

**This Opinion is Not a  
Precedent of the TTAB**

Mailed: January 8, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*Sprint Communications Company L.P.*

*v.*

*AT&T Intellectual Property II, L.P.*

—  
Opposition Nos. 91241178 and 91241179  
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Marie Anne Mastrovito of Abelman, Frayne & Schwab,  
for Sprint Communications Company L.P.

Jeffrey M. Becker and Joseph Lawlor of Haynes and Boone, LLP,  
for AT&T Intellectual Property II, L.P.

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Before Cataldo, Adlin and Hudis,  
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

AT&T Intellectual Property II, L.P. (“Applicant”) seeks registration on the Principal Register of the proposed marks ENHANCED PUSH-TO-TALK and AT&T ENHANCED PUSH-TO-TALK (both in standard characters with “push-to-talk” disclaimed) for the following services:

Telecommunication services, namely, providing voice, text, data, pictures, music and video via wireless networks and two-way radio dispatching services; electronic transmission of voice, text, images, data and information by means of two-way radios, mobile radios, cellular telephones, dispatch radios, pagers; paging services; mobile telephone communication services; wireless Internet access; and wireless data services for mobile devices via a wireless network for the purpose of sending and receiving electronic mail, facsimiles, data, images, information, text, numeric messaging and text messaging and for accessing a global communications network in International Class 38.<sup>1</sup>

In Opposition No. 91241178,<sup>2</sup> Sprint Communications Company L.P. (“Opposer”) opposes registration of Applicant’s proposed ENHANCED PUSH-TO-TALK mark under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1), on the ground that the proposed mark is merely descriptive of the services identified in the Application. In Opposition No. 91241179,<sup>3</sup> Opposer asserts that the term “enhanced” in Applicant’s proposed AT&T ENHANCED PUSH-TO-TALK mark is merely descriptive of the services identified in the Application. Since “push-to-talk” already is disclaimed, Opposer opposes registration of Applicant’s proposed AT&T ENHANCED PUSH-TO-TALK mark in the absence of an additional disclaimer of “enhanced” apart from the proposed mark as shown.

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<sup>1</sup> Application Serial Nos. 87649171 and 87649163 were filed on October 17, 2017, each based upon Applicant’s claim of first use anywhere and first use in commerce since at least as early as February 21, 2012.

<sup>2</sup> 1 TTABVUE, Notice of Opposition in Opposition No. 91241178. References to the pleadings, the evidence of record and the parties’ briefs refer to the Board’s TTABVUE docket system. Coming before the designation TTABVUE is the docket entry number; and coming after this designation are the page and paragraph references, if applicable.

<sup>3</sup> 1 TTABVUE, Notice of Opposition in Opposition No. 91241179.

Applicant's Answers deny the salient allegations in each Opposition,<sup>4</sup> and assert in the alternative two Affirmative Defenses: (1) "enhanced push-to-talk" in each Application is inherently distinctive; and (2) to the extent that "enhanced push-to-talk" is not inherently distinctive, it has acquired distinctiveness. In its Order of January 24, 2019, the Board consolidated the two Oppositions for presentation on the same record and briefs, with Opposition No. 91241178 maintained as the "parent case."<sup>5</sup>

The cases are fully briefed. Having considered the entire evidentiary record, the parties' arguments and applicable authorities, as explained below, we sustain Opposition No. 91241178 as to the proposed ENHANCED PUSH-TO-TALK mark, and sustain Opposition No. 91241179 as to the proposed AT&T ENHANCED PUSH-TO-TALK mark in the absence of the entry of a disclaimer of "enhanced push-to-talk."

## **I. Evidentiary Submissions**

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the files of Applicant's involved Applications. In addition, the parties offered the following evidence:

### **A. Opposer's Evidence**

- Opposer's First Notice of Reliance ("Opp 1st NoR") on third-party registrations for marks including the term "enhanced" or "enhancement" (19 TTABVUE).

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<sup>4</sup> 5 TTABVUE in Opposition No. 91241178, and 9 TTABVUE in Opposition No. 91241179.

<sup>5</sup> 9 TTABVUE in Opposition No. 91241178, and 13 TTABVUE in Opposition No. 91241179. From this point forward, unless specifically noted otherwise, all TTABVUE designations to

- Opposer’s Second Notice of Reliance (“Opp 2nd NoR”) on third-party registrations including the wording “push-to-talk” or “enhanced push-to-talk” within the identification of goods or services (14 TTABVUE).
- Opposer’s Third Notice of Reliance (“Opp 3rd NoR”) on dictionary definitions of “enhanced” and online references containing descriptions of the term “push-to-talk” (15 TTABVUE).
- Opposer’s Fourth Notice of Reliance (“Opp 4th NoR”) on Applicant’s Responses to Opposer’s First Set of Requests for Admission and copies of documents produced and authenticated by Applicant, showing Applicant’s own use of the wording “enhanced” and “push-to-talk” (16 TTABVUE (Public); 17 TTABVUE (Confidential)).
- Opposer’s Fifth Notice of Reliance (“Opp 5th NoR”) on an article reporting the details of a third-party patent, press releases and online articles showing use of the wording “enhanced” and “push-to-talk” by Opposer and third parties (18 TTABVUE).
- Opposer’s Sixth Notice of Reliance (“Opp 6th NoR”) on copies of registrations for the marks SPRINT and DIRECT CONNECT owned by Opposer or a related company for telecommunications products and services (21 TTABVUE).
- Opposer’s Seventh Notice of Reliance (“Opp 7th NoR”) on Applicant’s Responses to Opposer’s Second Set of Requests for Admission and copies of articles produced and authenticated by Applicant showing competition between Applicant and Opposer in the push-to-talk market (22 TTABVUE).
- Opposer’s Eighth Notice of Reliance (“Opp 8th NoR”) on Applicant’s Responses to Opposer’s Second Set of Requests for Admission and copies of additional articles produced and authenticated by Applicant showing uses of “enhanced” and “enhancements” in connection with Applicant’s Services (23 TTABVUE).
- Opposer’s Ninth Notice of Reliance (“Opp 9th NoR”) on excerpts from Opposer’s website showing the products and services offered by Opposer in connection with its SPRINT and DIRECT CONNECT marks (24 TTABVUE).

## **B. Applicant’s Evidence**

- Applicant’s Declaration of Igor Glubochansky (“Glubochansky Decl.”), Assistant Vice President 5G Development and Marketing of AT&T Mobility Services LLC, with exhibits (25 TTABVUE (Public); 26 TTABVUE (Confidential)).
- Applicant’s Notice of Reliance (“App NoR”) on a third-party registration including the wording “enhanced” and “push-to-talk” within the identification

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the pleadings, evidence of record and the parties’ briefs shall refer to the filings made in Opposition No. 91241178.

of services, third-party registrations for marks including the term “Enhanced,” Twitter postings containing the term “enhanced push-to-talk” or its acronym “EPPT,” YouTube channel postings and MP4 files of videos referring to AT&T ENHANCED PUSH-TO-TALK, online definition of “enhanced,” Applicant’s press releases from 2013, and Applicant’s AT&T ENHANCED PUSH-TO-TALK support, developer and help webpages, training videos and operating manuals (27 TTABVUE).

### **C. Opposer’s Rebuttal Evidence**

- Transcript from Opposer’s Testimonial Cross-Examination of Mr. Glubochansky (“Glubochansky Depo.”), with exhibits (39 TTABVUE (Public); 34-36 TTABVUE (Confidential)).

## **II. Applicant’s Evidentiary Objections**

Before proceeding to the merits of the Opposition, we address Applicant’s evidentiary objections to Opposer’s Notice of Reliance evidence, and certain testimony and exhibits from the testimonial cross-examination of Igor Glubochansky.<sup>6</sup>

### **A. Applicant’s Objections to Opposer’s Notice of Reliance Evidence**

Applicant objects to Internet materials Opposer submitted with its Fifth and Ninth Notices of Reliance (reference to a third-party patent, press releases, online articles and excerpts from Opposer’s website) on the following grounds:

**Hearsay** (Fed. R. Evid. 802) – Applicant asserts that “Internet printouts may not be offered for the truth of any matters contained therein.” “However, such materials are frequently competent to show, on their face, matters of relevance to trademark claims (such as public perceptions), regardless of whether the statements are true or false. Accordingly, they will not be excluded outright, but considered for what they

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<sup>6</sup> Applicant’s Brief, 40 TTABVUE 40-53, Appendices A and B. Opposer did not assert any objections to Applicant’s evidence.

show on their face. [Applicant’s hearsay] ... objection is overruled.” *Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1428 (TTAB 2014).

**Foundation** (Fed. R. Evid. 901) – Applicant further contends that “[n]o testimony or other evidence is offered [by Opposer] to provide any foundation for this evidence, including, its intended audience and who may (or may not) have seen th[ese] document[s].” “However, [Applicant’s] contention that ... Opposer failed to lay the proper foundation for [this evidence] ... is a procedural issue, not a substantive issue. ... An objection to foundation raised for the first time in a trial brief is untimely because the party offering the [evidence] ... does not have the opportunity to cure the alleged defect.” *Moke Am. LLC v. Moke USA, LLC*, 2020 USPQ2d 10400, \*5 (TTAB 2020). Applicant’s foundation objection is overruled.

