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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Bennis

Serial No. 78251943

Anthony J. DeGidio of Fraser, Clemens, Martin & Miller LLC for Gary Bennis.

Wiliam H. Dawe, III, Trademark Examining Attorney, Law Office 108 (Andrew Lawrence, Managing Attorney).

Before Quinn, Walsh and Cataldo, Administrative Trademark Judges.

Opinion by Walsh, Administrative Trademark Judge:

Gary Bennis (applicant) has applied to register the mark LOWAPR.COM, as amended, in standard-character form on the Principal Register for services now identifed as, "providing information via the Internet, in the field of debt and credit, namely credit repair, debt consolidation, credit cards, home and auto financing, insurance, and consumer protection laws" in International Class 36.

Applicant claims both first use of the mark anywhere and first use of the mark in commerce on July 17, 1999.

The Examining Attorney has finally refused registration on the grounds: (1) that the mark merely describes the services under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1); and (2) that applicant has failed to show that the mark has acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f).

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs. Although applicant has not said so explicitly in his brief, we believe and assume that he wishes to argue first that his mark is inherently distinctive, and in the alternative, if we find that it is not, that his mark has acquired distinctiveness. We affirm the refusal concluding that the mark is merely descriptive, and thus not inherently distinctive, and furthermore that applicant has failed to establish that his mark has acquired distinctiveness.

<u>The Descriptiveness Refusal</u>

A term is merely descriptive of services within the meaning of Section 2(e)(1) if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the services. *See*,

e.g., *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987); and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's services in order to be considered merely descriptive; it is enough that the term describes one significant attribute or function of the services. *See In re H.U.D.D.L.E.*, 216 USPQ 358, 359 (TTAB 1982); and *In re MBAssociates*, 180 USPQ 338, 339 (TTAB 1973).

Whether a term is merely descriptive is determined not in the abstract, but in relation to the services identified in the application, and the possible significance that the term would have to the average purchaser (user) of the services because of the manner of use. *In re Polo International Inc.*, 51 USPQ2d 1061, 1062 (TTAB 1999); and *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).

When two or more merely descriptive terms are combined, we must determine whether the combination of terms evokes a new and unique commercial impression. If each component retains its merely descriptive significance in relation to the services, then the resulting combination is also merely descriptive. *See*, *e.g.*, *In re Tower Tech,*

Inc., 64 USPQ2d 1314, 1317 (TTAB 2002)(SMARTTOWER merely descriptive of commercial and industrial cooling towers).

Applicant argues that LOWAPR.COM is not merely descriptive because the mark does not describe the services he has identified in the application. Applicant states:

> The relevant industry used by the Examining Attorney was presumably the banking industry. The correct relevant industry is more accurately cast as an informational website with information of interest to consumers, relating to debt management, consumer protection laws, insurance and credit. While LOW APR may be a feature of a loan service it is not a feature of this information website but rather a feature of a feature… It is thus difficult to imagine a consumer who upon hearing "LOWAPR" immediately calls to mind a website such as applicant's."

Applicant's Brief at 4.

Applicant submitted a copy from early 2002 of what appears to be the home page from his web site (Exhibit D to Applicant's Response of April 29, 2004). The page states "Welcome to LowAPR.com" and immediately below includes a series of topics which appear to function as "buttons" to access relevant information. The first three topic headings/buttons are: LowAPR Credit Cards, LowAPR Mortgages, Low APR Loans. On the same page under the heading "For All Your Lending Needs!" the site lists categories, including the following: Credit Card Center, Home Loan Center, Consumer Loan Center and Student Loan Center.

Applicant explains the operation of its service as follows: "… the relevant trade is the operation of an informational web site. Monies are generated by charging many of the websites which are linked to an advertising fee. Visitors get the information for free." Applicant's Response of April 29, 2004 at 3.

The Examining Attorney has submitted a copy of another page from applicant's website with the heading "Mortgage Center" showing four separate advertisements related to home loans with links to the advertiser.

