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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Zimmer Technology, Inc.

Serial No. 78289413

Gerard T. Gallagher of Baker & Daniels LLP for Zimmer
Technology, Inc.

Michael Engel, Trademark Examining Attorney, Law Office 107
(J. Leslie Bishop, Managing Attorney).

Before Quinn, Walsh and Bergsman, Administrative Trademark
Judges.

Opinion by Walsh, Administrative Trademark Judge:

Zimmer Technology, Inc. (applicant) has applied to
register the mark 2-INCISION in standard characters on the
Principal Register for services identified as "educational
services, namely conducting conferences, seminars,
workshops, interactive Internet courses, and classes in the
field of orthopaedic surgical techniques" in International

Serial No. 78289413

Class 41.¹ The Examining Attorney has finally refused registration on the grounds that the mark merely describes the services under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1). Applicant has appealed. Both applicant and the Examining Attorney have filed briefs.

We affirm.

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).

¹ Application Serial No. 78289413, filed August 19, 2003, claiming first use of the mark anywhere and first use of the mark in commerce in February 2001 in a statement of use.

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).

The Examining Attorney states, "The proposed mark 2-INCISION is merely descriptive of the number of incisions required by the surgical techniques which are the subject matter of applicant's educational conferences, seminars, workshops, interactive Internet course and classes." Examining Attorney's Brief at 2.

The Examining Attorney has submitted pages from applicant's website. Those pages describe "**The Zimmer Minimally Invasive Solutions™ (MIS™) 2-incision hip replacement procedure.**" The procedure is described as "one of the least invasive hip replacement procedures available today" and one "that allows muscles and tendons to be avoided or separated, rather than cut." The procedure permits a faster and less painful recovery from surgery. The text emphasizes the most significant aspects of the technique, including "smaller incisions and less scarring - 2 smaller incisions of 1½ to 2 inches each, rather than one

10- to 12-inch incision." Applicant's specimen identifies this procedure, among others, as the subject matter of the identified educational services. Applicant has not disputed the fact that the procedure described in these pages from its website is the subject matter of the educational services identified in the application.

Applicant presents a number of arguments in support of its position that 2-INCISION is "at most suggestive" and not merely descriptive of the identified services. We find none of the arguments persuasive.

Applicant first argues that "2-INCISION" does not appear in relevant dictionaries and that this fact indicates that 2-INCISION is not merely descriptive. As the Examining Attorney correctly notes, the mere absence of a dictionary entry for the relevant term does not establish that the term is not merely descriptive. *In re Orleans Wines, Ltd.*, 196 USPQ 516 (TTAB 1977). In this case, the Examining Attorney has provided dictionary definitions of the component parts of the mark, "2" and "incision." However, it is applicant's own usage, noted above, which explicitly discloses the readily apparent descriptive significance of 2-INCISION as applied to the identified services. See *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110 (Fed. Cir. 1987). For the record, there is

nothing at all unusual about the combination of "2" and "incision" here which would render the combination distinctive. See, e.g., *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1317 (TTAB 2002) (SMARTTOWER merely descriptive of commercial and industrial cooling towers). 2-INCISION describes, in plain language, a key characteristic of the surgical procedure which is the subject matter of the identified educational services. Anyone encountering 2-INCISION in relation to the identified services, whether a medical professional or other interested individual, would readily understand the descriptive significance of 2-INCISION in this context.

Applicant also argues that "... the 2-INCISION mark most certainly does not immediately convey to consumers that use of the mark is for "educational services ... in the field of orthopaedic surgical techniques." Applicant's Brief at 7. Of course, we must determine whether 2-INCISION is merely descriptive as applied to the identified services, not in a vacuum. *In re Bright-Crest, Ltd.*, 204 USPQ at 593. Accordingly, we reject this argument.

Applicant also argues that, "The 2-INCISION mark could convey a variety of meanings to consumers, some of them completely unrelated to the medical or surgical field. For example, 2-INCISION could refer to clothing patterns ..."

Serial No. 78289413

Id. Again, the fact that the mark may have meanings in another context is not relevant for purposes of our determination here. *In re IP Carrier Consulting Group*, 84 USPQ2d 1028, 1034 (TTAB 2007). Accordingly, we reject this argument.

Applicant also argues throughout its briefs that 2-INCISION is at most suggestive, but applicant does not indicate what the suggestive, nondescriptive significance might be. We have considered those arguments and find them unpersuasive. Again, 2-INCISION conveys a clear descriptive meaning as applied to the services identified in the application. *See In re Active Ankle Systems Inc.*, 83 USPQ2d 1532 (TTAB 2007) (DORSAL NIGHT SPLINT held generic for orthopedic splints for the foot and ankle). Applicant has also argued that its mark is suggestive based on a number of prior cases. We have also considered those cases and find them readily distinguishable from this case. *See, e.g., In re Colgate-Palmolive Co.*, 406 F.2d 1385, 160 USPQ 733 (CCPA 1969) (CHEW 'N CLEAN held suggestive for dentifrice).

Finally, based on the record in this case we conclude that 2-INCISION is merely descriptive of "educational services, namely conducting conferences, seminars, workshops, interactive Internet courses, and classes in the

Serial No. 78289413

field of orthopaedic surgical techniques." 2-INCISION merely describes a key feature of the surgical procedure which is the subject matter of the identified educational services. Specifically, a significant feature of the hip-replacement procedure in question is the use of 2 incisions of 1½ to 2 inches each, rather than one incision of 10 to 12 inches. The 2-incision technique is significant because it is less invasive, it eliminates the need to cut certain muscles and tendons, and it reduces scarring and permits a faster and less painful recovery.

Decision: We affirm the refusal to register under Trademark Act Section 2(e)(1).