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THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nissan Jidosha Kabushiki Kaisha
dba Nissan Motor Co. Ltd.

Serial No. 75/737,150

Mark A. Flagel, Manuel A. Abascal and Robert J. Schulze of
Latham & Watkins for Nissan Jidosha Kabushiki Kaisha dba
Nissan Motor Co., Ltd.

David H. Stine, Trademark Examining Attorney, Law Office
114 (Margaret Le, Managing Attorney).¹

Before Seeherman, Quinn and Hohein, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Nissan Jidosha Kabushiki Kaisha dba Nissan Motor Co.
Ltd. has applied to register KING CAB, with a disclaimer of

¹ Another Examining Attorney originally examined the
application. Mr. Stine took over responsibility for the
application after the issuance of the second Office action.

the word CAB, for "light duty trucks."² Registration has been finally refused pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. 1052(e)(1), on the ground that applicant's mark is merely descriptive of its goods; and that it is not eligible for registration pursuant to the provisions of Section 2(f) of the Act because the term is generic and thus de jure unregistrable and, even if the term is not generic, the evidence submitted by applicant is not sufficient to demonstrate acquired distinctiveness.

The appeal has been fully briefed.³ An oral hearing was not requested.

² Application Serial No. 75.737,150, filed June 25, 1999, and asserting first use and first use in commerce as early as June 15, 1976.

³ With its brief applicant has submitted "Excerpts of Record" which include virtually all of the Office actions in this file, as well as applicant's responses. Applicant is advised that it is Office practice to keep briefs in ex parte appeals with the file of the application, and therefore the submission as exhibits to briefs of copies of correspondence which is already of record is unnecessary and makes the file unduly bulky. Applicant should refrain from such filings in the future. Applicant also submitted, as Exhibits 2, 3 and 4 to its appeal brief, copies of those articles which the Board treated as of record by virtue of the remand order of October 3, 2001. Applicant had requested remand in order to make of record complete copies of all articles retrieved by the Examining Attorney's search of the NEXIS database. The Board denied this request because applicant did not show good cause for the delay in making the articles of record, but did grant remand to the extent that complete copies of the articles for which the Examining Attorney had submitted excerpts would be of record and considered by the Examining Attorney. With the remand request applicant had submitted multiple copies of the articles which it wished to make of record, such that these materials now occupy a large carton in the Board's exhibit room. In view of the fact that the relevant articles, i.e., those which are of record, are included as part

Examining Attorney's Evidence

Nexis articles

The Examining Attorney has made of record excerpts from 35 stories taken from the NEXIS database.⁴ Three of these stories reference applicant's truck, although in two the term "king cab" is shown in lower case:

...Camino Michelle, 3400 block, Oct. 6,
1999 Nissan King Cab pickup....
"The San Diego Union-Tribune,"
October 31, 1999

The Oakland Police Department was one of the agencies alerted this weekend to be on the look out for a red 1990 Nissan pickup truck owned by a murder victim in Scarborough. ... The woman's pickup truck—a king cab with a black cap—was believed to have been sighted in Florida Monday.
"Central Maine Morning Sentinel,"
May 20, 1997

of the exhibits to the brief, this carton will now be discarded. Applicant is advised for future reference that it is never necessary to submit more than a single copy of an exhibit, response or brief in connection with an application or an ex parte appeal. It should be noted that the articles submitted by applicant, with both the request for remand and with the appeal brief, do not include complete copies of two articles for which the Examining Attorney submitted excerpts with his Office actions, namely the article from the "San Diego Union Tribune" dated October 31, 1999 and the article from UPI dated August 25, 1999. Accordingly, only the excerpts for these articles have been considered.

Applicant has suggested that the Examining Attorney's brief was untimely because it was not filed within 60 days of the filing of applicant's brief. Trademark Rule 2.142(b)(1) provides that the Examining Attorney shall file his brief "within sixty days after the brief of appellant is sent to the examiner." (emphasis added). Thus, the Examining Attorney's brief was timely filed.

⁴ In point of fact, the Examining Attorney submitted 36 stories, but one was a duplicate.