**Best Evidence Rule** (Fed. R. Evid. 1002) – Applicant additionally states that “[t]here appear to be markings and alterations on the document[s] that would not appear in ... authentic LEXIS/NEXIS [articles] ....” This is not a proper assertion of the Best Evidence Rule. As the Board stated in *Mag Instrument, Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701 (TTAB 2010):

The “best evidence rule” is a common law proposition that has been codified in Rule 1002 of the Federal Rules of Evidence, which states: “To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.” However, the rule has been described as “one of preferences, not absolute exclusion.” 6 WEINSTEIN’S FEDERAL EVIDENCE, Section 1004.01 (2nd Ed. 1997).

*Mag Instrument*, 96 USPQ2d at 1707.

Responding to Applicant's objection, Opposer indeed points out that "some of the [LEXIS/NEXIS article] printout[s] include a handwritten underlining of the relevant uses of enhanced."<sup>7</sup> The documents also contain handwritten underlining of "push-to-talk." At no point does Applicant complain that Opposer's "markings and alterations" obscure the content of the articles, or that submission of the articles as they appeared in their original publications is necessary. Applicant's Best Evidence Rule objection is overruled.

**Relevance** (Fed. R. Evid. 401) – Applicant asserts its relevance objection against only two documents.<sup>8</sup> Opposer's Exhibit 2 (5th NoR, 18 TTABVUE 12) is an article having geographic coverage not only in Karnataka, India, but in Illinois and Virginia, United States as well. Applicant's relevance objection to this exhibit on the grounds that it addresses matters solely outside the United States is thus overruled. Opposer's Exhibit 6 (5th NoR, 18 TTABVUE 25) is an article that does not include any written material in the body, but the title of the article seems to have originally appeared in the Factiva Dow Jones News Service. Since there is insufficient content for us to adjudicate the relevance of this article, Applicant's objection to this exhibit is sustained.

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<sup>7</sup> Opposer's Reply Brief, 42 TTABVUE 11.

<sup>8</sup> On the cover sheet for its 5<sup>th</sup> NoR, Applicant states: "The enumerated documents are all relevant to show the common use of the wording 'enhanced' and 'push-to-talk' by both consumers and Applicant's competitors as highly descriptive or generic terms in connection with telecommunication services and goods used in telecommunication which are the same as or related to the services covered by the Applicant's applications."

**Legibility** – Opposer complains that Applicant’s Exhibits 7, 12, 13 and 25 (5th NoR, 18 TTABVUE 26-27, 39-46 and 99-102) should not be received in evidence because they are illegible. *See Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc.*, 107 USPQ2d 1750, 1753 n.6 (TTAB 2013), *aff’d mem.*, 565 Fed. Appx. 900 (Fed. Cir. 2014) (citing *Hard Rock Café Licensing Corp. v. Elsea*, 48 USPQ2d 1400, 1404 (TTAB 1998) (“It is reasonable to assume that it is opposer’s responsibility to review the documents it submits as evidence to ensure that such submissions meet certain basic requirements, such as that they are legible.”). Having reviewed these exhibits, we find they are sufficiently readable for the Board’s purposes. Applicant’s legibility objection to these exhibits is overruled.

**B. Applicant’s Objections to Certain Testimony and Exhibits from the Testimonial Cross-Examination of Igor Glubochansky**

Applicant objects to the following question posed to Mr. Glubochansky during his deposition as vague and calling for speculation: “Do you know what the word ‘enhanced’ communicates to consumers concerning AT&T’s Push-to-Talk service?” We find this question straightforward, intended to ascertain what Applicant wished to convey (or understands is conveyed) to consumers in the use of the term “enhanced,” and that Mr. Glubochansky was fully capable of answering the question. Applicant’s objection to this question is overruled.

Applicant objects on grounds of hearsay, relevance and lack of authentication to Exhibits 3 and 5 marked during Mr. Glubochansky’s deposition, and testimony thereon, concerning the definitions of Enhanced Driver’s License (EDL) and Enhanced Messaging Service (EMS) from the website WhatIs.com (39 TTABVUE 73-

78, 127-128). Mr. Glubochansky testified that he had no familiarity with the WhatIs.com website or the terms Enhanced Driver's License and Enhanced Messaging Service discussed in the documents.<sup>9</sup> These exhibits and related testimony also have no bearing on the issues in these Oppositions. Applicant's objections to these exhibits and related testimony are sustained.

Applicant objects on grounds of hearsay, relevance and lack of authentication to Glubochansky deposition Exhibit 6, and testimony thereon, concerning an undated posting titled "Enhanced-Push to Talk (E-PTT) Launches this Fall" on the NCGrowth/Kenan Institute website, originating from the Kenan-Flagler Business School of the University of North Carolina at Chapel Hill (39 TTABVUE 94-99, 129). Mr. Glubochansky testified that whoever established this web page (with which he otherwise was unfamiliar) is not somebody who is offering a service in the market; the text appears to have been copied from Applicant's website; and that the posting is nothing more than an announcement from an MBA candidate who may have been working with, or was tangentially involved in, Applicant's push-to-talk service.<sup>10</sup> This document appears to have some tangential relevance. For the reasons discussed above, Applicant's other objections to this exhibit and related testimony (based on

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<sup>9</sup> Opposer did not separately offer these Exhibits 3 and 5 as part of any of its Notices of Reliance, and moreover they do not bear the self-authenticating information (URL and print date) required by Trademark Rule 2.122(e)(2), 37 C.F.R. § 2.122.(e)(2). So these documents are not otherwise admissible on this basis.

<sup>10</sup> Once again, Opposer did not offer Exhibit 6 as part of any of its Notices of Reliance, and like Exhibits 3 and 5 does not bear the self-authenticating information required by Trademark Rule 2.122(e)(2). So this document is not otherwise admissible on this basis.

hearsay and lack of authentication) are overruled. However, we afford Exhibit 6 low probative value.

### **III. The Parties and the Push-to-Talk Market**

Through related companies, Opposer and Applicant are direct competitors in the wireless telecommunication market for business customers in the United States.<sup>11</sup> Both companies offer what is known as push-to-talk services.<sup>12</sup> Push-to-talk (“PTT”) is a service that essentially turns a cellular phone into a two way radio. PTT services utilize a cellular phone network to allow subscribers to use their phones like walkie-talkies anywhere with cellular coverage. In practice, PTT services seek to combine the best of both worlds of cellular networks and two-way radios. The goal of a PTT service is to allow a user to communicate almost instantaneously with another user (or group) over any distance using a single button press.<sup>13</sup>

PTT is a one-way (half-duplex) communication. When one wants to talk, one presses and holds down a button on the phone, or holds down the mouse button or space bar on the computer. Letting go of the button gives the other person an opportunity to push-to-talk.<sup>14</sup> PTT can be enabled on a variety of devices, including two-way radios, smart/mobile phones, and mobile radios.<sup>15</sup>

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<sup>11</sup> Glubochansky Decl., 25 TTABVUE 5, ¶¶ 1, 7; Opp 9th NoR, 24 TTABVUE 5-14.

<sup>12</sup> Glubochansky Decl., 25 TTABVUE 6, 20, ¶¶ 10, 61.

<sup>13</sup> *Id.* at 6, ¶ 8.

<sup>14</sup> Glubochansky Decl., 25 TTABVUE 6, ¶ 9; Opp 3rd NoR, 15 TTABVUE 36, 45, Exhs. 5, 7.

<sup>15</sup> Opp 3rd NoR, 15 TTABVUE 49, Exh. 8.

Applicant asserts it has been marketing its PTT services in connection with the proposed marks sought for registration, or the acronym EPTT (for “Enhanced Push-to-Talk”) since 2012.<sup>16</sup> Opposer asserts it has been marketing its PTT services in connection with the marks SPRINT and DIRECT CONNECT since 2009.<sup>17</sup>

#### **IV. Entitlement to Bring and Maintain a Statutory Cause of Action**

To establish its entitlement to bring and maintain a statutory cause of action under Trademark Act Section 13, 15 U.S.C., § 1063, a plaintiff must demonstrate “an interest falling within the zone of interests protected by the statute and ... proximate causation.” *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at \*4 (Fed. Cir. 2020) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061, 2067-70 (2014)); *see also Peterson v. Awshucks SC, LLC*, 2020 USPQ2d 11526 (TTAB 2020) (same).<sup>18</sup> Stated another way, a plaintiff is entitled to bring and maintain a statutory cause of action by demonstrating a real interest in the proceeding and a reasonable belief of damage. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at \*3 (Fed. Cir. 2020); *see also Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). According to the Court of Appeals for the

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<sup>16</sup> Glubochansky Decl., 25 TTABVUE 3-4, 7-8, ¶¶ 2, 12, 15.

<sup>17</sup> Opp. 5th NoR, 18 TTABVUE 14-20, 39-49, 81-87, Exhs. 3, 4, 12-14, 22; Opp 6th NoR, 21 TTABVUE 5-56; Opp 9th NoR, 24 TTABVUE 5-14.

<sup>18</sup> Our decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of “standing.” We now refer to this inquiry as entitlement to bring and maintain a statutory cause of action. Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain equally applicable.

Federal Circuit, there is “no meaningful, substantive difference between the analytical frameworks expressed in *Lexmark* and *Empresa Cubana*.” *Corcamore*, 2020 USPQ2d 11277 at \*4. Thus, “a party that demonstrates a real interest in [opposing registration of] ... a trademark under [Trademark Act Section 13, 15 U.S.C.] § 106[3] has demonstrated an interest falling within the zone of interests protected by [the Trademark Act]. ... Similarly, a party that demonstrates a reasonable belief of damage by the registration of a trademark demonstrates proximate causation within the context of § 106[3]. *Corcamore*, 2020 USPQ2d 11277 at \*7.

