend as you wear it for a personal patina
- Two hand pockets, two chest pockets, and two internal pouch pockets
- Banded collar with throat tab to close it against the wind
- Unlined for a lightweight and breathable build
- Adjustable at the cuffs and the rear waist for the perfect fit
- Custom Ginew hardware
- Designed, sourced, and built in the USA

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¹³ *Id.* at TSDR 13.

¹⁴ *Id.* at TSDR 4.

¹⁵ *Id.* at TSDR 5.

¹⁶ *Id.* at TSDR 6.

- weight 41lbs
- Dimensions 19-3/4" wide, 19-1/2" high (with 12" speaker), 10-1/4" deep
- Designed, sourced and built in the USA!

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Vesper enables maximum situational awareness in all conditions without risk of detection.

- **Capable EO/IR Camera** has 3-axis stabilization, 18x combined zoom 4K EO/320p thermal, 0.01 low light capabilities
- **Portable** 1 kg/ 2,300cm³ drone packed in IP-67 crushproof field case can go from back to air in less than 90 seconds.
- **Exceptional Flight Capabilities** 50 minute flight time, 28 mile flight range/5 mi radio range, and 45 mph flight speed
- **Operate without detection** Not visible or audible at 50 m
- **Modular** Multiple battery and rotor set options enable configuration for specific mission needs
- **Secure** AES-256 encryption/ Designed, sourced and built in the USA/ NDAA compliant

It's been an honor for us to have the chance to contribute to national security with these new capabilities. We look forward to hearing more about specific mission needs within the US government and supporting a greater level of situational awareness for our federal customers. Get in touch at sales@vantagerobotics.com to learn more.

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Klear Solutions, Inc.

Klear's founder and President, Trish Hamilton, has brought together a team of like-minded professionals that include former silicon valley executives, chemical engineering professionals and manufacturing specialists who are all driven by a common belief in protecting the environment while supporting our US economy. The entire line of Klear Kryptonite products are designed, sourced and built in the USA.

"The Klear Green Team" supports numerous charities and community organizations and if you are interested in joining "Klear's Green Team", please reach out to one of our authorized distributors (located on our website), [fill out our contact form](#) on our website or call us at (855) 805-5327.

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¹⁷ *Id.* at TSDR 9.

¹⁸ *Id.* at TSDR 7.

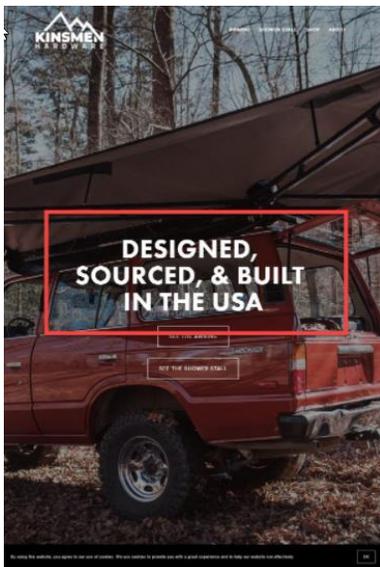
¹⁹ *Id.* at TSDR 10.

Joined: Feb 12, 2005
Location: Fort Myers, FL
Posts: 4,449
Likes: 269

While I probably own more amplifiers that I have need for, both desktop and portable, I am always on the lookout for new or innovative products which serve well their intended purpose, namely reproducing music at the output that mirrors that which is presented at the input.

Some time back, I happened across a single review of the **Andante**, manufactured by **Scherzo Audio**, located in Kissimmee, Florida. Interestingly, the Andante is completely designed, sourced and built in the USA!

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²⁰ *Id.* at TSDR 11.

²¹ *Id.* at TSDR 2.

²² *Id.* at TSDR 12.

B. Arguments

Applicant maintains that the Examining Attorney has provided limited evidence of “uses of the exact wording” and none of the uses were for the same or similar goods as those of Applicant. 4 TTABVUE 7-8. Applicant argues that these “handful of examples” of use “does not compare to the record in the Board cases involving the marks I♥DC or God Bless the USA,” (*D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d at 1710 and *In re Lee Greenwood*, 2020 USPQ2d 11439 (TTAB 2020)), “does not demonstrate that Appellant’s mark is used in everyday parlance” or that it is “a familiar everyday expression or slogan,” and fails to show the phrase is “widely used in the marketplace” in relation to similar goods. 4 TTABVUE 6, 10. Applicant further argues that the Examining Attorney’s “scour[ing] the internet for exact phrase matches, is not evidence of frequent use ... without more context.” 4 TTABVUE 9. Applicant contends that the Examining Attorney’s evidence of separate uses of “designed in the USA,” “built in the USA,” and “sourced in the USA,” are “mutilations of its mark” and do not show use of the phrase in connection with all of its identified goods. 4 TTABVUE 7. Applicant then argues that the specific wording of its mark is so “niche and uncommon that a consumer would perceive it as a trademark.” 4 TTABVUE 10.

