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Paper No. 30
EJS

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re William J. Hardie

Serial No. 75/315,021

Jill M. Pietrini, Edward M. Jordan and Michael B. Adlin of
Manatt, Phelps & Phillips, LLP for William J. Hardie

Jeffrey S. Molinoff, Trademark Examining Attorney, Law
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Before Cissel, Seeherman and Quinn, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

William J. Hardie has appealed from the final refusal of the Trademark Examining Attorney to register HOOTENANNY as a mark for "entertainment services in the nature of live musical performances."¹ Registration has been refused on the ground that applicant's asserted mark is generic and that, if the term is not generic, it is merely descriptive

¹ Application Serial No. 75/315,021, filed June 26, 1997 and asserting first use and first use in commerce as of May 15, 1995.

and has not acquired distinctiveness as a mark for applicant's services.

This appeal has had a rather complicated history. A final refusal first issued on November 16, 1998, on the ground that applicant's mark is merely descriptive of his identified services. Applicant appealed from that refusal, both applicant and the Examining Attorney filed briefs, and applicant filed a reply brief. An oral hearing was also scheduled. A few days before that hearing was to be held, applicant filed a consented motion to remand so that applicant could amend his application to seek registration pursuant to Section 2(f) of the Trademark Act, 15 U.S.C. 1052(f). Because the Examining Attorney consented to the request for remand, the request was granted, and the application was remanded to the Examining Attorney to consider the Section 2(f) claim. See TBMP 1207.02. After the Examining Attorney made final a refusal to accept that claim, the appeal was then resumed, and applicant and the Examining Attorney filed supplemental appeal briefs.² Applicant withdrew his request for an oral hearing.

² Applicant stated in his supplemental appeal brief that he incorporated all of his previous filings by reference in their entirety. In the reply brief filed as part of his first set of appeal papers, applicant objected to certain exhibits submitted by the Examining Attorney with his original appeal brief, namely, two dictionary definitions and complete copies of articles, excerpts of which had been previously submitted during the

There is some dispute as to the issues on appeal. The Examining Attorney asserts that because applicant amended his application to seek registration pursuant to Section 2(f), he has acknowledged that his mark is merely descriptive. Therefore, the Examining Attorney contends that the issue is whether applicant's claimed mark is generic or, if not, whether applicant has established that the mark has acquired distinctiveness. Applicant argues that the question of mere descriptiveness is still at issue, pointing to that section of the Trademark Trial and Board Manual of Procedure (TBMP) that provides that an

examination of the application. The basis for the objection was that the exhibits had not been made of record prior to the appeal. Trademark Rule 2.142(d). Because the application was subsequently remanded (the course provided by Trademark Rule 2.146(d) if the applicant or Examining Attorney wishes to submit additional evidence after an appeal is filed), it is assumed that applicant's objection has been withdrawn. In any event, the Board may take judicial notice of dictionary definitions, and complete copies of articles which were previously submitted in excerpt form are not considered to be new evidence. See **In re Bed & Breakfast Registry**, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986). Further, despite what might be characterized as technical irregularities, we have considered the language quoted by applicant from the prefaces of the dictionaries.

We also note that in his supplemental appeal brief applicant complains that the Examining Attorney submitted with his final Office action articles referring to third parties' "alleged" uses of HOOTENANNY rather than inquiring about the uses and giving applicant time to investigate them. Although applicant has not made a formal objection to the submission of the articles, we confirm that the Examining Attorney did nothing inappropriate in his examination. Examining Attorneys may, and generally do, make evidence of record with final Office actions. If applicant had wished to submit evidence to rebut the articles, he could have done so by filing a request for reconsideration or even a request for remand.

applicant may assert that its mark is not merely descriptive and may, in the alternative, assert a claim of acquired distinctiveness.

Applicant is correct that an applicant may argue inherent distinctiveness and acquired distinctiveness in the alternative. However, in this case applicant did not make his claim of acquired distinctiveness as an alternative position to his assertion that his mark is not merely descriptive. His request for remand unequivocally amends the application to assert a Section 2(f) claim, and makes no mention that this is in the alternative, or that he was maintaining his claim that his mark is not merely descriptive. Thus, the Section 2(f) amendment acts as a concession that applicant's mark is merely descriptive.