When challenging a term as merely descriptive, a plaintiff may establish its entitlement to bring and maintain a statutory claim by showing that it is engaged in the sale or offering of services the same as or related to those covered by the challenged marks, *See Eastman Kodak Co. v. Bell & Howell Document Mgmt. Prods. Co.*, 23 USPQ2d 1878, 1879 (TTAB 1992), *aff'd*, 994 F.2d 1569, 26 USPQ2d 1912 (Fed. Cir. 1993); *Binney & Smith Inc. v. Magic Marker Indus., Inc.*, 222 USPQ 1003, 1010 (TTAB 1984), which (as discussed above) Opposer has done. We therefore find that Opposer has demonstrated its entitlement to bring and maintain a statutory cause of action pursuant to Trademark Act Section 2(e)(1).

## **V. Applicable Law Regarding Mere Descriptiveness**

A mark may not be registered on the principal register if, “when used on or in connection with the [services] ... of the applicant[,]” the mark is “merely descriptive ... of them.” Trademark Act Section 2(e)(1). A mark is merely descriptive if it “consists merely of words descriptive of the qualities, ingredients or characteristics of the goods

or services related to the mark.” *DuoProSS Meditech Corp. v. Inviro Medical Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1755 (Fed. Cir. 2012) (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1173 (Fed.Cir.2004) (quoting *Estate of P.D. Beckwith, Inc. v. Comm’r of Patents*, 252 U.S. 538, 543 (1920))). One articulation of that rule, of particular significance to the proposed marks here, is that a mark is merely descriptive if it “conveys information regarding a function, or purpose, or use of the ... [services].” *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217 (CCPA 1978) (citations omitted). Additionally, “[m]arks that are merely laudatory and descriptive of the alleged merit of a ... [service] are also regarded as being [merely] descriptive.... Self-laudatory or puffing marks are regarded as a condensed form of describing the character or quality of the ... [services].” *In re Bos. Beer Co.*, 198 F.3d 1370, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999) (citing 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 11:17 (4th ed. 1996) (internal quotations omitted)).

“The line between a mark that is merely descriptive and may not be registered absent secondary meaning, and one that is suggestive and may be registered, is that a suggestive mark ‘requires imagination, thought and perception to reach a conclusion as to the nature of the ... [services],’ while a merely descriptive mark ‘forthwith conveys an immediate idea of the ingredients, qualities or characteristics of the ... [services].” *DuoProSS*, 103 USPQ2d at 1755 (citing *In re Abcor*, 200 USPQ at 218 (quoting *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 11, 189 USPQ 759, 765 (2d Cir. 1976))).

The determination of whether a mark, or portion thereof, is merely descriptive is a question of fact. *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1344, 57 USPQ2d 1807, (Fed.Cir.2001) (“Placement of a term on the fanciful-suggestive-descriptive-generic continuum is a question of fact.”) As the party challenging the validity of the opposed marks, Opposer bears the burden of proving that the proposed ENHANCED PUSH-TO-TALK mark is merely descriptive, and that the proposed AT&T ENHANCED PUSH-TO-TALK mark is unregistrable absent a disclaimer of the term “enhanced” pursuant to Trademark Act Section 6(a), 15 U.S.C. § 1056(a), by a preponderance of the evidence. *See StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 111 USPQ2d 1649, 1652 (Fed. Cir. 2014) (“The party opposing a registration bears the burden of proving by a preponderance of the evidence that an applicant’s mark is merely descriptive.”)

Moreover, “[t]he question is not whether someone presented with only the mark could guess what the ... services are. Rather, the question is whether someone who knows what the ... services are will understand the mark to convey information about them.” *DuoProSS*, 103 USPQ2d at 1757 (quoting *In re Tower Tech, Inc.*, 64 U.S.P.Q.2d 1314, 1316-17 (TTAB 2002)).

Any competent source suffices to show the relevant purchasing public’s understanding of a contested term, including purchaser testimony, consumer surveys, dictionary definitions, trade journals, newspapers and other publications. *Royal Crown*, 127 USPQ2d at 1046 (citing *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 2000)), as well as

“advertising material directed to the ... [services].” *In re Abcor*, 200 USPQ at 218. The public’s understanding also may be obtained from websites and publications, and an applicant’s own specimen[s] of use and any explanatory text included therein. *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017); *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1565 (Fed. Cir. 2001). “[D]escriptive usage of such term[s] [sought for registration] ... in ... patent [or trademark] filings [also] can be ... probative.” *In re Omniome, Inc.*, 2020 USPQ2d 3222, \*4 (TTAB 2019).

“When determining whether a mark is merely descriptive, the Board must consider the commercial impression of a mark as a whole. ... Because a mark must be considered as a whole, the Board may not ‘dissect’ the mark into isolated elements.” *DuoProSS*, 103 USPQ2d at 1756 (internal citation omitted). On the other hand, we may consider the significance of each element separately in the course of evaluating the proposed marks as a whole. *Id.* at 1756-57 (noting that “[t]he Board to be sure, can ascertain the meaning and weight of each of the components that makes up the mark.”). Thus, “[w]hen two or more merely descriptive terms are combined, ... [i]f each component retains its merely descriptive significance in relation to the goods or services, the combination results in a composite that is itself merely descriptive.” *In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1823 (TTAB 2012).

## **VI. Examination of the Record on the Question of Mere Descriptiveness**

In view of the above principles, we now review the record to determine the relevant purchasing public’s understanding of the terms “enhanced” and “push-to-talk,” as well as the phrases “Enhanced Push-to-Talk” and “AT&T Enhanced Push-to-Talk” as

a whole. We evaluate this evidence against the backdrop of Opposer's assertions<sup>19</sup> that:

3. The wording PUSH-TO-TALK is merely descriptive of a feature of two-way radios, mobile phones and other communication devices which allows users to switch from reception mode to transmit mode with the push of a button (i.e., to "push to talk"). This feature generally enables subscribers to reach an active talk group with a single button press.

4. The wording PUSH-TO-TALK, with and without hyphens, is in common use by Opposer and many other telecommunications companies to refer to service options and communications devices incorporating a push-to-talk feature.

5. In view of the descriptiveness of this wording, the Applicant has disclaimed the exclusive right to use the wording PUSH-TO-TALK apart from the mark as shown.

6. The word ENHANCED is a laudatory word meaning "better than before," "to improve or augment, especially in effectiveness, value or attractiveness," and "made better."

7. As applied to the services covered by the Applicant's Application[s] the word ENHANCED is merely descriptive, because it does nothing more than directly convey to consumers that the services are improved, augmented or better than before.

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9. The word "enhanced" is frequently used by third parties in close connection with the wording "push-to-talk" to refer to push-to-talk services with enhanced features.

10. Consumers would perceive the combined wording ENHANCED PUSH-TO-TALK as nothing more than a description of the Applicant's services, that is, that the push to talk services offered under the mark are better than before, augmented or otherwise improved.

#### **A. The Relevant Purchasing Public**

"Whether a mark is merely descriptive or not is 'determined from the viewpoint of the relevant purchasing public.'" *In re Stereotaxis, Inc.*, 429 F.3d 1039, 77 USPQ2d

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<sup>19</sup> The allegations of Opposer's Notices of Opposition in Opposition Nos. 91241178 and 91241179 as to ¶¶ 3-7 and 9-10 are identical.

1087, 1090 (Fed. Cir. 2005) (quoting *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818, 819 (Fed. Cir. 1986)). The relevant purchasing public for PTT services includes businesses such as fleet dispatchers, construction, transportation and waste management companies, colleges and universities, security agencies, governments and the military.<sup>20</sup>

**B. Applicant Concedes “Push-to-Talk” is Merely Descriptive of its Identified Services**

As originally filed, Applicant disclaimed the exclusive right to use the term “push-to-talk” apart from the mark as shown in each application. Under such circumstances, the disclaimer may be considered an admission by Applicant that the term “push-to-talk” is merely descriptive of its identified services. *See Bass Pro Trademarks LLC v. Sportsman’s Warehouse Inc.*, 89 USPQ2d 1844, 1851 (TTAB 2008). This admission is entirely consistent with Mr. Glubochansky’s descriptive use of “push-to-talk” in his Testimony Declaration<sup>21</sup> and, more importantly and as discussed below, Applicant’s descriptive use of the term in its marketing materials. That “push-to-talk” does not indicate the source of any particular company’s telecommunications services also is consistent with numerous relevant and active

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<sup>20</sup> Glubochansky Decl., 25 TTABVUE 6-8, 12, 16, ¶¶ 9, 15-16, 37, 52; Glubochansky Depo., 39 TTABVUE 100-101; App 5th NoR, 18 TTABVUE 8-10, 53-56, 88-90, 110-112, Exhs. 1, 16, 23, 28.