A two-tone blue 1985 Nissan king-cab truck sporting a front license plate inscribed with "USMC" was stolen from a driveway shortly before 1 a.m.
"Orlando Sentinel," December 18, 1997

Other stories use "King Cab" with initial capital letters, but coupled with the trademark of a company other than applicant:

A truck (above) owned by Mark Rittenberg of Orlando has a fully operational hot tub installed in its bed. The 1994 Chevy King Cab is this year's state champion.;[sic] The truck was 1 of the many vehicles on display at the recent Custom and Classic Car Show....
"The Orlando Sentinel," December 27, 1997

For \$28,500 in cash they bought a three-quarter-ton Chevy King Cab pickup truck and a Six-Pak cab-over camper.
"Money," November 1993

Most of the crimes occurred in the Livingston Acres and Willow Pond subdivisions near Maniscalco Elementary School, though one vehicle—a white 1995 Chevrolet Suburban—was taken from Turtle Drive, about 2 miles northwest. A red 1997 Ford King Cab pickup truck was stolen from Shaded Water Way, and a 1995 tan Nissan Maxima was stolen from Fallowfield Drive.
"St. Petersburg Times," March 10, 2000

Cridland travels in a Toyota King Cab pickup with his partner, the Impervious Aziza, also known as Sharon Nickle....
"The Idaho Statesman," January 26, 1996

The men, who were armed with two handguns and a shotgun, stole the victim's keys and wallet, pistol-whipped him and then put him in the back of his own Toyota Tacoma King Cab pickup truck, Pettiford said.
"The Herald-Sun" (Durham, NC),
December 1, 1999

Other articles show "king cab" used in lower case in connection with other companies' trucks, including as a general reference to a feature of such trucks:

Police said Keith Gardner is white, about 5 feet 10 inches tall with brown hair and brown eyes. He may be driving a dark blue Chevrolet king-cab pickup truck.
"The Washington Times," May 13, 1999

Monica Moore and her sister-in-law Debbie Beck left Coral Springs at 5 a.m. so they could be there in the Thomas J. White Stadium parking lot when Brooks arrived in his blue Chevy king cab truck.
"The Daily Oklahoman," February 25, 2000

"I rely heavily on this baby right here," she said, lifting an ADC map book from the console of a Chevrolet king cab pickup.
"Sunday News" (Lancaster, PA),
November 7, 1999

The truck was described as a Ford 150 longbed king cab with a blue stripe on the side.
"The San Diego Union-Tribune," July 3, 1997

The burglar and one or two accomplices then escaped with the pickup, a white

1998 GMC Sonoma with a king cab and a silver toolbox in the back.
"The Columbian" (Vancouver, WA), May 6, 1998

The vehicle witnesses described to police the night of the shooting is a late 1980s red, king-cab pickup truck with a loud muffler. It's possibly a Chevrolet or GMC make with faded paint.
"The Deseret News" (Salt Lake City, UT), July 24, 1997

Here are what some Indy drivers cruise around in away from the track:
A.J. Foyt drives a Chevy pickup with a king cab and dual rear wheels.
"The Orange County Register," May 24, 1992

Speaks' vehicle, a 1992 silver and white GMC pickup-truck with a windshield visor, was found Monday morning on the second level of Station Casino St. Charles. Investigators have received several calls from people who say they saw the king-cab truck, but McCarrick would not say whether any suspects were generated from those calls..
"St. Louis Post-Dispatch," March 22, 2000

Finally, other articles contain references to "king cab" without any capitalization:

Then three years ago, the industry introduced king cabs, pickups with a back seat for added passengers.
"The Patriot Ledger" (Quincy, MA), March 2, 2000

"My truck doesn't look like a man's truck," said Elizabeth "Bucky" Bibey, who bought her white 1997 Chevrolet S-10 pick-up from Bill Heard Chevrolet in

Columbus last Christmas. "Women need trucks," said Bibey. Her other two cars are El Caminos. "If you are single, you have all the room you need up front. If you have kids, just buy a king cab."

"Columbus Ledger-Enquirer," October 2, 1997

Willie Bloomquist drove north in his black pickup, the same king-cab truck he has driven since he left Port Orchard for Arizona State three years ago.

"The Seattle Times," June 16, 1999

Rawls pointed out some of the best birding spots from the driver's seat of a king-cab pickup truck earlier this month.

"Daily Press," July 28, 1997

The CHP is looking for a gray midsize pickup truck with a king cab and a blue stripe down the side, Lundy said.

"The Press-Enterprise" (Riverside, CA) February 7, 1997

An 8-year-old girl and her mother were killed Thursday morning in southeast Fresno when the king cab pickup truck they were riding in hit a parked tractor-trailer rig....

The pickup truck driver was westbound on Kings Canyon Road near Peach Avenue shortly before noon with the woman in a passenger seat and the girl in the king cab's back seat, police said.

