

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Mailed:
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Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Kraus Productivity Organization Limited

Serial No. 78224674

Akana K.J. Ma of Ater Wynne LLP for Kraus Productivity
Organization Limited.

Gene V.J. Maciol, II, Trademark Examining Attorney, Law
Office 103 (Michael Hamilton, Managing Attorney).

Before Bucher, Kuhlke and Cataldo, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Kraus Productivity Organization Limited seeks
registration on the Principal Register of the mark
PRODUCTIVITY for services recited in the application as
"business consulting services to improve efficiency in
manufacturing industries" and "training services to improve
efficiency in manufacturing industries."¹

¹ Application Serial No. 78224674 was filed on March 12, 2003 based upon applicant's allegation of first use anywhere and use in commerce in both classes of services at least as early as August 25, 1981.

This case is now before the Board on appeal from the final refusal of the Trademark Examining Attorney to register this designation under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), based upon the ground that this term is merely descriptive when considered in relation to applicant's identified services, i.e., that the term "Productivity" immediately informs potential purchasers about the subject matter, purpose and use of the applicant's business consulting and training services and fails to create a mark with separate, non-descriptive meaning. Furthermore, the Trademark Examining Attorney has refused registration under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), because the evidence in the record does not support applicant's claim of acquired distinctiveness.

Applicant and the Trademark Examining Attorney submitted briefs. We affirm the refusal to register.

Term is merely descriptive

The Trademark Examining Attorney has made a well-articulated and fully-supported case for why this term is merely descriptive under Section 2(e)(1) of the Act. In response, applicant did not take issue with this refusal, but immediately submitted a claim of distinctiveness under

§ 2(f) of the Act. In his appeal brief, the Trademark Examining Attorney has continued to make cogent arguments for a refusal under Section 2(e)(1) of the Act. After reviewing the evidence in the record in support of his position, we agree that this alleged mark is merely descriptive. We also construe applicant's unequivocal amendment as conceding that the matter to which it pertains is not inherently distinctive, and thus not registrable on the Principal Register absent proof of acquired distinctiveness. See *Yamaha International Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988) ["Where, as here, an applicant seeks a registration based on acquired distinctiveness under Section 2(f), the statute accepts a lack of inherent distinctiveness as an established fact."]; and *In re Leatherman Tool Group, Inc.*, 32 USPQ2d 1443 (TTAB 1994). Consistent with this result, in its appeal brief, applicant does not even discuss the question of mere descriptiveness. Hence, we find that the sole remaining issue for our determination is whether this term has acquired distinctiveness.

Has applicant demonstrated acquired distinctiveness?

Applicant has the burden of proving that its mark has acquired distinctiveness. *In re Hollywood Brands, Inc.*, 214 F.2d 139, 102 USPQ 294, 295 (CCPA 1954) ["[T]here is no doubt that Congress intended that the burden of proof [under Section 2(f)] should rest upon the applicant"]. "[L]ogically that standard becomes more difficult as the mark's descriptiveness increases." *Yamaha International Corp.*, *supra* at 1008.

Because the Trademark Examining Attorney alleges that the proposed mark is "highly descriptive" and that the evidence of acquired distinctiveness is insufficient to establish acquired distinctiveness, we review the evidence of descriptiveness submitted by the Trademark Examining Attorney, before looking to the evidence applicant has submitted in support of its Section 2(f) claim:

- A number of separate dictionary entries, including one where the word "productivity" is succinctly defined as "the amount of output per unit of input; a measure of efficiency."
- Excerpts from LEXIS/NEXIS articles discussing gains in manufacturing productivity across

various sectors of the economy focusing on performance and efficiency.

Because the very definition of the word "productivity" encompasses efficiency, and inasmuch as applicant's business consulting and training services are directed at improving efficiency, applicant's own recitation of services makes clear that applicant's services are for use in increasing productivity.

Certainly, in view of the highly descriptive nature of the mark, applicant's statement of substantially exclusive and continuous use for a period of more than five years is not sufficient to establish acquired distinctiveness.² Nor is the claim of a prior registration of this matter on the Supplemental Register. *See In re Cannon, Inc.*, 219 USPQ 820 (TTAB 1983). These claims were rejected as inadequate under Section 2(f) of the Act quite early in the prosecution of the application, and the Trademark Examining Attorney repeatedly suggested that applicant submit evidence such as the type and amount of advertising of the mark and the success of applicant's efforts to associate

² In fact, the relevant period of years during which applicant has used this mark in commerce in connection with the recited business consulting and training services is unclear. In applicant's declaration asserting use of the mark in commerce, the reference is made to prior use of the mark only in connection with books and newsletters.

the mark with the source of the services, such as unsolicited media coverage and consumer studies.

Finally, in support of its Section 2(f) claim, applicant submitted seven testimonials from applicant's customers. However, we agree with the Trademark Examining Attorney that these testimonials fail to establish that the term "Productivity" is recognized by consumers as an exclusive source designator for the recited services. At most, they show that a small number of persons associate this term with applicant.

Even among these testimonials, the thrust seems to be the perceived excellence of applicant as a consultant and trainer. Some signatories use the term "productivity" descriptively. Most refer to "Productivity" or "Productivity, Inc." only in the context of applicant's trade name. As such, these testimonials fail to prove that applicant's mark has acquired distinctiveness in connection with business consulting and training services in the field of manufacturing productivity.

As to the type of information requested by the Trademark Examining Attorney, applicant has failed to include any dollar figures for sales generated from these services, advertising expenditures to educate the consumer

that this term is more than merely descriptive, or sample advertisements showing how applicant has undertaken efforts at educating members of the relevant public.

Given the highly descriptive nature of the designation "Productivity" for applicant's services, we would need to see a great deal more evidence than what applicant has submitted in order to find that this designation has become distinctive of applicant's services.

Decision: The refusal under Section 2(e)(1) of the Act on the ground that the mark is merely descriptive and the Section 2(f) showing is insufficient is affirmed as to both classes of services.