<sup>21</sup> Glubochansky Decl., 25 TTABVUE 3 and 6, ¶¶ 2 and 8 (“The Opposed Marks are the name of, and are used to market and provide, AT&T’s ... push-to-talk and related telecommunications and wireless services ....” “Push-to-talk (‘PTT’) is a service that essentially turns a cellular phone into a two way radio.”

third-party registrations that Opposer made of record in which this term is included in the identification of services.<sup>22</sup>

### C. Dictionary Definitions of “Enhance” and “Enhanced”

Opposer and Applicant made of record the following dictionary definitions of “enhance” and “enhanced”:

- Enhance (Enhanced) – heighten, increase especially: to increase or improve in value, quality, desirability, or attractiveness.<sup>23</sup>
- Enhance – to improve something, or to make it more attractive or more valuable.<sup>24</sup>
- Enhance – to improve the quality, amount, or strength of something.<sup>25</sup>
- Enhance (Enhanced) – to improve or augment, especially in effectiveness, value, or attractiveness.<sup>26</sup>

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<sup>22</sup> Opp 2nd NoR, 14 TTABVUE 6-76. The parties argue over the significance of the registration for the mark BEHIVE (Reg. No. 5689187) which, as originally issued, recited “telecommunications services, providing real-time mobile **enhanced push-to-talk** voice Communications as a Service (CaaS) ...” Opp 2nd NoR, 14 TTABVUE 6-8. Several months after the BEHIVE registration issued, the owner, BluIP, Inc., requested and received a post-registration amendment to the identification of services so that it now recites: “telecommunications services, providing real-time mobile **advanced push-to-talk** voice Communications as a Service (CaaS) ...” App NoR, 27 TTABVUE 6-8. Opposer argues that BluIP, a member of Applicant’s partner exchange (citing to Glubochansky Decl. 25 TTABVUE 18, ¶ 58), amended the identification of services in its registration at Applicant’s behest only after Opposer made the BEHIVE registration of record in these proceedings. Opposer’s Reply Brief, 42 TTABVUE 5. Since this is only one registration, it has limited probative value to the overall question of the descriptiveness of “Enhanced Push-to-Talk.”

<sup>23</sup> Opp 3rd NoR, 15 TTABVUE 7, Exh. 1; App NoR, 27 TTABVUE 129, Exh. 59 (the parties submitted the identical definition of “enhance” from MERRIAM-WEBSTER).

<sup>24</sup> Opp 3rd NoR, 15 TTABVUE 18, Exh. 2 (definition from MACMILLAN DICTIONARY).

<sup>25</sup> *Id.* at 21, Exh. 3 (definition from CAMBRIDGE DICTIONARY).

<sup>26</sup> *Id.* at 31, Exh. 4 (definition from THE FREE DICTIONARY).

**D. Third Party Registrations of Marks including the term “Enhanced” or “Enhancement”**

Opposer introduced into evidence the following relevant and active<sup>27</sup> registrations for marks including the term “enhanced” or “enhancement” for telecommunication services that have been registered on the Supplemental Register or in which this term was disclaimed:<sup>28</sup>

<b>Mark</b>	<b>Reg. No.</b>	<b>Register / Disclaimer</b>
ENHANCED TELECOM SERVICES	2407484	Supplemental Register
I.C.E. INTERIOR CELLULAR ENHANCEMENT	5104237	Principal Register; “Interior Cellular Enhancement” Disclaimed
TESSCO ENHANCED SERVICES	4915043	Principal Register; “Enhanced Services” Disclaimed

Applicant, on the other hand, introduced the following relevant and active registrations for marks including the term “enhanced” for telecommunication services that have been registered on the Principal Register and in which this term was not disclaimed:

<b>Mark</b>	<b>Reg. No.</b>	<b>Register / Disclaimer</b>
ARCHROMA LIFE ENHANCED	4737087	Principal Register; No Disclaimer

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<sup>27</sup> Regardless of which party introduced them, we do not consider any third-party registrations for marks outside the relevant field of telecommunication services. *See Nat’l Cable Television Ass’n v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 19 USPQ2d 1424, 1430 (Fed. Cir. 1991) (“The real world segment of the public is limited to the market or universe necessary to circumscribe purchasers or users of products or services like those being offered by the parties ....”). We also give no consideration to third-party registrations that have been cancelled or have expired. Such registrations have no probative value other than to show that they once issued. *See Action Temp. Servs. Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) (“a cancelled registration does not provide constructive notice of anything.”).

<sup>28</sup> Opp 1st NoR, 19 TTABVUE 6-9, 13-14 and 49-50.

<b>Mark</b>	<b>Reg. No.</b>	<b>Register / Disclaimer</b>
VERIZON ENHANCED COMMUNITIES	3865119	Principal Register; “Communities” Disclaimed
ECDS ENHANCED COMMUNICATIONS DELIVERY SYSTEMS	3838524	Principal Register; “Communications Delivery Systems” Disclaimed

We find that the limited record of active and relevant registrations at the USPTO of marks including the term “enhanced” or “enhancement” for telecommunication services is mixed regarding the treatment of these terms for registration purposes.

**E. Opposer’s and Third-Party Uses of “Enhanced” and “Push-to-Talk”**

Opposer submitted numerous references to demonstrate the descriptive uses of “enhanced” and “push-to-talk” in connection with telecommunication services by Opposer and third-parties. The following are representative:

<b>Title</b>	<b>Quote</b>	<b>Record Cite</b>
Motorola Solution buying Kodiak to <b>enhance</b> broadband <b>push-to-talk</b> position, URGENT COMMUNICATIONS, May 1, 2017	“Kodiak has worked with AT&T for years to develop the carrier’s <b>enhanced-push-to-talk</b> technology ....”	Opp 5th NoR, 18 TTABVUE 8-10, Exh. 1
<b>Enhanced push to talk</b> systems and methods with floor control and media traffic optimization, U.S. Pat. No. 9306991 (from PLUS PATENT NEWS, April 7, 2016)	From patent abstract: “An <b>enhanced push to talk (PTT)</b> method, a network, and a <b>PTT</b> server provide floor control and media traffic optimization for push to talk over cellular (PoC).”	Opp 5th NoR, 18 TTABVUE 11-13, Exh. 2
Sprint’s New <b>Push-to-Talk</b> Service - Sprint Direct Connect - to Launch Next Week, Business Wire, September 27, 2011	“Sprint’s 3G data network and our <b>enhanced push-to-talk platform</b> will deliver instant calls, increased <b>push-to-talk</b> reliability, and support for cutting-edge data applications.”	Opp 5th NoR, 18 TTABVUE 14-17, Exh. 3

Title	Quote	Record Cite
Ascom Announces 3 Major Enhancements to i75 Handset; <b>Enhanced Push-to-Talk</b> ..., BUSINESS WIRE, November 1, 2007	“ <b>Enhanced Push-to-Talk</b> offers all users a full-duplex speech path as well as the ability to quickly initiate up to 10 unique conference groups from the soft keys of their <i>i75</i> handset. Each <b>enhanced Push-to-Talk</b> group can be configured for automatic join or prompt for participation.”	Opp 5th NoR, 18 TTABVUE 21-23, Exh. 5
Verizon resurrects <b>push-to-talk</b> with new business-minded service, TECHSPOT, August 8, 2014	“In a press release on the matter, Verizon said they’ve <b>enhanced push to talk</b> with upgrades like improved voice quality and faster call set up times across their 4G LTE network.”	Opp 5th NoR, 18 TTABVUE 26-27, Exh. 7
Twisted Pair Demonstrates <b>Enhanced PTT</b> Functionality for Mobile Workers ..., BENZINGA.COM, November 2, 2012	“Twisted Pair Solutions Inc., a recognized leader in mobile workforce communications today announced that it has <b>enhanced</b> the capabilities of its WAVE Mobile Communicator application by enabling secure one-to-one <b>PTT</b> communications for users of smartphones, tablets und handheld computers.”	Opp 5th NoR, 18 TTABVUE 31-33, Exh. 9
Next-gen <b>push-to-talk</b> for Cingular, FLEET OWNER, January 1, 2006	“Using a single phone number for both cellular, and ‘walkie-talkie’ calls, the <b>enhanced PTT</b> service also features call waiting, contact alerts ... call me alerts ..., quick group calling, and voice messaging.”	Opp 5th NoR, 18 TTABVUE 34-35, Exh. 10
Motorola and Sprint Announce World’s First <b>Push-To-Talk</b> Android-Powered Smartphone ..., PR NEWSWIRE, March 22, 2010	“Motorola <b>enhances</b> the <b>push-to-talk</b> experience with the ability to view who is calling regardless of what application you are in ....”	Opp 5th NoR, 18 TTABVUE 39-42, Exh. 12
<b>Push-to-Talk</b> Market Growth, Size, Share, Demand, Trends and Forecasts to 2026, RELEASEWIRE, June 21, 2019	“The rising penetration of the internet worldwide will bode well for the global <b>push-to-talk</b> market. Software companies are investing increasingly in the development of innovative applications to provide customers get [a] reliable and <b>enhanced push-to-talk</b> device.”	Opp 5th NoR, 18 TTABVUE 47-49, Exh. 14