"The Fresno Bee," November 28, 1997

Applicant has raised a number of criticisms of this evidence. First, noting that the Examining Attorney submitted excerpts from 36 stories although the various searches retrieved 515 stories, applicant suggests that the

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remaining stories do not show the descriptive or generic nature of "king cab." In support of this position, applicant relies on **In re Homes & Land Publishing Corp.**, 24 USPQ2d 1717 (TTAB 1992) in which the Board stated, at p. 1718:

In this case, the Lexis/Nexis printout indicates that the search found eighteen stories. Three stories were submitted as evidence. One of the three was a reference to applicant. It is extremely difficult, if not impossible, to find, on the basis of such a weak showing, that the term in question is generic of the goods on which it is being used. Moreover, there was no indication from the Examining Attorney that the submitted articles constitute a representative sample of the entirety of the search results. Eighteen articles is a small enough number that submission of the entire search would have been quite easy to accomplish and would have been infinitely more helpful than three. In the absence of the full search, we must presume that the excerpts selected for submission provide the best support of the refusal to register available from that source. See **In re Federated Department Stores, Inc.**, 3 USPQ2d 1541 (TTAB 1987).

The Homes case does not stand for the proposition that the Board will presume that the articles retrieved by a search of the NEXIS database which are not submitted do not support the Examining Attorney's position. In Homes, the search retrieved a relatively small number of articles, and

despite this, the Examining Attorney chose to submit only three of the articles. In those circumstances, it was appropriate for the Board to presume that the remaining articles did not support the Examining Attorney's position. However, in the present case, the three searches conducted by the Examining Attorney retrieved over 500 articles. Certainly the Board has no interest in reviewing "noise," in which the searched words appear in such a manner that the article has no relevance whatsoever to the issue at hand. Searches may also retrieve duplicate articles, as the submissions in this very case show, the article from the September 14, 1999 "Chattanooga Times" having been submitted in duplicate. The search conducted by the Examining Attorney on September 30, 1999 was for "KING CAB w/10 TRUCK"; the searches conducted on May 17, 2000 were for "KING CAB w/3 TRUCK OR PICKUP." There would obviously be some overlap between the stories retrieved by the three searches. The searches may also have retrieved articles from foreign publications, which have little probative value in determining the impression of a term on the consuming public in the United States.

Even when duplicate, nonprobative and irrelevant articles are eliminated, the Board does not encourage the submission of all other articles retrieved by a search when

that number is very large, and we have been critical of Examining Attorneys' submitting numerous articles. In fact, the Board would not expect Examining Attorneys to even read each article when the search retrieves 500 articles, as was the case here. Thus, we reiterate that there was no need for the Examining Attorney to submit all the articles retrieved by the searches, as long as the articles which were submitted were representative of the search results.

Applicant asserts that the Examining Attorney did not consider whether the articles which were submitted were representative of all the articles retrieved, and in fact asserts that they are not representative. However, in the Office action mailed September 30, 1999, the Examining Attorney referred to the attached excerpts from the NEXIS data base as a "sample," while in his brief the Examining Attorney calls them "representative news stories." p. 3. Applicant has not provided any evidence to show that the articles are not representative. Even when applicant filed its request for remand to make of record complete copies of all the articles that would have been retrieved by the Examining Attorney's searches, see footnote 3, it did not identify any articles not made of record that would show that the articles submitted by the Examining Attorney were

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not representative. Further, our review of the search request cover pages indicates that the Examining Attorney submitted a range of articles, e.g., 2, 4, 6, 12, 50, 52, 61, 73, 20, 84, 90 and 98, such that we cannot say that the Examining Attorney deliberately culled articles, and that the remaining articles should be presumed to show KING CAB used as applicant's trademark. Cf. **In re Trans Continental Records Inc.**, 62 USPQ2d 1541 (TTAB 2002).

Applicant has also engaged in significant discussion regarding what the articles show, as well as their probative value. For example, applicant dismisses many of the articles as being police or crime reports. It is true that many of the articles involve reports of crimes, with either damage to or from pickup trucks, or suspects believed to be in pickup trucks. However, none of these articles can be considered merely police reports or internal police documents. They all appear in newspapers of general circulation, and therefore must be presumed to be available to the general public. Further, although one or two of the articles are clearly taken from police reports, the other articles appear to have been written by reporters, and reflect the reporters', rather than the police, view of the meaning of "king cab." Moreover, most

of the articles⁵ relate to non-police activity, as shown by many of the excerpts quoted above.

Applicant asserts that the articles do not show misuse by another manufacturer. We agree that such companies as General Motors and Ford have not written or been the source of the articles which refer to, inter alia, a Ford King Cab or a Chevy king-cab pickup truck. However, the fact remains that the reporters who wrote the articles did not consider "king cab" to be a trademark of applicant's, nor would the public reading those articles.