Yamaha International Corp. v. Hoshino Gakki Co., 840 F.2d 1572, 6 USPQ2d 1001 (Fed. Cir. 1988). We would add that this discussion is largely irrelevant, in view of our finding, discussed infra, that HOOTENANNY is generic for applicant's identified services.

The issues before us in this appeal, therefore, are whether applicant's claimed mark is generic or, if not, whether applicant has established that it has acquired distinctiveness as a mark identifying applicant's services.

In support of his position that HOOTENANNY is generic, the Examining Attorney has made of record, inter alia, the following definitions of "hootenanny" taken from various dictionaries:

1. an informal performance by folk singers. 2. *Informal*. An unidentified or unidentifiable gadget.³

1. a social gathering or informal concert featuring folk singing and, sometimes, dancing. 2. an informal session at which folk singers and instrumentalists perform for their own enjoyment. 3. *Older use*. A thingumbob. [1910-15; orig. uncert.]⁴

1. *Music*. An informal performance by folk singers, typically with participation by the audience. 2. *Informal*. An unidentified or unidentifiable gadget.⁵

The Examining Attorney also submitted excerpts and/or articles taken from the Nexis data base, including the following:

This weekend, the hall celebrates its first birthday, belatedly, with a hootenanny and a benefit concert honoring the legacy of Woody Guthrie. "Newsday," September 26, 1996

Arizona Roadhouse & Brewery: New Year's Eve Hootenanny with Grave Danger,

³ New Riverside University Dictionary, © 1988.

⁴ Random House Compact Unabridged Dictionary, Special 2d ed. © 1996.

⁵ The American Heritage Dictionary of the English Language, 3d ed. © 1992.

Trophy Husbands, Nitpickers, Chicken,
Tammy Patrick, Mark Insley, and Heather
Rae and the Moonshine Boys. 8 p.m.,
\$15. 21 and over.
"The Arizona Republic," December 28,
2000

The Ryan Adcock band hosts another Yule
hootenanny tonight at York Street
Cafe....
"The Cincinnati Enquirer," December 15,
2000

The Temecula Art Gallery will present a
Hootenanny featuring folk group Wolf
Valley at 8:30 p.m. at 42031 Main
St....
"The Press-Enterprise," (Riverside, CA)
September 12, 1997

An old-fashioned Saturday-night
hootenanny celebrating Woody Guthrie at
the Odeon rock club here stayed true to
form.
"Chicago Sun-Times," October 1, 1996

July 6-9: Winnipeg Folk Festival.
Winnipeg. Folk music hootenanny
spotlights more than 200 performers.
Concertgoers can also enjoy a craft
village and an international food area.
"The Atlanta Journal and Constitution,"
April 2, 2000

Area residents are invited to share
song and fun this Sunday as the Santa
Monica Traditional Folk Music Club
gathers round for its hootenanny in
Pete's Hollow at the Peter Strauss
Ranch....
"Ventura County Star" (CA), July 7,
1999

...“But were I sitting around with a youth group at a summer camp or with adults at a hootenanny, I’d think her music was wonderful.”

“Star Tribune” (Minneapolis, MN)
June 19, 1999

James Kelly, a singer and guitarist, has been performing at the Buffet since 1986, when Bearden agreed to host an occasional hootenanny. “It was the first place in the city that would feature original country music,”....

“The Atlanta Journal and Constitution,”
December 31, 1999

...“I got started playing music right after boot camp, and even did a hootenanny in San Diego, and figured that might be what I wanted to do someday.

“The Arkansas Democrat-Gazette,”
July 16, 1999

...And the music: Country music was never meant for stadiums and high-tech hootenannies, regardless of how many speakers and video screens you have....