Title	Quote	Record Cite
<p>Motorola Adventure V750 Works Hard So Verizon Wireless Customers Can Play Hard, PR NEWSWIRE, July 21, 2008</p>	<p>“Network Reliability – with the <b>enhanced Push to Talk</b> service, customers get an instant connection feature combined with the best wireless coverage in the United States.”</p>	<p>Opp 5th NoR, 18 TTABVUE 53-56, Exh. 16</p>
<p>AINA Wireless Announce Strategic Partnership, MARKET NEWS PUBLISHING, October 9, 2018</p>	<p>“AINA Wireless’ <b>PTT</b> accessories are the perfect combination of technology and convenience to further <b>enhance</b> the highly innovative <b>Push-to-Talk</b> Over Cellular in-vehicle solution in the Uniden UV350.”</p>	<p>Opp 5th NoR, 18 TTABVUE 60-62, Exh. 18</p>
<p>Sprint launches <b>PTT</b> platform for businesses, TELECOMPAPER.COM, January 17, 2018</p>	<p>“Sprint officially launched Sprint Direct Connect Plus (SDC Plus), its new <b>push-to-talk</b> platform for businesses. SDC Plus is enabled by the new <b>PTT</b> platform from Kodiak, a Motorola Solutions company. Kodiak brings customers <b>enhanced push-to-talk</b> capabilities including over Wi-Fi, presence status and tablet support.”</p>	<p>Opp 5th NoR, 18 TTABVUE 81-87, Exh. 22</p>
<p><b>Push to Talk (MCPTT) Services for First Responders</b>, TRANSECTOR, November 16, 2016</p>	<p>“Many states are facing the decision to replace aging analog LMR systems with <b>enhanced push-to-talk (PTT)</b> service.”</p>	<p>Opp 5th NoR, 18 TTABVUE 88-90, Exh. 23</p>
<p>C Spire Business Solutions launches new <b>Push-To-Talk</b> service, NEWS   C SPIRE WIRELESS, July 22, 2013</p>	<p>“C Spire Business Solutions today launched its next generation <b>Push-To-Talk (PTT)</b> service for businesses, government agencies and service organizations .... Key features of C Spire’s <b>enhanced PTT service</b> include: ....”</p>	<p>Opp 5th NoR, 18 TTABVUE 107-109, Exh. 27</p>
<p><b>Push-to-Talk Over Cellular For Transportation</b> TEAMCONNECT, July 18, 2019</p>	<p>“Stay connected to drivers with real-time information:</p> <ul style="list-style-type: none"> <li>• One-touch group-wide <b>push-to-talk</b> with multiple talk groups ...</li> <li>• DOT-compliant solution with <b>enhanced push-to-talk</b> features reduces driver distraction and minimizes operational liability.”</li> </ul>	<p>Opp 5th NoR, 18 TTABVUE 110-112, Exh. 28</p>

Title	Quote	Record Cite
Mission critical <b>Push To Talk</b> that just won't quit, SOUTHERN LINC, July 18, 2019	“We’ve <b>enhanced</b> our basic <b>Push To Talk</b> service. Critical Linc customers have access to two-way private <b>PTT</b> calling and group <b>PTT</b> calling - plus some valuable new features: ...”	Opp 5th NoR, 18 TTABVUE 113-117, Exh. 29
New offerings in <b>push-to-talk</b> communication, FLEETOWNER, March 19, 2015	“AT&T recently introduced what it calls <b>enhanced PTT</b> or ‘ <b>EPTT</b> ’ and integrated dispatch offerings to give dispatchers and field workers more ‘flexibility’ in terms of how they communicate with one another ....”	Opp 4th NoR, 16 TTABVUE 59-63, Exh. 8
AT&T goes after Sprint iDEN customers with Enhanced PTT service, FIERCEWIRELESS, November 13, 2012	“AT&T’s <b>Enhanced PTT</b> offering is based on technology from Kodiak Networks. AT&T said the service boasts sub-second call setup; larger contact lists and talk groups than rival <b>PTT</b> solutions; the ability to combine <b>PTT</b> services and mobile applications; supervisory override; and talk group scanning.”	Opp 7th NoR, 22 TTABVUE 15-17
AT&T boosts enterprise offering by adding <b>push-to-talk</b> on iPhone, TELECOM LEAD AMERICA, June 10, 2013	“The telecom major says AT&T <b>Enhanced Push-to-Talk</b> can be used over Wi-Fi, giving U.S. based customers improved in-building coverage and access to the service via compatible Wi-Fi networks.”	Opp 7th NoR, 22 TTABVUE 18-19
Sprint’s Nextel Shuts Down, <b>Push-to-Talk</b> Coming to AT&T iPhones, COMPLEX, June 10, 2013	“The company [AT&T] plans on <b>enhancing</b> the <b>push-to-talk</b> experience with the iPhone, allowing users to make contact lists of up to 1,000 names and the ability to make group calls of up to 250 people at the same time. The <b>push-to-talk</b> service will be enabled through an app and will work for iPhone 4S and iPhone 5.”	Opp 8th NoR, 23 TTABVUE 14-18
AT&T Launches <b>Push-to-Talk</b> iPhone App, PC MAGAZINE, June 10, 2013	“AT&T launched its <b>enhanced push-to-talk</b> service, which runs on the carrier’s 4G LTE network, in November. It offered faster communication with larger groups of people, across more types of handsets, including AT&T’s own rugged lineup ....”	Opp 8th NoR, 23 TTABVUE 19-20

Title	Quote	Record Cite
Charting the evolution of “ <b>push to talk</b> ” technology, COMMERCIAL CARRIER JOURNAL, December 26, 2014	“From the start, radio communications created the instant ‘ <b>push-to-talk</b> ’ ( <b>PTT</b> ) pipeline between the office and mobile workers .... In the past decade, most of the major network carriers have created IP-based communications to connect fleets with their mobile workers in an even more efficient way than radio. One of the more recent developments is Web-based software applications that instantly connect the office to drivers using <b>PTT</b> , text and data. AT&T, for example, offers such an application for its <b>Enhanced PTT</b> service. Its Integrated Dispatch application is uniquely centered on voice communications for fleets that would benefit from having instant, nationwide <b>PTT</b> connectivity with drivers and workers.”	Glubochansky Decl., Exh. 27, 25 TTABVUE 277-287
AT&T brings <b>PTT</b> app to iPhone ahead of Sprint’s iDEN shutdown; FIERCEWIRELESS; June 10, 2013	“AT&T said the app [available for Apple’s iPhone 5 and iPhone 4S] will give iPhone users who use its <b>Enhanced PTT</b> service larger contact lists and talk groups than competing solutions, the ability to combine <b>PTT</b> services and mobile applications, tools that let supervisors communicate urgent messages to their workers and call setup in less than one second. ... In addition to the app, AT&T said its <b>Enhanced PTT</b> service can now be used over Wi-Fi ....”	App NoR, 27 TTABVUE 136-169, Exh. 60

#### F. Applicant’s Uses of “Enhanced” and “Push-to-Talk”

Opposer and Applicant submitted a plethora references to demonstrate Applicant’s own uses of “enhanced” and “push-to-talk” in connection with telecommunication services, as well as descriptive uses by third parties of these terms in connection with Applicant’s telecommunications services. The following are representative:

Source	Quote	Record Cite
AT&T White Paper	<p>“In numerous industries using <b>push-to-talk</b>, it is a technology that has become irreplaceable. ... Characteristics of a <b>PTT Service</b>: Speed ... Simplicity ... Call Bursts ... Group Calls ... Handsets and Accessories. ... AT&amp;T’s <b>Enhanced PTT</b> retains the traditional strengths of <b>PTT</b> and offers numerous new capabilities.”</p>	Opp 4th NoR, 16 TTABVUE 14-22, Exh. 2
AT&T Solutions Brief	<p>Coordinating ... workers on [a college or university] campus can be challenging at the best of times but <b>AT&amp;T Enhanced Push-to-Talk (ePTT)</b> lets you coordinate talk groups to reach different departments at different locations.”</p>	Opp 4th NoR, 16 TTABVUE 34-35, Exh. 4
AT&T <b>Enhanced PTT</b> Integrated Dispatch User Guide	<p>“AT&amp;T <b>Enhanced PTT</b> Integrated Dispatch ... provides <b>Enhanced PTT</b> calling, location, alerts, and indicates presence through an intuitive user interface.”</p>	Opp 4th NoR, 16 TTABVUE 36-51, Exh. 5
AT&T <b>Enhanced Push-To-Talk</b> Improves Business Mobility, Expands to New Markets, AVTEC, March 18, 2015	<p>“Today, at the International Wireless Communications Expo (IWCE), AT&amp;T will demonstrate the latest planned AT&amp;T <b>EPTT</b> features, which include: Talk Group Scanning ... Broadcast Calling ... Sonim XP Channel Select Module ... Application Programming Interfaces (API) Integration ... Secure Communication ...”</p>	Opp 4th NoR, 16 TTABVUE 52-56, Exh. 6
Next generation <b>Push-To-Talk</b> Reshaping <b>PTT</b> for the modem-day workforce – promotional materials	<p>“In an independent test of AT&amp;T’s next-generation PTT (called <b>Enhanced PTT</b> and abbreviated as <b>EPTT</b>), call setup time was on par with or out-performed competitors, and voice quality is far superior.”</p>	Opp 4th NoR, 16 TTABVUE 64-73, Exh. 9
Communication Systems Upgrades Boost Efficiency, Expand Capabilities, SCHOOL BUS FLEET, April 20, 2016	<p>“With AT&amp;T <b>Enhanced Push-to-Talk (EPTT)</b>, there are no private radio networks to build or bulky radios to buy and program. Unlike two-way radios, <b>push-to-talk</b> devices can run applications for location tracking, dispatch, messaging, and</p>	Opp 4th NoR, 16 TTABVUE 74-80, Exh. 9