We do not believe it appropriate to dismiss the evidence submitted by the Examining Attorney as, in the words of applicant, "anecdotal evidence of misuse, from which any mark suffers." Brief, p. 12. The numbers of articles submitted by the Examining Attorney, from periodicals from all over the country, show that people everywhere have been exposed to the term "king cab" as meaning a pickup truck with a larger-size cab. We also note that applicant has not submitted any evidence regarding its efforts to prevent or correct what it terms

⁵ There is some discrepancy between applicant's calculations and characterizations of the number of articles and those of the Board; however, they are not critical to our decision herein, and therefore we will not burden this opinion with an extensive discussion of the differences.

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misuse, despite the fact that applicant was able to submit, in terms of evidence of acquired distinctiveness, "over 700 pages of promotional and advertising material." Brief, p. 16

Internet Evidence⁶

[Classified ad to sell] 1986 FORD F150
XLT KING CAB
Comments: 1986 Ford F150 XLT King Cab,
Blue/Grey with Blue interior-clean.
New tires, AC, AmFm Cassette, CB radio,
tool box...
www.pcnw.net/classifiedads/_ads/00000099.htm

Re: 86 4 x 4 king cab 22R
[requesting advice about a blown head
gasket]
www.t4x4pickup.com/group/messages/2638/html

Specimens

Although not specifically discussed by the Examining Attorney, we note that applicant's own specimens, at best, show mixed usage. In particular, the price sticker which shows the equipment for applicant's FRONTIER 4x4 XE-V6 truck lists, under the heading "Comfort & Convenience," "King Cab w/Rear Fold-Down Jump Seats" along with descriptive terms such as "Front Velour Bucket Seats,"

⁶ In addition to the two listings excerpted herein, the Examining Attorney submitted a summary of results from an EXCITE search. Because such summaries do not necessarily show how the term is used at the actual website, we have not considered this submission.

"Dual Adjustable Head Restraints" and "Fully Carpeted Cabin Floor," such that consumers would perceive "King Cab" as just another descriptive term. In addition, the specimen brochure for the 2000 NISSAN FRONTIER states, at page 3, "The full lineup includes Frontier Regular Cab, King Cabs and Crew Cabs; V6 and 4-cylinder engines; 2-wheel and 4-wheel drives." There is also a statement about "Frontier King Cabs" on p. 10. Not only does "King Cab" appear with and in the same manner as other generic or descriptive terms, but it is shown in the plural, as "KING CABS," which is consistent with generic rather than trademark use.

Applicant's Evidence

With its brief applicant has submitted definitions of "king" taken from two dictionaries, and specifically points out that the word means "a male sovereign, items of luxury, or a chess piece" and that to "live like a king" means living in "great comfort and luxury." Brief, p. 7. We take judicial notice of the dictionary listings,⁷ and we also note that "king" is "used in names of animals and plants that are particularly large, e.g., king cobra," and

⁷ The Board may take judicial notice of dictionary definitions. **University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.**, 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

that "king-sized" (also "king-size") means "of a larger size than the standard; very large: a *king-sized bed*."⁸

Applicant's Evidence of Acquired Distinctiveness

In support of its claim of acquired distinctiveness, applicant has submitted a declaration of five years substantially exclusive and continuous use of the mark in commerce; a copy of its expired registration for a stylized form of KING CAB for light duty trucks, and over 700 pages of evidence which includes market research, brochures and articles. Such evidence has a bearing on the issue of genericness as well as on the issue of acquired distinctiveness, so we will discuss this evidence in some detail.

Expired Registration

Applicant has submitted a copy of its registration for KING CAB in a stylized format. This registration, No. 1,080,296 issued on December 27, 1977, and expired 20 years later because it was not renewed. Applicant attempts to rely on this registration to show acquired distinctiveness of KING CAB in its current application, which is applied for in typed form. However, although ownership of a currently existing trademark registration may be used as evidence of acquired distinctiveness, an expired

⁸ The New Oxford American Dictionary, © 2001.

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registration has no probative value other than for what it shows on its face, namely, that the registration issued.

Sunnun Products Co. v. Sunex International Inc., 1 USPQ2d 1744 (TTAB 1987); see also, **Anderson, Clayton & Co. v. Krier**, 478 F.2d 1246, 178 USPQ 46, 47 (CCPA 1973). An argument similar to applicant's was raised in **In re Phillips-Van Heusen Corp.**, 63 USPQ2d 1047 (TTAB 2002), in which applicant asserted, in support of its claim of acquired distinctiveness, that it had previously owned a registration, now expired, for the same mark for the same goods which was not based on a Section 2(f) showing of distinctiveness, and that under Trademark Rule 2.41(b), that registration should be accepted as prima facie evidence of distinctiveness. The Board made clear, at footnote 2, that Rule 2.41(b) applies only to live registrations, not expired registrations.