With further regard to the Class 1 and 5 goods in Serial No. 88852858, Applicant contends that “the wording designed and built when used on industrial chemicals, hand sanitizing preparations and disinfectants” is incongruous as you “don’t ‘build’

chemicals” and the wording is “sufficiently nebulous” and has “potential ambiguity.”
4 TTABVUE 10-11.

The Examining Attorney responds that the evidence demonstrates “common use of the wording ‘DESIGNED, SOURCED, AND BUILT IN THE USA’ by a variety of sources to convey information about their goods, namely, to convey a common place phrase that the goods in question are planned, acquired, and created in the United States of America.” 8 TTABVUE 8. The Examining Attorney also argues that the refusal was proper even though the application is filed under intent-to-use, because “under TMEP §1202.04, ‘a refusal must be issued regardless of the filing basis, if the evidence’ makes clear that the proposed mark is informational.” 8 TTABVUE 10.

C. Analysis

Beginning with Applicant’s challenges to the competence of the evidence introduced by the Examining Attorney, Applicant’s criticisms about lack of context of the Internet evidence is without merit, as the Examining Attorney provided complete web pages showing the use of the phrase “designed, sourced, and built in the USA” in connection with a variety of goods. These complete webpages show the meaning this phrase has to consumers and how consumers would perceive it when used by businesses in connection with a variety of goods. Applicant also criticizes the Examining Attorney as selectively providing web pages that are the most favorable to his position. However, Applicant’s complaint about “cherry-picked” evidence is not a valid criticism, as Examining Attorneys are expected to search for and provide the most probative evidence to support the refusal. In any event, Applicant was free to

replicate the search and submit evidence countering the Examining Attorney's position, but did not avail itself of this option. *See In re Tilcon Warren, Inc.*, 221 USPQ 86, 88 (TTAB 1984) (where the examining attorney made a determination that a proposed mark failed to function as a mark, "the burden was on applicant to establish by competent evidence that it does serve such function").

We also find that the website evidence of the separate uses of the phrases "designed in the USA," "sourced in the USA," and "built in the USA" show how consumers are exposed to the informational terms that compose Applicant's mark as a whole. *Cf. In re Melville Corp.*, 228 USPQ 970, 971 (TTAB 1986) (although examples of phrases used by other retailers not identical to applicant's proposed mark BRAND NAMES FOR LESS, they do show a marketing environment where consumers are exposed to the common practice by retailers claiming that their brand name merchandise is sold for less than the usual price; the fact that applicant may convey similar information in a slightly different way than others is not determinative).

As to Applicant's criticism of lack of evidence of use of the complete phrase "designed, sourced and built in the USA" in connection with its particular goods, the Examining Attorney's evidence shows that all types of businesses have adopted this slogan. In prior cases, we have found evidence of adoption by various businesses, not limited to any particular sector, to be probative of informational use. *See In Re Wal-Mart Stores, Inc.*, 129 USPQ2d 1148, 1157 (TTAB 2019) (third-party usage examples provided by the Examining Attorney "show that people are exposed to the ordinary meaning of the phrase 'investing in American jobs' in everyday life" from commercial

businesses in various industries); *In re Manco Inc.*, 24 USPQ2d 1938 (TTAB 1992) (evidence of use by media and businesses in a variety of industries established that the slogan THINK GREEN for mailing and shipping items and weather-stripping does not function as a trademark); *In re Wakefern Food Corp.*, 222 USPQ 76, 78 (TTAB 1984) (evidence that food stores and other businesses use the informational phrase “why pay more” was probative of use of the phrase as a common merchandising slogan used by others in connection with a variety of businesses).