The Examining Attorney has also submitted copies of additional pages from applicant's website which include general information for borrowers; this information appears to be derived from government sources. In this material, under the heading "Rates," the text from applicant's site states, "Ask about the loan's annual percentage rate (APR). The APR takes into account not only the interest rate but also points, broker's fees, and certain other credit charges that you may be required to pay, expressed as a yearly rate." These pages from applicant's site also include a glossary of terms with the following definition: "Annual Percentage Rate (APR) is the cost of credit expressed as a yearly rate. The APR includes the interest rate, points, broker fees, and certain other credit charges

that the borrower is required to pay." There is no dispute that this is the commonly understood meaning of APR.

For completeness we also note that the Examining Attorney has provided a definition of "low" from the online version of The *American Heritage Dictionary of the English Language* (3rd ed. 1992), which, in relevant part, provides - adj. "10. e. Relatively small. Used of a cost, price or other value: *a low fee; a low income.*" The Examining Attorney has also provided evidence of third-party use of "low APR" in relation to credit cards, for example at low-intro-apr.net, 1placeloan.com and rewardscards.com and in relation to auto loans, for example at about.com.

Marks which identify the subject matter of web sites are merely descriptive, as in the case of printed publications. *See, e.g., In re Medical Digest, Inc.*, 148 USPQ 570 (TTAB 1965) (OB/GYN DIGEST held merely descriptive of magazine). See also *In re Cox Enterprises Inc.*, 82 USPQ2d 1040, 1043-1044 (TTAB 2007) ("THEATL" held merely descriptive of magazines, newspapers, and directories, since at least one class of relevant purchasers are residents of Atlanta, Georgia, and visitors to Atlanta area.); *In re Classic Media Inc.*, 78 USPQ2d 1699 (TTAB 2006) ("SATURDAY MORNING T.V." held merely descriptive of "entertainment in the nature of on-going television

programs in the field of comedy.”). There is no reason to treat an information service rendered through the Internet, such as the one identified by applicant, any differently than a printed publication which serves the same purpose. *See In re Reed Elsevier Properties Inc.*, 77 USPQ2d 1649 (TTAB 2005) (LAWYERS.COM held generic for “providing access to an online interactive database featuring information exchange in the fields of law, legal news, and legal services.”).

Furthermore, although applicant does not appear to dispute the point, we note for completeness that the “.com” element in the mark is not distinctive, nor does it render the mark, when viewed in its entirety, distinctive. *See In re Oppendahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370 (Fed. Cir. 2004); *In re Reed Elsevier Properties Inc.*, 77 USPQ2d at 1657-58.

Accordingly, we conclude that LOWAPR.COM is merely descriptive of “providing information via the Internet, in the field of debt and credit, namely credit repair, debt consolidation, credit cards, home and auto financing, insurance, and consumer protection laws.” The evidence of record establishes that “APR” is merely descriptive of a significant featue of various types of financing, including home loans, credit cards and auto loans, among others. We

conclude further that the evidence of record establishes that "low" delineates a generally desirable, commonly identified feature of APR as applied to these forms of financing. Finally, we conclude that the evidence of record estalishes that financing with a "low APR" feature is a significant charateristic of applicant's service. That is, applicant's service is substantially devoted to information about and identification of financing featuring "low APR." The prominent display of the topic headings, LowAPR Credit Cards, LowAPR Mortgages and Low APR Loans, on applicant's site, the evidence that applicant's site provides links to parties offering low APR financing and other evidence of record establishes that applicant's LOWAPR.COM mark is merely descriptive.

Acquired Distinctiveness

As we noted, applicant argues in the alternative that his mark has acquired distinctiveness. Section 2(f) contemplates that, in the case of a mark found to be merely descriptive under Section 2(e)(1), but not generic, an applicant may nonetheless establish that the mark is entitled to registration by showing that the mark has acquired distinctiveness. 15 U.S.C. § 1052(f). The applicant bears the burden of establishing acquired distinctiveness. *Yamaha Intl. Corp. v. Hoshino Gakki Co.*

Ltd., 840 F.2d 1572, 6 USPQ2d 1001, 1004-1008 (Fed. Cir. 1988).