Sales Volume

Applicant has stated that from January 1995 until some point in 2000 (the declaration, which was filed on November 17, 2000, gives the time period as being from January 1995 "to the present"), it sold 257,000 "King Cab" trucks, as compared with sales of 1,295,000 of all its trucks, including "King Cab" trucks.

Market Research

Applicant has submitted listings from 1998, 1999 and 2000 Maritz studies in which models of various trucks are listed. Applicant's trucks in the 1998 report are listed as:

Nissan Frontier 2WD Std/XE Reg Cab
Nissan Frontier 2WD XE King Cab
Nissan Frontier 4WD Std/XE Reg Cab
Nissan Frontier 4WD King Cab

We do not believe these materials indicate that "King Cab" is regarded by the trade as a trademark, or that consumers viewing this report would so regard it. The term "King Cab" is used in the same manner as "Reg Cab," a abbreviation describing a truck with a regular cab. The RL Polk market data is similar. There are listings for, inter alia, applicant's "Nissan Frontier," "Nissan Frontier /XE," "Nissan US Frontier XE/SE Crew Cab," "Nissan Frontier King Cab," "Nissan US Frontier KG Cab XE," "Nissan USA Truck Reg Bed," "Nissan USA Trk Longbd," as well as "Chevrolet C1500 Extended Cab," "Chevrolet C2500 Crew Cab," "Ford F350 Crew Cab," "GMC Sierra 1500 Extended Cab," "Isuzu USA Standard Bed" and "Toyota USA Std." In other words, "King Cab" is used in these listings in the same manner as such descriptive terms as "extended cab" and "standard bed," and

neither those in the trade nor consumers would be able to ascertain, from this report, that "King Cab" is being used as a trademark by applicant. In fact, one of the listings for applicant's truck abbreviates "King Cab" as "KG Cab"; one normally does not expect to see a trademark abbreviated in this manner.

Applicant has also submitted copies from the "Kelley Blue Book" guides from 1990-2000. Again, these listings do not show that "King Cab" is being used as, or would be perceived as, a trademark. For example, in the July-August 2000 guide, under the listings for "Pickup" under "1995 Nissan Trucks" is a column with, on separate lines, "Short Bed," "XE Short Bed," "XE King Cab," "4WD" and "V6 3.0 Liter."

Advertising Materials (Brochures, Articles, etc.)

As applicant has stated, it submitted over 700 pages of such materials. It has not discussed specific pieces in either the response with which the exhibits were submitted, or in its appeal brief. However, it did submit with its appeal brief exhibits which include "Excerpts of record," and it identified pages 224-251 of the Excerpts of Record in the brief as such material. Therefore, we consider these pages to be what applicant feels is the strongest

evidence of acquired distinctiveness, and will concentrate our comments on this specific material.

The first document is a brochure for "Nissan -01 Frontier," and the pages excerpted from that publication show "REGULAR + KING CAB SPECIFICATIONS" on one page, and "FRONTIER CREW CAB SPECIFICATIONS" on another. A third page lists and pictures the "REGULAR CAB," "KING CAB" and "FRONTIER CREW CAB." The manner in which KING CAB appears, in the same size and type as REGULAR CAB and CREW CAB, indicates that KING CAB may be a size, rather than a trademark. Certainly REGULAR CAB is a commonly used term for pick-up trucks, as shown by the market research materials discussed above and, while applicant asserts that CREW CAB is one of its trademarks, we note from the market research materials that CREW CAB is used in the trade in connection with FORD, CHEVROLET, GMC SIERRA and GMC SONOMA trucks.

The next document is a partial copy of an article from the August 4, 2000 issue of "USA Today."⁹ The article discusses applicant's new truck design, and in the last paragraph on the first page mentions "a four-door, four-

⁹ Although applicant submitted pages marked 230 and 231 of the Excerpts of Record, there is clearly some material missing, as page 230 ends with the partial sentence "...was the kind of rocket ship that Nis" and page 231 begins with a new paragraph. The page is also missing from the original submission.

wheel-drive Crew Cab and a two-door, two wheel-drive King Cab," in what we consider appropriate trademark usage. However, on the second page one of the paragraphs begins, "Nissan says Frontier comes in 17 varieties of regular, King and crew cabs with a choice of two- or four-wheel drive..."; thus, although "King" is capitalized, it is used in the manner of a size descriptor, in the same manner as "regular" and "crew."