Source	Quote	Record Cite
AT&T Sample Bill	<p>more.” (quoting Igor Glubochansky, AT&amp;T’s executive director of mobility product management).</p> <p>“<b>Enhanced Push-to-Talk</b> for LTE Device – includes <b>enhanced Push-to-Talk</b> for dedicated <b>Push-to-Talk</b> LTE device. AT&amp;T standard device requirements apply.”</p>	Opp 4th NoR, 17 TTABVUE 90-95, Exh. 13
<p>AT&amp;T <b>Enhanced Push-To-Talk</b> Offers More Devices, Features and Functionality Than Ever Before – Press Release, August 7, 2014</p>	<p>“AT&amp;T <b>Enhanced Push-to-Talk (EPTT)</b> is more versatile and feature-rich than ever before for field workers. AT&amp;T <b>EPTT</b> offers businesses a larger selection of accessories and devices, more flexibility when migrating from older legacy CDMA <b>push-to-talk</b> systems, and greater control of their workforce ....”</p>	Opp 7th NoR, 22 TTABVUE 10-14
<p>AT&amp;T <b>launches push-to-talk</b> for business iPhones, iTECHPOST, June 10, 2013</p>	<p>“From the start, AT&amp;T <b>Enhanced Push-to-Talk</b> was designed specifically for AT&amp;T’s speedy 4G LTE networks and now we are offering even more devices so our business customers can communicate faster and to larger talk groups.” (quoting Mike Troiano, Vice President for Advanced Mobility Solutions at AT&amp;T business solutions).</p>	Opp 7th NoR, 22 TTABVUE 29-31
<p>AT&amp;T <b>Enhanced Push to Talk (EPTT) - Push to Talk</b> Services, Applicant’s website, January 4, 2019</p>	<p>“New features based on 3GPP Mission Critical <b>Push-to-Talk</b> standards. <b>Enhanced</b> situational awareness and emergency calling plus priority treatment for <b>push-to-talk</b> data on the 4G LTE network.”</p>	Glubochansky Decl., Exh. 2, 25 TTABVUE 32-36
<p>AT&amp;T <b>Enhanced Push-to-Talk</b> Download center</p>	<p>“AT&amp;T <b>Enhanced Push-to-Talk</b> for Smartphones</p> <ul style="list-style-type: none"> <li>• Use your phone as a walkie talkie with unlimited range.</li> <li>• Communicate with one person or a group.</li> <li>• Connect in an instant with the push of a button.”</li> </ul>	Glubochansky Decl., Exh. 4, 25 TTABVUE 46-49

Source	Quote	Record Cite
AT&T <b>Enhanced Push-to-Talk</b> – The proof is in the push; advertisements	“AT&T <b>Enhanced Push-to-Talk</b> is <b>push-to-talk</b> the way it should be. ... With AT&T <b>Enhanced Push-to-Talk</b> , you can connect quickly with up to 1,000 contacts, or talk to up to 250 people simultaneously.”	Glubochansky Decl., Exh. 10, 25 TTABVUE 56-58
AT&T First U.S. Carrier to Offer <b>Enhanced Push-to-Talk</b> on iPhone Through New App Available to Business Customers, AT&T press released published in ENGADGET, June 10, 2013	“AT&T <b>Enhanced Push-to-Talk (EPTT)</b> is now available to AT&T business customers through a new app available for iPhone 5 and iPhone 4S. This marks the first time a U.S. carrier is offering <b>push-to-talk</b> capabilities on iPhone. In addition, AT&T <b>Enhanced Push-to-Talk</b> can now be used over Wi-Fi, giving U.S.-based customers improved in-building coverage and access to the service via compatible Wi-Fi networks.”	Glubochansky Decl., Exh. 16, 25 TTABVUE 77-89
Truly instant communication. The proof is in the push; advertisement	<p>“Come into an AT&amp;T store and experience AT&amp;T <b>Enhanced Push-to-Talk</b>.</p> <ul style="list-style-type: none"> <li>• Communicate Instantly with lightning-fast call setup times and the fastest 4G LTE speed ...</li> <li>• Reach more employees with up 1,000 contacts per contact list and up to 250 users per talk group.</li> <li>• Connect over Wi-Fi for improved range and in-building coverage ...</li> <li>• A variety of devices ...”</li> </ul>	Glubochansky Decl., Exh. 17, 25 TTABVUE 100-101
AT&T promotional video	“Combining the power of <b>push-to-talk</b> with the intelligence of a smartphone, introducing AT&T <b>Enhanced Push-to-Talk ...</b> ”	Glubochansky Decl., Exh. 20, 25 TTABVUE (Video produced at Production No. HNB-00000388)
AT&T Business promotional video	“AT&T Business: AT&T <b>Enhanced Push-to-Talk</b> Training Series: Introduction to the New Corporate Admin Tool.” “The Corporate Admin Tool has been redesigned to offer an	Glubochansky Decl., Exh. 21, 25 TTABVUE (Video produced at

Source	Quote	Record Cite
	intuitive and efficient user experience. With <b>enhancements</b> like one-click access to user types, and new features like user site management, the new Corporate Management Tool simplifies the management of <b>PTT</b> users like never before.”	Production No. HNB-00000361)
Your Inside Connections: AT&T <b>Enhanced Push-to-Talk</b> Users Can Now Text, Share Photos and More; AT&T blog by Igor Glubochansky; October 20, 2017	“AT&T <b>EPTT</b> gives [businesses] ... walkie-talkie-type service, similar to 2-way radios, right on their smartphones or tablets over our network. ... Other new features of <b>EPTT</b> include: <ul style="list-style-type: none"><li>• Location-based services ...</li><li>• Voice message fall back ...</li><li>• Easier adoption ...</li><li>• Better Integration ...”</li></ul>	Glubochansky Decl., Exh. 25, 25 TTABVUE 237-242
City of Richardson (Texas): Steve Graves describes transition from LMR to <b>enhanced PTT</b> offering; video	“We’ve been testing and working with a product from AT&T and Kodiak that allows us to set up ISSI connections between our trunked radio system ... to go directly to AT&T so that we can use a <b>push-to-talk</b> service on our smartphones and other phones that they have available for us to purchase ....” “It allows us to use features like this ... so that in the future as we start deploying other technology like ... a new Work Order Asset Management System that has mobility in it, any of our users can have a smartphone ..., use that device to ... add assets into the system and also use that same device to talk over our radio system.”	Glubochansky Decl., Exh. 29, 25 TTABVUE (Video produced at Production No. HNB-00000525)
AT&T Business TWITTER posting, November, 13 2013	<b>AT&amp;T Enhanced Push-to-Talk</b> <ul style="list-style-type: none"><li>• Near-real time location tracking on desktop computer</li><li>• Read missed call alerts, notifications and return <b>PTT</b> calls while screen locked</li></ul>	App NoR, Exh. 57, 27 TTABVUE 69-96

Source	Quote	Record Cite
AT&T Business YouTube Channel	<p>• Works with traditional two-way radios and other <b>PTT</b> systems”</p> <p>“Introducing <b>AT&amp;T Enhanced Push-To-Talk</b>: Instant voice communications and business applications available on a single device by combining the power of <b>push-to-talk</b> with the intelligence of a smart phone.” (Posting of February 20, 2014). “<b>AT&amp;T Enhanced Push-to-Talk</b> is an instant communication solution for connecting mobile workers. A single portal lets you create talk groups, manage contacts in real time and deploy &amp; scale services easily. Integration with Land Mobile Radio and other <b>push to talk</b> systems helps you connect and coordinate services within and between local, state or federal agencies.” (Posting of April 9, 2013).</p>	App NoR, Exh. 58, 27 TTABVUE 97-126
AT&T <b>Enhanced Push-to-Talk</b> with Land Mobile Radio Interoperability, promotional video	“A fast-to-deploy platform extends <b>push-to-talk</b> service beyond your land mobile radio network, connecting teams across sites and devices. Class-of-Service options can prioritize traffic for business-critical or mission-critical use.”	App NoR, Exh. 58, 27 TTABVUE (Video produced at Production No. HNB-00000507)
<b>Enhanced Push-to-Talk</b> Application for Android, Standard Version, Release 8.3	“The <b>Enhanced Push to Talk (EPTT)</b> application supports two versions: Standard and Land Mobile Radio (LMR). ... This document describes the Standard version. The Standard version of the <b>EPTT</b> application provides instant communication to individuals and groups at the push of a button. Here is a brief description of key features of the Standard version[:] Alerts ... Broadcast Talkgroup Calling ... Contact and Talkgroup Management ... Favorites ... Integrated Secure Messaging ... Location Tracking ... EPTT Calling to Individuals and	App NoR, Exh. 64, 27 TTABVUE 245-253

Source	Quote	Record Cite
	Talkgroups ... Real-Time Presence ... Supervisory Override ... Talkgroup Scanning with Priority ... Wi-Fi Support ....”	

### G. Applicant’s Testimony

Applicant’s only testifying witness, Igor Glubochansky, is the Assistant Vice President for 5G Development and Marketing of AT&T Mobility Services LLC, an affiliated company to Applicant; both of whose ultimate parent is AT&T Inc.<sup>29</sup> From 2010 through 2019, Mr. Glubochansky and his team were responsible for the development, launch and management of, and oversaw the advertising effort in connection with, Applicant’s push-to-talk services offered under Applicant’s proposed marks.<sup>30</sup> Since the launch of Applicant’s push-to-talk services in 2012, Applicant’s affiliated companies have promoted these services in connection with one or both of the proposed marks via a business-to-business sales force, its retail stores, an online self-service portal, print and radio marketing, digital advertising (online by text and video, and within Applicant’s smartphone app), a multi-city roadshow, branding on company bills, press releases, broadcast customer reviews and Twitter postings.<sup>31</sup> Above, we listed and quoted from a representative sampling of Applicant’s promotional materials.

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<sup>29</sup> Glubochansky Decl., 25 TTABVUE 3, ¶ 1.

<sup>30</sup> *Id.* at 5 and 7, ¶ 5 and 12; *see also* Glubochansky Depo., 39 TTABVUE 17-20.

<sup>31</sup> *Id.* at 7, 8, 9, 11, 12 and 14-17, ¶¶ 15, 18, 20-22, 32, 33, 36, 38, 47, 48, 52 and 53.