“The Richmond Times Dispatch,” May 17, 1999

...Hudson River Sloop Clearwater Festival. Hootenanny/fall sail, with pumpkin pie, hot cider and music, 2-5 p.m. Saturday, Oct. 3

“The Times Union” (Albany, NY),
September 24, 1998

According to Mr. Golden, the hootenanny was started six years ago by local

musician Eric Bruton as a winter concert to benefit public radio. The event became so popular that a summer Hootenanny was added, and now the series runs several times a year, always benefiting a local group....
"Morning Star" (Wilmington, NC), July 14, 2000

Applicant has responded to this evidence with several arguments. First, applicant states that the dictionary definitions show that "hootenanny" has two meanings: an informal performance by folk singers, and an unidentified or unidentifiable object. Even if we accept that the second meaning is known to the public (and the dictionaries characterize this meaning as "informal" and "older use"), when the word HOOTENANNAY is used in conjunction with "entertainment services in the nature of live musical performances," clearly the second meaning would not apply. Marks must be viewed in connection with the goods or services with which they are used to determine their meaning to the public. For example, the fact that a "table" may mean one thing when used in connection with a display of data does not preclude it from being generic when used for a piece of furniture.

Applicant asserts that generic use of a term in dictionaries is not dispositive of the issue of genericness. Applicant points to the disclaimers in the

dictionaries, one of which is quoted by applicant as stating that "no definition in this Dictionary is to be regarded as affecting the validity of any trademark."⁶ We are not persuaded by this argument. Such a disclaimer is typically made in case the dictionary includes as an ordinary word what is, in fact, a trademark. However, in this case, two of the dictionaries from which definitions of "hootenanny" were quoted in this opinion, including the dictionary in which the above disclaimer was made, were printed prior to applicant's claimed first use date in 1995. Therefore, the dictionaries cannot be said to have inadvertently misused applicant's trademark as a common noun; on the contrary, the dictionaries show that "hootenanny" was recognized as a common noun prior to applicant's use.

Applicant also argues that the dictionary definition of "hootenanny" does not apply to his services because his performances are not informal, having scheduled dates,

⁶ This language was quoted in applicant's first appeal brief, with the statement that it was taken from the preface of the New Riverside University Dictionary. We note that, although applicant strenuously objected to the Examining Attorney's submission of dictionary definitions and complete copies of previously provided NEXIS articles with his appeal brief, see discussion at footnote 2, applicant had no concern about including the quote from the dictionary preface for the first time with his appeal brief, without even the submission of the actual preface. Despite what might be viewed as technical irregularities, we have considered the quoted language.

times and places, and are events for which tickets are sold in advance. Applicant points out that his specimens, an advertisement for his HOOTENANNY '97 concert,⁷ does not feature folk singing or audience participation as a feature of his services, and the performers are not folk singers. This statement was made by applicant's attorney in his first appeal brief, rather than applicant, and it seems to be contradicted by the record. It appears to us that certain of the musicians listed in the specimen ad, for example, Steve Earle, described in the July 7, 1997 "Los Angeles Times" article submitted by applicant as a "Texas 'hillbilly'", would be considered a folk musician. There is evidence that folk musicians have also performed at applicant's HOOTENANNY events in other years. The July 3, 1995 "Los Angeles Times" article submitted by applicant describes the Lucky Stars band, which appeared at the Hootenanny Festival that year, as having "traditional country sounds", and reports that the Reverend Horton Heat, another act, performed the "hillbilly rocker 'Baddest of the Bad'" while Big Sandy & His Fly-Rite Boys played an "old-fashioned set of country-fried music." The July 7,

⁷ We make no comment as to whether the actual mark applicant is using to identify his services is HOOTENANNY followed by the particular year, rather than HOOTENANNY per se. The Examining Attorney viewed the specimens as supporting the use of HOOTENANNY per se, and this issue is therefore not before us.

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1998 "Los Angeles Times" article, also submitted by applicant, states that Buck Owens, "the Bakersfield country-music patriarch," was a featured performer at Hootenanny '98. In addition, the July 6, 1998 "Orange County Register" article submitted by applicant states that "audiences sang and cheered during an intensely tight and clear set."

Even assuming that applicant's concerts do not currently include folk musicians, there are still problems with applicant's argument. Leaving aside the question of misdescriptiveness, what applicant fails to realize is that his services are identified as "entertainment services in the nature of live musical performances," and these services would certainly encompass the dictionary definitions of "hootenanny." A registration for HOOTENANNY for live musical performances would thus give him the right to HOOTENANNY for entertainment that fits the traditional, dictionary definition of a hootenanny.