An article in the August 4, 2000 "USA Today" discusses the 2001 Nissan Frontier, describing it as a "compact pickup, available with two- or four-wheel drive; regular, extended or crew-size cab." The third paragraph lists prices for the regular cab XE, and ends with "Midlevel SE King Cab with two-wheel drive starts at \$18,619." The article in the September 4, 2001 "Chicago Sun-Times" does not mention the term "King Cab" until the third column, where it refers to "a Regular Cab model with a 6.5-foot cargo bed, two-door extended King Cab with a 6.2-foot bed and a carlike four-door Crew Cab with a 4.6 foot bed."

A three-page article from the October 2000 issue of "Truck Trend"¹⁰ features "King Cab" in a list of models in a

¹⁰ Although not identified in the exhibit from the Excerpts of Record at 234-236, the copy originally submitted with applicant's response bears the publication information.

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box on the second page, e.g., "XE Regular Cab 4x2," "XE King Cab 4/2," "SE-V-6 King Cab 4x4," "XE-V-6 Crew Cab 4x4," and "SC-V-6 Crew Cab 4x4." All of these models are depicted in the same format. It should be noted that on the first page the article contains the statement "The Xterra and Frontier crew cab were the first notices...", with crew cab used in a descriptive or generic manner.

Applicant has also made of record a few pages from the 2000 and 1998 "IntelliChoice The Complete Small Truck Cost Guide." Of these excerpts, there is only one page in each guide that has a reference to applicant's "King Cab," in which two of applicant's KING CAB trucks are pictured, along with four other trucks, as a "best overall value." The copy shows "Nissan Frontier King Cab Series" over the words "2 Door Extended Cab" and "Nissan Frontier SE King Cab" over "2 Door Extended Cab" under the respective pictures.

Finally, applicant has submitted something from the February 12, 1999 "Dow Vision Story Display" from Dow Jones, which appears to be a press release from IntelliChoice, announcing their Best Overall Value of the Year awards. The "Nissan Frontier SE King Cab" is listed as the winner of the "Best Truck Value Under \$18,000," and this listing appears with a listing for the "GMC Sierra

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C2500 3 Door Ext'd Cab" as "Best Truck Value Over \$18,000."
Other listings include "Honda Civic CX/DX/HX Series 2 & 4
Door Coupe and Sedan" and "Honda Accord EX 4 Door Sedan."
In short, the way in which "King Cab" is used is similar to
descriptive or generic terms for the other vehicles. Thus,
the term is not likely to be perceived as a trademark.

Analysis

It is the Examining Attorney's position that KING CAB
is a generic term for a type of light duty truck, namely
one with a larger than normal cab, and therefore it is also
merely descriptive of such goods.

The critical issue in determining genericness of a
term is whether members of the relevant public would
primarily use or understand the designation sought to be
registered to refer to the genus or category of goods or
services in question. See **H. Marvin Ginn Corp. v.
International Association of Fire Chiefs, Inc.**, 782 F.2d
987, 228 USPQ528 (Fed. Cir. 1986). In making such a
determination in this case, we must follow the two-step
inquiry set forth in *Marvin Ginn* and reaffirmed by the
Court in **In re American Fertility Society**, 188 F.3d 1341,
51 USPQ2d 1832 (Fed. Cir. 1999), namely:

- (1) What is the genus or category of
goods at issue?, and

(2) Is the designation sought to be registered understood by the relevant public primarily to refer to that genus or category of goods?

The genus or category of goods at issue are light duty trucks, and specifically pickup trucks with larger than ordinary cabs. Applicant has focused its comments on what term the relevant public uses to refer to the genus of goods. In particular, applicant asserts that the newspaper articles are not sufficient to show the perception of the consuming public, and that the Examining Attorney has not made of record any evidence of industry use. Indeed, applicant asserts that other companies do not use the term KING CAB to refer to their larger-sized cabs.

With respect to the asserted lack of evidence of trade literature, technical reference materials or product promotions or sales releases, we point out that our principal reviewing court, in **In re Northland Aluminum Products, Inc.**, 777 F.2d 1556, 1159, 227 USPQ 961, 963 (Fed. Cir. 1985), stated that evidence of the public's understanding of a term may be obtained from any competent source, such as consumer surveys, dictionaries, newspapers and other publications. Although trade literature, etc. may be used to show public perception of a term, to the extent that applicant is suggesting that the USPTO is

required to submit such evidence, applicant is incorrect. Moreover, because light duty or pick-up trucks may be purchased by the public at large, we consider articles from newspapers and magazines in general circulation, as are the articles submitted by the Examining Attorney, to be appropriate materials from which to ascertain public perception of the term KING CAB.