As indicated, stripped down to its essence, push-to-talk is a service that turns a cellular phone into a two way radio.<sup>32</sup> Applicant's proposed marks are ENHANCED PUSH-TO-TALK and AT&T ENHANCED PUSH-TO-TALK. In his testimony declaration, Mr. Glubochansky asserts that:

The term "**enhanced**" does not describe any of the qualities, characteristics, functions, features, purpose, or use of AT&T's PTT Services. "**Enhanced**" in the context of a PTT service does not have any particular meaning and does not describe any aspect of the PTT service. Instead, "**enhanced**" ... can, at best, signal to consumers that AT&T's PTT Services are somehow better in general than those offered by competitors. (Emphasis added).<sup>33</sup>

On cross-examination, Mr. Glubochansky stated that "most customers understand what 'push-to-talk' means, since they use it."<sup>34</sup> However, he did not know whether "enhanced" in the proposed mark ENHANCED PUSH-TO-TALK communicates to consumers the source of the service.<sup>35</sup> He could not even say why the term "enhanced" was chosen.<sup>36</sup> Mr. Glubochansky also could not identify any concrete research within his company from which one could determine whether customers associate Applicant's proposed marks with AT&T.<sup>37</sup>

In his Declaration, Mr. Glubochansky discusses a number of added features associated with Applicant's push-to-talk service, over and above simply providing

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<sup>32</sup> *Id.* at 6, ¶ 8; *see also* Glubochansky Depo., 39 TTABVUE 43-44

<sup>33</sup> *Id.* at 9, ¶ 23; *see also* Glubochansky Depo., 39 TTABVUE 71-72 ("'enhanced,' in the context of [AT&T's] ... PTT service ... kind of describes the fact that it's ... better ... more generally ... than those offered by competitors.").

<sup>34</sup> Glubochansky Depo., 39 TTABVUE 26.

<sup>35</sup> *Id.* at 28.

<sup>36</sup> *Id.* at 51.

<sup>37</sup> *Id.* at 32-34.

walkie talkie functionality via a cell phone: PTT support over 3G and 4G networks, availability of PTT communications over a WiFi network, a desktop, web-based PTT interface, PTT support over a wide variety of devices, and PTT support over a widely-available cellular, as opposed to a proprietary, network.<sup>38</sup> On cross-examination, he testified “[t]hese are features that are important to users [and] that were built into the product.”<sup>39</sup> Mr. Glubochansky refused to say that these features were “enhancements” to Applicant’s push-to-talk service. Yet, he recognized that “‘enhance’ ... means [to] improve over something.”<sup>40</sup>

## **VII. Discussion and Analysis on the Question of Mere Descriptiveness**

Having reviewed the record in its entirety, for the reasons that follow, we find that, as a whole, ENANCED PUSH-TO-TALK is merely descriptive of Applicant’s services, and that AT&T ENANCED PUSH-TO-TALK is unregistrable in connection with Applicant’s services absent a disclaimer of “Enhanced Push-to-Talk.”

As we noted previously, Applicant’s disclaimer of “push-to-talk” in its opposed Applications is an admission that the term is merely descriptive of its identified services. Applicant’s disclaimer of “push-to-talk” is consistent with the descriptive, if not generic, manner in which this term is used by Opposer, by Applicant itself, and third parties in connection with telecommunication services. The term “enhanced” means “to increase or improve in value, quality, desirability, or attractiveness,” based on the MERRIAM-WEBSTER dictionary definition submitted by both parties. It is this

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<sup>38</sup> Glubochansky Decl., 25 TTABVUE 8, ¶ 17.

<sup>39</sup> Glubochansky Depo., 39 TTABVUE 61.

<sup>40</sup> *Id.* at 61-63.

“dictionary sense” in which “enhanced” is being used in the telecommunications market, and it is not being used in a source-identifying manner by Applicant.

The evidence submitted by the parties of relevant and active third-party registrations for marks including the term “enhanced” or “enhancement” for telecommunication services shows a limited and mixed record of how these terms have been treated by the USPTO for registration purposes – that is, on the Principal and Supplemental Registers, with and without disclaimers. Although “[t]hird party registrations are relevant to prove that some segment of the composite marks which both contesting parties use has a normally understood and well recognized descriptive or suggestive meaning,” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674-75 (Fed. Cir. 2015) (quoting 2 J. T. McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:88 (4th ed. 2015)), this record includes slightly more than a handful of relevant and active third-party registrations for marks including the term “enhanced” or “enhancement” for telecommunication services, well short of the volume of evidence found convincing in *Juice Generation* and *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015).

Moreover, we are not bound by the decisions of examining attorneys in other applications. The Board must make its own findings of fact, and that duty may not be delegated by adopting the conclusions reached by examining attorneys on different records. *In re Sunmarks, Inc.*, 32 USPQ2d 1470, 1472 (TTAB 1994); *In re*

*BankAmerica Corp.*, 231 USPQ 873, 876 (TTAB 1986). “It has been said many times that each case must be decided on its own facts.” *In re Eagle Crest Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010) (internal citation omitted). *See also, In re Nett Designs*, 57 USPQ2d at 1566 (“Even if some prior registrations had some characteristics similar to [Applicant’s] application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”).

More persuasive, in our view, is the number of descriptive uses by Opposer, third parties and the media of “enhanced push-to-talk,” or the combined use of “enhanced” and “push-to-talk” (or the acronym “PTT”) in press releases, a patent, advertising materials and press reports. Even when the media uses “enhanced push-to-talk” to refer to a service associated with Applicant (or more precisely one of its affiliated companies), the news articles always are accompanied by a listing of additional features or functionality that Applicant provides besides simply a service that turns a cellular phone into a two way radio.

Equally edifying is Applicant’s own descriptive uses of “enhanced push-to-talk” (or the acronym “EPTT”) in its advertising, marketing and promotional materials. Regularity, almost every time Applicant uses “Enhanced Push-to-Talk” or “EPTT” in an arguable trademark manner (e.g., in all-caps or initial caps), use of the term is accompanied by a listing or explanation of additional features or functionality that Applicant provides besides simply a service that turns a cellular phone into a two way radio – hence, the meaning of “enhanced” as communicated to the relevant purchasing public.

Applicant's Mr. Glubochansky was steadfast in his declaration testimony and on cross-examination that the term "enhanced" does not describe any of the qualities, characteristics, functions, features, purpose, or uses of Applicant's push-to-talk services. We disagree. Rather, in context, we view Applicant's use of "enhanced" as merely describing that Applicant's push-to-talk services are accompanied by a wealth of additional features over and above mere walkie talkie functionality via a cell phone.

The most Mr. Glubochansky would concede in his testimony is that "enhanced," in the context of Applicant's push-to-talk services, describes the fact that these services generally are better than those offered by competitors. As a self-laudatory term or one of marketing puffery, Applicant's use of "enhanced" in this way is also a form of describing the character or quality of Applicant's push-to-talk services. *In re Bos. Beer Co.*, 53 USPQ2d at 1058.

In fact, we find each of the words comprising the term "enhanced push-to-talk," "enhanced" and "push-to-talk," is highly descriptive of telecommunication services of the type provided by Applicant. Moreover, when combined, we further find the composite terminology "enhanced push-to-talk" is, at the very least, highly descriptive of a walkie talkie type service provided over a cell phone accompanied by additional features and functionality. *See Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.*, 123 USPQ2d 1844, 1856 (TTAB 2017) (finding MEDICAL EXTRUSION TECHNOLOGIES highly descriptive for polyurethanes used in the manufacture of medical devices).

### **VIII. Whether ENANCED PUSH-TO-TALK has Acquired Distinctiveness**

As we noted at the beginning of this opinion, Applicant asserts as an Affirmative Defense that, to the extent that “enhanced push-to-talk” is not inherently distinctive, it has acquired distinctiveness. Applicant has the ultimate burden of proving acquired distinctiveness when registration is sought on this basis. *See Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018) (applicant has the final burden of going forward with evidence proving acquired distinctiveness by at least a preponderance of the evidence); *Yamaha Int’l Corp. v. Hoshino Gakki Co., Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1006 (Fed. Cir. 1988) (“The burden of proving secondary meaning is on the party asserting it....”). The greater the degree of descriptiveness, the greater the evidentiary burden on the applicant to establish acquired distinctiveness. *See Real Foods Pty Ltd.*, 128 USPQ2d at 1373 (“[T]he applicant’s burden of showing acquired distinctiveness increases with the level of descriptiveness; a more descriptive term requires more evidence of secondary meaning.”); *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1045 (Fed. Cir. 2018) (“Where a mark sits on a sliding scale of descriptiveness impacts the burden a proposed registrant must bear with respect to its claim of acquired distinctiveness.”).

Highly descriptive terms are less likely to be perceived as trademarks, and therefore more substantial evidence of secondary meaning will ordinarily be required to establish their distinctiveness. “In assessing acquired distinctiveness, accordingly, the Board must first determine whether the proposed mark is highly descriptive rather than merely descriptive.” *Royal Crown*, 127 USPQ2d at 1045. Because we have

found that “enhanced push-to-talk” is highly descriptive of Applicant’s telecommunications services, Applicant’s burden of establishing acquired distinctiveness is commensurately high. *See In re Steelbuilding.com*, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005); *In re Bongrain Int’l Corp.*, 894 F.2d 1316, 13 USPQ2d 1727, 1729 (Fed. Cir. 1990).

“To show that a mark has acquired distinctiveness, an applicant must demonstrate that the relevant public understands the primary significance of the mark as identifying the source of a product or service rather than the product or service itself.” *In re Steelbuilding.com*, 75 USPQ2d at 1422; *see also Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1729 (Fed. Cir. 2012). Our ultimate analysis and determination whether “enhanced push-to-talk” has acquired distinctiveness as a source indicator of Applicant’s services in this case is based on all of the evidence considered as a whole.

