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Paper No. 9
Bottorff

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re ENDS, L.L.C.

Serial No. 76/184,516

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L.L.P. for ENDS, L.L.C.

Steven W. Jackson, Trademark Examining Attorney, Law Office
114 (K. Margaret Le, Managing Attorney).

Before Bottorff, Holtzman and Drost, Administrative
Trademark Judges.

Opinion by Bottorff, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register
of the mark EMERGENCY NURSING DOCUMENTATION SYSTEM (in
typed form) for goods identified in the application, as
amended, as "printed matter, namely, emergency room

documentation for specific complaints and payment coding guidelines.”¹

The Trademark Examining Attorney has refused registration under Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1), on the ground that applicant’s mark is merely descriptive of the identified goods. When the refusal was made final, applicant filed this appeal. Applicant and the Trademark Examining Attorney have filed opening briefs, but applicant did not file a reply brief and did not request an oral hearing. We affirm the refusal to register.

A term is deemed to be merely descriptive of goods or services, within the meaning of Trademark Act Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. See, e.g., *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987), and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). We find that the matter applicant seeks to register, EMERGENCY NURSING DOCUMENTATION SYSTEM, merely describes the nature, function and purpose of the goods because it immediately and directly informs

¹ Serial No. 76/184,516, filed December 22, 2000. The application is based on use in commerce under Trademark Act Section 1(a), 15 U.S.C. §1051(a), and August 1, 2000 is alleged in the application as the date of first use anywhere and the date of first use in commerce.

purchasers that the goods comprise a documentation system for use in the emergency nursing field.

"Emergency nursing" is the name of a discrete field of nursing, as is shown by the Nexis and Internet evidence made of record by the Trademark Examining Attorney. See, for example:

The medical center includes health and dental care, **emergency nursing** and physician services. (The Washington Times, March 1, 2002);

Cook will be responsible for administration and management of the center and Moran will manage the **emergency nursing** team. (The Tampa Tribune, January 14, 2002);

During the year, 14 Deaconess nurses passed an **emergency nursing** certification exam.. (The Spokesman-Review (Spokane, WA), December 28, 2001); and

Emergency Nursing Questions for the Internet - Test your skills for the **Emergency Nursing** exam interactively... (<http://www.springnet.com/ENA/indexena.htm>);

"Documentation system" describes, indeed names, applicant's goods, which comprise a system for documenting emergency nursing care.

There is nothing inherently distinctive about any of the words in the mark, as applied to applicant's goods. Applicant itself, on its website, uses these terms

descriptively (indeed generically) to refer to its product, as is shown by the following excerpts (emphasis added):

ENDS is a complaint specific template driven **documentation system** used in the Emergency Care setting to record pertinent information about patient assessment, interventions and outcomes. The **system** has been developed **by emergency nurses for emergency nurses** in an effort to maximize **nursing documentation** and charge capture with minimal effort.

... There are no other **systems** on the market that provide a concise and comprehensive **Emergency Nursing documentation product** that begins in triage and ends with disposition.

... You may also download an E-packet that contains more information about our **documentation system...**

This **system** allows nurses to have concise, in depth **documentation** with minimal time and effort.

The Internet evidence of record shows that others in the field use these terms as well:

... The HCMC Emergency Department became the first beta site for installation of the EmStat computer system in March of 1992. ... **Emergency nursing documentation** is totally electronic for the vast majority of our patients. (<http://www.hcmcem.com/Emstat.htm>);

MedHost's **emergency nursing documentation** module utilizes the same technology that has made EDMS the most intuitive and easiest-to-use patient management technology available. ... Chief complaint templates are used to structure the data entry and include implied rules to help guide the creation of additional chart

components such as treatments, notes, actions and discharge instructions that are critical for a complete nursing document.
(<http://www.medhost.com/02252000c.asp>)

Nor does the combining of the words comprising the mark into "emergency nursing documentation system" result in a composite which is inherently distinctive as applied to applicant's goods. The words in the mark are as merely descriptive when considered in the composite as they are when considered separately. Contrary to applicant's contention, that applicant may be the first or only user of the specific four-word composite term does not make the mark suggestive. *See In re National Shooting Sports Foundation, Inc.*, 219 USPQ 1018 (TTAB 1983).