However, after thoroughly reviewing the evidence of record, we cannot say that KING CAB is used by the public to refer to the genus of light duty or pickup trucks. In most of the newspaper articles which are of record, the term "truck" or "pickup truck" is used along with "king cab," such that "truck" or "pickup truck" would be viewed as the generic term. Also, several of the articles use "king cab" to identify a major feature or characteristic of the truck rather than the truck itself, for example, "a white 1998 GMC Sonoma with a king cab" or "A.J. Foyt drives a Chevy pickup with a king cab and dual rear wheels." Accordingly, we cannot state on this record that KING CAB is a generic adjective for a type of pickup truck, rather than the name of a feature or characteristic of a pickup truck. Thus, we find that the Office has not met its burden in demonstrating that KING CAB is generic for the

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identified goods, and must reverse the refusal of registration on this ground.

Although we have found that KING CAB is not a generic term for light duty trucks, we find that KING CAB describes, and indeed names, a major feature of pickup trucks, namely, a larger than standard truck cab. The use of the term in the newspaper articles without regard to what company manufactures the trucks shows that newspaper reporters and their sources treat KING CAB as a descriptive term for this type of truck cab, and the readers of these articles would have the same perception. Moreover, applicant's own materials, and in particular, its price sticker specimens, list "King Cab" in the same manner as "Bucket Seats" and "Dome Light," as the common name of the particular feature or characteristic of the trucks. A term is merely descriptive if it immediately conveys knowledge of the ingredients, qualities, or characteristics of the goods with which it is used. **In re Gyulay**, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); **In re Engineering Systems Corp.**, 2 USPQ2d 1075 (TTAB 1986).

In light of this evidence, applicant's arguments that KING CAB is inherently distinctive and at most suggestive are unpersuasive. Applicant relies solely on the dictionary meanings of "king" to say that KING CAB

literally would mean "a light duty truck cabin belonging to a male monarch or sovereign" or, "with some thought or imagination, the term could describe a cabin that had luxurious, majestic, or perhaps ornate features, such as leather seats and wool rugs." Brief, p. 7. Applicant asserts that to understand that KING CAB refers to a larger than standard passenger compartment one would have to use thought and a multi-stage reasoning process to go beyond the traditional definitions of "king" to understand the term as referring solely to size. However, applicant's arguments totally ignore the evidence of applicant's own descriptive usage, as well as the descriptive usage shown in the newspaper articles, evidence which, without question, shows that KING CAB is a merely descriptive term for applicant's goods.¹¹

We think it appropriate to comment on the fact that applicant was able to obtain a registration on the Principal Register for a slightly stylized form of KING CAB in 1977, without resort to the provisions of Section 2(f) of the Act. Obviously, the decision of an Examining

¹¹ Even if we were to consider only the dictionary definitions, the fact that "king" is used in the names of animals and plants to indicate those that are particularly large, and that "king-size" and "king-sized" means being of a larger size than standard are enough to immediately convey to consumers that the KING CAB trucks have a larger than standard size cab. In this connection, we note that "king-sized bed" is often abbreviated to "king bed."

Attorney more than 25 years ago does not bind the Board today. More importantly, our decision as to whether a term is merely descriptive must be made on the record before us, and that record is certainly not the same as the evidence before the Examining Attorney in 1977. In particular, it appears from the newspaper articles that the nature of pickup trucks changed some time after applicant's original mark was registered. According to an article in the March 2, 2000 "The Patriot Ledger":

The automobile industry is in the midst of another flash of brilliance: Continued innovation of an old friend, the pickup truck.

The pickup truck has a long and respected history. The regular sized pickup with its 6- to 8-foot bed was typically used only commercially. Passengers were limited to the driver and one or two others.

Then three years ago, the industry introduced king cabs, pickups with a back seat for added passengers.

This idea caught on, giving the pickup the dual role of commercial and family recreational use. King cabs provided added passenger space without reducing the size of the cargo bed.