[T]he considerations to be assessed in determining whether a mark has acquired secondary meaning can be described by the following six factors: (1) association of the [mark] with a particular source by actual purchasers (typically measured by customer surveys); (2) length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage of the product embodying the mark.

*In re Snowizard, Inc.*, 129 USPQ2d 1001, 1005 (TTAB 2018) (quoting *Converse, Inc. v. Int’l Trade Comm’n*, 907 F.3d 1361, 128 USPQ2d 1538, 1546 (Fed. Cir. 2018)). “On this list, no single factor is determinative.” *In re Tires, Tires, Tires Inc.*, 94 USPQ2d 1153, 1157 (TTAB 2009); *see also In re Ennco Display Sys. Inc.*, 56 USPQ2d 1279, 1283 (TTAB 2000) (“Direct evidence [of acquired distinctiveness] includes actual

testimony, declarations or surveys of consumers as to their state of mind. Circumstantial evidence, on the other hand, is evidence from which consumer association might be inferred, such as years of use, extensive amount of sales and advertising, and any similar evidence showing wide exposure of the mark to consumers.”).

As we discussed earlier, Applicant asserts it has been marketing its push-to-talk services in connection with the proposed marks sought for registration, or the acronym EPTT since 2012.<sup>41</sup> Since then, Applicant has promoted these services in connection with one or both of the proposed marks in-person, in print, online, and in broadcast media.<sup>42</sup> Below we describe the results of these efforts in general terms because Applicant’s supporting evidence has been designated confidential.

Applicant boasts hundreds of thousands of individual subscribers and tens of thousands of corporate, government entity, and college/university subscribers for its push-to-talk services spread throughout the United States, resulting in hundreds of millions of dollars in annual revenue from these subscribers.<sup>43</sup> Applicant has spent tens of millions of dollars promoting the proposed marks in connection with its push-to-talk services,<sup>44</sup> resulting in its capture of a significant share of the wireless business market.<sup>45</sup> As of the time that Mr. Glubochansky’s testimony declaration was

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<sup>41</sup> Glubochansky Decl., 25 TTABVUE 3-4, 7-8, ¶¶ 2, 12, 15.

<sup>42</sup> *Id.* at 7, 8, 9, 11, 12 and 14-17, ¶¶ 15, 18, 20-22, 32, 33, 36, 38, 47, 48, 52 and 53.

<sup>43</sup> Glubochansky Decl., 25/26 TTABVUE 3-4, 10 and 12, ¶¶ 2, 25 and 37.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 5 and 10, ¶¶ 7 and 27.

filed (January 2020), the latest version of Applicant's smartphone app through which its push-to-talk services are provided in connection with the proposed marks had been downloaded over hundreds of thousands of times,<sup>46</sup> and the promotional videos for these services had been viewed over 175,000 times.<sup>47</sup>

In 2013, the year after their launch, Applicant's push-to-talk services rendered in connection with the proposed marks attained significant media attention. This coverage included more than 150 unique articles appearing in more than 450 separate publications.<sup>48</sup> Applicant did not provide the extent of media exposure for its push-to-talk services or the proposed marks in subsequent years.

Applicant claims Twitter references to "enhanced push-to-talk" from 2012-2018 do not bring up anything other than Applicant's services.<sup>49</sup> Applicant also mentions that its push-to-talk services were featured on an episode of *The Profit*, which aired on CNBC on September 6, 2016; and that approximately 542,000 people watched the episode. Applicant also prominently advertised *The Profit* appearance through its own YouTube channel.<sup>50</sup>

Opposer argues that "enhanced" has been shown to be in common use by Opposer and third parties in connection with push-to-talk telecommunication services, which strongly weighs against a finding that this term serves as a source indicator for

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<sup>46</sup> *Id.* at 9, ¶ 20.

<sup>47</sup> *Id.* at 15, ¶ 48.

<sup>48</sup> *Id.* at 13 and 95-103, ¶ 42 and Exh. 15.

<sup>49</sup> Glubochansky Decl., 25 TTABVUE 17 and 271-283, ¶ 53 and Exh. 31.

<sup>50</sup> *Id.* at 17 and 284-306, ¶ 54 and Exhs. 32-34.

Applicant's services. Opposer further contends the record is devoid of any direct evidence that consumers would interpret "enhanced push-to-talk" as anything other than a description of the services offered under the well-known AT&T mark.<sup>51</sup>

Applicant argues that it has made substantially exclusive and continuous use of its proposed marks in connection with Applicant's services since 2012, which Applicant alleges to be prima facie evidence that the marks have acquired distinctiveness. Alternatively, Applicant maintains that it has made sufficient evidence of record demonstrating that consumers do associate the proposed marks with its push-to-talk telecommunication services, and that Opposer has not submitted any direct consumer evidence to the contrary. Moreover, Applicant argues that Opposer's evidence of use of "enhanced" and "push-to-talk" by Opposer and third parties is dated (old), limited, sporadic, unreliable, unsupported, obscure and entirely not compelling.<sup>52</sup>

We find that the nature and number of descriptive uses in the record by Opposer and third-parties of "enhanced push-to-talk," "enhanced" and "push-to-talk" indicate that use by Applicant has not been "substantially exclusive" as is required for a showing of acquired distinctiveness. This prevents the relevant public from perceiving the designation "enhanced push-to-talk" as an indicator of a single source. *See Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 222 USPQ 939, 940-41 (Fed. Cir. 1984) ("When the record shows that purchasers are confronted with

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<sup>51</sup> Opposer's Brief, 37 TTABVUE 22.

<sup>52</sup> Applicant's Brief, 40 TTABVUE 35-42.

more than one (let alone numerous) independent users of a term or device, an application for registration [based on acquired distinctiveness] ... cannot be successful, for distinctiveness on which purchasers may rely is lacking under such circumstances.”).

In our review of the entire record, we also considered Applicant’s contention that it has used the “enhanced push-to-talk” since 2012. However, an applicant’s use of wording for eight years or an even a longer period of time does not necessarily establish that the wording has acquired distinctiveness as a mark. *See, e.g., Alcatraz Media*, 107 USPQ2d at 1766; *In re Packaging Specialists, Inc.*, 221 USPQ 917, 920 (TTAB 1984); *In re The Interstate Folding Box Co.*, 167 USPQ 241, 245 (TTAB 1970). Here, Applicant’s length of use is outweighed by the other evidence showing that “enhanced push-to-talk” is highly descriptive, and the absence of any additional direct evidence showing recognition of the wording by consumers as a source indicator for Applicant’s telecommunication services.

Although we recognize there is evidence showing Applicant’s use of the wording “enhanced push-to-talk” in connection with its services, that fact, in and of itself, does not establish that consumers perceive the wording alone as an indication of source of the services, rather than as a highly descriptive designation. Almost without exception, Applicant’s use of “enhanced push-to-talk”, whether directly in connection the services (such as within Applicant’s smartphone app) or in advertisements, appears in connection with the prominently displayed AT&T mark. *See In re Mogen David Wine Corp.*, 372 F.2d 539, 152 USPQ 593, 595 (CCPA 1967) (where advertising

depicting the bottle design sought to be registered always featured the word mark MOGEN DAVID, such evidence failed to prove acquired distinctiveness in the design itself).

Notwithstanding Applicant's arguments to the contrary, the registrations sought by Applicant, if granted, would be inconsistent with Opposer's right to use the wording "enhanced push-to-talk" descriptively for its own telecommunication services. Not every word that appears in connection with an entity's services, regardless of how prominently it is displayed, functions as a service mark. Mere intent that a term function as a service mark is not enough in and of itself. *In re Morganroth*, 208 USPQ 284, 287 (TTAB 1980) ("Wishing does not make a trademark or service mark be.").

Although we have considered Applicant's impressive advertising and promotional efforts and expenditures, sales numbers, and relative market share, we find these numbers are insufficiently persuasive to establish that "enhanced push-to-talk" has acquired sufficient distinctiveness to overcome our earlier finding that the term is highly descriptive of Applicant's services. *In re Bos. Beer*, 53 USPQ2d at 1058 (Notwithstanding the applicant's annual advertising expenditures in excess of ten million dollars and annual sales under the mark of approximately eighty-five million dollars, "considering the highly descriptive nature of the proposed mark [THE BEST BEER IN AMERICA], [Applicant] ... has not met its burden to show that the proposed mark has acquired secondary meaning.").

## **IX. Conclusion**

We find Opposer met its burden of demonstrating, by a preponderance of the evidence, that “enhanced push-to-talk” is merely descriptive, in fact highly descriptive, of Applicant’s identified services. In view of the substantial burden of proof before it, Applicant failed to establish that “enhanced push-to-talk” has acquired distinctiveness as a designation of the source of Applicant’s telecommunication services.

### **Decision:**

The opposition is sustained in Opposition No. 91241178, and registration of ENHANCED PUSH-TO-TALK to Applicant is refused.

The opposition is sustained in Opposition No. 91241179, and registration of AT&T ENHANCED PUSH-TO-TALK to Applicant is refused in the absence of the entry of a disclaimer of “enhanced push-to-talk.” However, if Applicant submits the required, properly worded disclaimer to the Board within 30 days from the date of this decision and prior to filing any appeal of this decision, the requirement for the disclaimer will have been met. Trademark Rule 2.142(g), 37 C.F.R. § 2.142(g). The disclaimer should read as follows: “No claim is made to the exclusive right to use “ENHANCED PUSH-TO-TALK” apart from the mark as shown.” TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1213.08(a)(i) (October 2018). The submission of the required disclaimer, however, does not serve to toll the time to appeal the Board’s decision.