Also contrary to applicant's contention, that the mark might not convey to purchasers each and every specific function, feature or capability of applicant's goods does not make the mark suggestive. A term need not immediately convey an idea of each and every specific feature of the applicant's goods in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods. *See, e.g., In re Pencils Inc.*, 9 USPQ2d 1410 (TTAB 1988); *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). Here, the mark

describes the most significant attribute and function of the goods, i.e., that the goods are a documentation system for use in the emergency nursing field.

In summary, and for the reasons discussed above, we find that EMERGENCY NURSING DOCUMENTATION SYSTEM is merely descriptive of applicant's goods, and that the Section 2(e)(1) refusal is proper.

Applicant, for the first time in its appeal brief, has asserted a claim of acquired distinctiveness under Section 2(f) and has presented evidence in support of that claim. The claim of acquired distinctiveness is made in the alternative to applicant's contention that the mark is inherently distinctive. We reject this claim and evidence as untimely.²

Applicant contends that, in its response to the first Office action, it stated (after arguing that the mark was not merely descriptive): "However, if the Trademark Attorney requires evidence of secondary meaning prior to

² Because applicant's Section 2(f) claim is untimely, we need not reach the issue of the sufficiency of applicant's Section 2(f) evidence. We would note, however, that in view of the highly descriptive nature of applicant's mark, a very substantial evidentiary showing of acquired distinctiveness would be required in order to justify registration of the mark under Section 2(f). See *Yamaha Int'l Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 1581, 6 USPQ2d 1001, 1008 (Fed. Cir. 1988) ("...the greater the degree of descriptiveness the term has, the heavier the burden to prove it has attained secondary meaning").

final passage of the mark to publication, the Applicant would be happy to provide proper evidence, including client testimonials." Applicant further contends that the Trademark Examining Attorney "did not ask the Applicant to produce the evidence of secondary meaning," but rather "issued a final refusal without providing the Applicant the opportunity to produce its evidence. Applicant respectfully requests the opportunity to do so herein."

Contrary to applicant's contention in its appeal brief, it was not the Trademark Examining Attorney's duty to "ask the Applicant to produce the evidence of secondary meaning," nor did the Trademark Examining Attorney deprive applicant of an opportunity to make a proper Section 2(f) claim by going final on the mere descriptiveness refusal in the second Office action. If applicant wished to make an alternative claim of acquired distinctiveness under Section 2(f), it was incumbent on applicant to clearly assert such a claim either in its response to the first Office action or in a timely-filed request for reconsideration of the final refusal. Applicant did not do so,³ but instead waited

³ Applicant's statement in its response to the first Office action, i.e., that "if the Trademark Attorney requires evidence of secondary meaning prior to final passage of the mark to publication, the applicant would be happy to provide proper evidence," is too ambiguous and contingent to be deemed a Section 2(f) claim. See TMEP §1212.07 ("To base a registration on acquired distinctiveness under §2(f), 15 U.S.C. §1052(f), an

until its appeal brief (which, having been filed more than six months after the issuance of the final refusal, cannot be accepted as a timely request for reconsideration under Trademark Rule 2.64(b)) to assert its Section 2(f) claim.

Thus, applicant's assertion of its Section 2(f) claim is untimely, as is its submission of evidence in support thereof. See Trademark Rule 2.142(d).

Decision: The refusal to register under Trademark Act Section 2(e)(1) is affirmed.

applicant must indicate its intent to do so."). Moreover, applicant's stated contingency to presentation of its Section 2(f) evidence cannot have been satisfied, because the Trademark Examining Attorney cannot "require" evidence of acquired distinctiveness as a precondition to allowance of a mark for publication. See TMEP §1212.02(g). In any event, it should have been apparent to applicant upon receipt of the final refusal that the Trademark Examining Attorney did not deem the above-quoted statement to be an assertion of a Section 2(f) claim. Applicant then had six months in which to file a request for reconsideration formally asserting such claim and providing evidence in support thereof. Applicant failed to do so.