Based on the evidence of record before us in this file, we find that KING CAB is merely descriptive of light duty trucks, and, indeed, is highly descriptive of such trucks because it is the common term for a major feature or

characteristic of such trucks. Thus, we now must consider whether applicant has shown that KING CAB has acquired distinctiveness as a trademark for applicant's goods. Because of the highly descriptive nature of the term, the evidence necessary to show acquired distinctiveness must be substantial. See **Yamaha International Corp. v. Hoshino Gakki Co. Ltd.**, 840 F.2d 1572, 6 USPQ2d 1001 (Fed. Cir. 1988) (the greater the degree of descriptiveness the term has, the heavier the burden to prove it has acquired distinctiveness). Applicant has not met this burden.

We have already, in our discussion of applicant's evidence at pages 15 through 21 of this opinion, indicated various problems with applicant's evidence in terms of showing that KING CAB has acquired distinctiveness. We will thus, at this juncture, concentrate our comments on the evidence of acquired distinctiveness applicant has discussed in its brief. First, with respect to applicant's expired registration, we have already explained that such a registration cannot be used as evidence of acquired distinctiveness. See also, TMEP §1212.04(d) ("a claim of acquired distinctiveness cannot be based on a registration that is cancelled or expired"), citing **In re BankAmerica Corp.**, 229 USPQ 852, 853 (TTAB 1986). Second, applicant relies on its claim of substantially exclusive and

continuous use of the mark in commerce for the five years before the submission. Section 2(f) provides that the Director may accept proof of such use as prima facie evidence that the mark has become distinctive. However, Trademark Rule 2.141(b) makes it clear that this is discretionary, and that while such a statement may be accepted as prima facie evidence of distinctiveness, further evidence may be required. In this case, given the highly descriptive nature of the term KING CAB, a statement of five years continuous and substantially exclusive use is insufficient to prove acquired distinctiveness. See TMEP §1212.05(a), and cases cited therein.

At pages 15 and 16 of its appeal brief applicant states that it has presented evidence of actual acquired distinctiveness, as follows:

Nissan presented substantial evidence to demonstrate that the "KING CAB" mark is closely associated with its trucks. No other manufacturer uses the mark, and relevant industry publications (e.g., Maritz buyer study, Polk data, Kelly Blue Book) identify the mark solely with Nissan. Nissan submitted over 700 pages of promotional and advertising material demonstrating use of the "KING CAB" mark. See ER (excerpts of record) at Tab 6, ER pp. 11, 224-251 (Nov. 17, 2000 Response to Office Action at p. 4 & exhibit E attached thereto). These materials show that the "KING CAB" mark is an integral part of Nissan's marketing of

its light duty truck products and that in the past five years, approximately 20% of Nissan trucks sold were "KING CAB" trucks. See ER at Tab 6, ER pp. 99, 1-2-107 (Nov. 17, 2001 Response to Office Action at p. 3 & exhibit B attached thereto.)

We agree that there is no evidence of record that other manufacturers identify their larger-size cabs as "king cabs," but this evidence is countered by the newspaper articles that tend to show the public does associate this term with manufacturers other than applicant. As for the relevant industry publications, as we previously stated, the Maritz, Polk and Kelley Blue Book guides use "king cab" in the same manner as other descriptive terms, rather than as a trademark. Thus, these uses do not show that KING CAB has acquired distinctiveness as a trademark.

With respect to the promotional and advertising material, we have already discussed the evidence that applicant presumably believed was most persuasive. Although there are some trademark uses, there are also uses that are inconsistent with trademark use. Further, applicant has not provided any information about the manner or extent of the distribution of its promotional materials; thus, we cannot ascertain what exposure consumers may have had to them.

With respect to applicant's sales of 257,000 KING CAB trucks between 1995 and 2000, this number does not seem on its face to be so large that we must conclude that the mark has acquired distinctiveness on the basis of such sales. Moreover, it does not appear from the materials which are of record that applicant uses the mark KING CAB on the goods themselves. The specimens which have been accepted as showing use of the mark for the goods are price stickers and, as we have previously said, they show the term in a descriptive manner rather than as a trademark.

In conclusion, after thoroughly reviewing all of applicant's evidence,¹² we find that applicant has failed to prove that KING CAB has acquired distinctiveness as a mark.

Decision: The refusal on the ground that KING CAB is a generic term is reversed; the refusal on the ground that the mark is merely descriptive of the goods is affirmed, and the refusal to accept applicant's alternative claim that the mark has acquired distinctiveness is affirmed.

¹² We note that applicant submitted a case for a compact disk from Zimmerman & Partners advertising. The case does not contain a disk, nor has it been located in the Office. From the label, we infer that the disk contains 11 advertisements for applicant's trucks, including one advertisement identified as "NOSE-054 Tournament Time King Cab." Although we have not been able to review the disk itself, that has no effect on our decision herein, since applicant has not provided any information as to viewer exposure to the ads.