Applicant also criticizes the amount of evidence submitted by the Examining Attorney as insufficient to establish widespread use, but we find the evidence shown across varied industries of “designed, sourced, and built in the USA” along with the separate uses of “designed in the USA”, “sourced in the USA”, and “built in the USA” sufficient to show a marketing environment where consumers are accustomed to the use of these similar informational phrases by businesses. Although the volume of evidence in this case is not as large as in other Board cases, there is no specific rule as to the exact amount or type of evidence necessary to prove informational use. *Cf. Hunter Publishing Co. v. Caulfield Publishing Ltd.*, 1 USPQ2d 1996, 1999 (TTAB 1986) (“[e]valuation of the evidence requires a subjective judgment as to its sufficiency based on the nature of the mark and the conditions surrounding its use.”). As indicated, it is not required that the term be shown to be in common usage in the particular industry before it can be found informational, as Board cases have found phrases similar to this one informational across a variety of businesses and industries.

Applicant also argues that the “designed, and built in the USA” portion of its mark is incongruous in connection with chemical goods and hand sanitizing goods. The evidence reflects that “designed in the USA” has been used in connection with hand sanitizers to reference their formulation, and chemical compounds could be similarly designed. And while industrial chemicals and sanitizers may not be “built” in the sense of putting solid materials together, they are manufactured by combining their constituent elements, which is conveyed by the term “built.” Therefore, we find no incongruity in the phrase as a whole as to these particular goods.

Applicant also has argued that the refusal is premature for an application filed under Section 1(b). However, as the Examining Attorney points out, a refusal may be issued “if information in the application record or other available evidence is dispositive of the failure of the relevant matter to function as a mark.” TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 1202.17(c)(ii)(A) (July 2021). Here we find the evidence sufficient to show that DESIGNED, SOURCED, AND BUILT IN THE USA is a common phrase used by businesses and industries to not only convey support for American made products, but to encourage a preference for them by intimating better quality, safety and durability due to the designing, sourcing and building of the goods in the United States. Consumers accustomed to seeing similar wording by third-parties to support American businesses and products will not perceive DESIGNED, SOURCED, AND BUILT IN THE USA as pointing uniquely to a single source. *See, e.g., In re Greenwood*, 2020 USPQ2d 11439, at *3 (GOD BLESS THE USA would not be perceived as a source indicator but as an expression of

patriotism, affection, or affiliation with the United States of America); *In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1403-04 (TTAB 2018) (consumers accustomed to seeing similar, ornamental displays of I LOVE YOU on bracelets and jewelry from different sources will not perceive I LOVE YOU appearing on bracelets as pointing uniquely to applicant as a single source).

We find this case similar to other Board cases involving phrases ordinarily used in business and industry to convey support for American-made goods and encourage a preference for American products. *See, e.g., In re Wal-Mart Stores Inc.*, 129 USPQ2d at 1156 (INVESTING IN AMERICAN JOBS conveys support for American-made goods and is not a source indicator); *In re Remington Prods.*, 3 USPQ2d 1714, 1715 (TTAB 1987) (PROUDLY MADE IN USA for electric shavers and parts thereof is a slogan to encourage preference for American products and would not be recognized as source indicator). As the Board stated in *In re Remington Prods.*, 3 USPQ2d at 1715: “It is common knowledge that today’s American marketplace has a surplus of foreign-made goods and that American manufacturers are anxious to encourage purchasers to give preference to American products.” And in *In re Wal-Mart Stores*, 129 USPQ2d at 1152, the Board stated that “the slogan INVESTING IN AMERICAN JOBS is like other statements that would ordinarily be used in business or industry, or by certain segments of the public generally, to convey support for American-made goods.” Applicant’s proposed mark DESIGNED, SOURCED, AND BUILT IN THE USA, in addition to conveying information to the consumer to support American made goods and businesses, taps into the American consumer’s desire to purchase products

of higher quality and better design, that are durable and sourced locally, ensuring safety & quality at every step of the supply chain.

II. Conclusion

Based on the record in this case, Applicant's proposed mark DESIGNED, SOURCED AND BUILT IN THE USA fails to function as a mark for Applicant's Class 1, 5, 10 and 20 goods. As used by Applicant, it would be perceived by consumers as a merely informational phrase, and not as a source of Applicant's goods.

Decision: The refusals to register Applicant's mark DESIGNED, SOURCED, AND BUILT IN THE USA in both application Serial Nos. 88852858 and 88866690 are affirmed.