Section 2(f) provides, in part, "The Director may accept as prima facie evidence that the mark has become distinctive, as used on or in connection with the applicant's goods in commerce, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date on which the claim of distinctiveness is made." 15 U.S.C. § 1052(f). In considering a claim of acquired distinctiveness, the Examining Attorney must determine, based on the degree of descriptiveness of the mark in question, whether a five-year claim or other evidence proffered is adequate to establish acquired distinctiveness. *See In re America Online Inc.*, 77 USPQ2d 1618 (TTAB 2006); *In re Mine Safety Appliances Co.*, 66 USPQ2d 1694, 1697 (TTAB 2002).

Here applicant has submitted what he represents to be a five-year claim under Section 2(f), as well as other evidence to show that his mark has become distinctive. However, the five-year claim is defective. In his April 29, 2004 response at page 2 applicant states that "… the mark has been in substantially exclusive and continuous use by applicant in commerce for the five years before the date

on which this claim of distinctiveness is made." Later, on the same page, applicant states, "These exhibits show that the LOWAPR designation has been in continuous use since 1999 and *in July of this year it will have been in use for five years.*" (Emphasis provided.) The application claims first use in commerce on July 17, 1999. Thus, the mark had not been in use for five years at the time applicant made the five-year claim.

Also, the five-year claim relates to the mark LOWAPR, rather than the mark, as amended, LOWAPR.COM. Furthermore, applicant has also submitted a copy of an assignment to show that he is entitled to claim use of the mark by a predecessor, again as of the July 17, 1999 date. Exhibit A to the April 29, 2004 Response. The assignment recites the following: "WHEREAS, assignor first began to use the mark in commerce for commercial purposes on 7/17/1999." However, the mark assigned to applicant in this document is LOWAPR.NET, not LOWAPR.COM. Accordingly, we reject applicant's five-year claim as defective. We hasten to add that, even if we had a proper five-year claim, we would find such a claim insufficient in the circumstances of this case due to the high degree of descriptiveness of LOWAPR.COM.

We now turn to applicant's other evidence of acquired distinctiveness. The purpose of applicant's evidence, including the referenced assignment, appears to be merely to show that applicant used the mark on and since the claimed date of first use. The evidence fails to address either the extent of that use or the impact of that use on potential users of its identified services. The applicant's evidence also includes archival records to show that he used his mark from July 17, 1999.[1] None of this evidence is probative of whether or not applicant's mark has acquired distinctiveness. It merely shows that applicant, or his predecessor, used certain versions of the LOWAPR.COM mark on Internet web pages.

The only other evidence of record which arguably relates to applicant's claim of acquired distinctiveness is evidence from searches for "lowapr.com" from the Overture.com and WebCrawler.com search engines. Exhibits F and G to Applicant's Response of April 29, 2004. Applicant offers this evidence to show how he "advertised" his mark and services. However, this evidence likewise lacks probative value with regard to whether or not applicant's

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[1] For the purposes of this ex parte case we will take the archival records applicant offers with regard to his own web site at face value. *Cf. Paris Glove of Canada, Ltd. v. SBC Sporto Corp.*,__USPQ2d__, Cancellation No. 92044132 (TTAB, August 22, 2007).

mark has acquired distinctiveness. If it shows advertising at all, it fails to show the extent or impact of that advertising. We would expect that a search in any search engine for the specific Internet domain name "lowapr.com" would yield results relating to the site associated with that domain name. This evidence in no way demonstrates that anyone has performed this search on these or any other search engines and thereby accessed applicant's site and services. Thus, it does not show that anyone has been exposed to and come to associate applicant's mark with his services. We have no evidence, such as advertising efforts and expenditures, volume of traffic on applicant's site or any other evidence which would show that potential users of applicant's services have come to associate the LOWAPR.COM mark with applicant. Cf. *In re America Online Inc.*, 77 USPQ2d at 1625 (INSTANT MESSENGER held to have acquired distinctiveness for telecommunications services and other related services.).

Accordingly, we conclude that applicant has failed to show that LOWAPR.COM has acquired distinctiveness for "providing information via the Internet, in the field of debt and credit, namely credit repair, debt consolidation, credit cards, home and auto financing, insurance, and consumer protection laws."

Decision: We affirm the refusal to register the mark under Trademark Act Sections 2(e)(1) and 2(f).