More importantly, the newspaper excerpts submitted by the Examining Attorney show that the recognized meaning of "hootenanny" has expanded so that it is no longer limited to folk music entertainment. See, for example, the following:

... The band crisscrossed the country twice last year, bringing its greasy, good-time rock 'n' roll party to crowds from California to the Carolinas. The hard-rock hootenanny continues Saturday, when the band performs at the Boardwalk in Orangevale.

"Sacramento Bee," March 24, 2000

DFW HILTON: Sponsored by the Bula Boys, a young professional party crowd, this hootenanny features Slippery When Wet running the gamut of rock, dance and country to welcome the New Year.

"The Dallas Morning News," December 31, 1993

If you don't make it out to the blues-jazz hootenanny this weekend at the Liberty Memorial, you still can see two of the festival's best acts perform (two who don't come around here too often), but in a smaller setting.

"The Kansas City Star," July 16, 1999

Midway through the Thursday Night Rhombus Room, a weekly hootenanny at the Hexagon Bar during which a band plays rock covers....

"Star Tribune (Minneapolis, MN), November 17, 2000

...A drenching, icy downpour failed to dampen spirits as American's latest arena-rock gods staged a funk hootenanny for almost three hours.

"The Denver Post," December 27, 1998

The guys are working with local bands of all genres to bring an eclectic mix of music and people together for this Halloween hootenanny.

"Sarasota Herald-Tribune," August 6,
1999

...The two are sponsoring The Melungeon
Mardi Gras, a "two-night crazy melting-
pot of a hoot-nanny" on Feb. 13 and 14
at the Mudpie.

Performing the first night will be the
Shaking Ray Levi's Lil' Rock Act with
special guests. They will perform
their "de-rangements" of Pink Floyd,
Yes, King Crimson, Capt. Beefheart and
Willie Nelson numbers. The show starts
at 8 p.m.

"Chattanooga Free Press," February 12,
1997

A Barbecue Bash is scheduled at 7 p.m.
the same day at 1112 Whispering Pines,
followed by An Evening of Motown,
Downtown and Hoot Nanny Get Down from
the '60s at 7 p.m. May 16 at 830 Elm.
"The Daily Oklahoman," May 1, 1992

The evidence retrieved from the NEXIS data base also
indicates that the term "hootenanny" is now particularly
applicable to rockabilly and roots-rock music which,
according to many of the articles submitted by applicant,
is the type of music featured at his HOOTENANNY events:⁸

... Saturday, IOTA hosts another "DC
Roots Rock Allstars" show, featuring
folks taking time off from their usual

⁸ See, for example, articles in the "Los Angeles Times"
submitted by applicant on March 14, 2000: "...Saturday's roots-
rock oriented Hootenanny Festival" (June 30, 1995); "Hootenanny
'96 at Oak Canyon Ranch is geared to music fans who crave rock
'n' roll that has a strong sense of roots" (July 4, 1996);
"...third annual daylong, outdoor concert, Hootenanny '99. The
roots-music celebration is July 3..." (April 24, 1999).

bands to put on a hootenanny of the highest order. There's Jake Flack, Chris Watling, ... and they'll be doing the most eclectic selection of songs (swing, country, holiday, blues, rockabilly, jazz standards, Broadway and lots of rock) you'll possibly ever hear coming from one stage.
"The Washington Post," December 15, 2000

In honor of our nation's 233rd birthday, the Grand Emporium, 3832 Main St., is throwing a Kansas City Americana hootenanny Thursday night, featuring three of the area's best roots-rock bands...

"The Kansas City Star," June 27, 1999

It seems that all old punk rockers end up going in one of two directions—either into the roots rock/alt. country/hot rod/hootenanny scene (as la Social Distortion's Mike Ness) or into that experimental netherworld where free jazz meets noise, punk....
"New Times Los Angeles," November 11, 1999

Applicant also dismisses certain of the NEXIS excerpts submitted by the Examining Attorney because they do not spell "hootenanny" as applicant does. See, for example:

Highlights of the weekend include a Cowboy Hoot-n-Nanny, with cowboy humor, songs and storytelling...
"The Dallas Morning News," November 26, 1995

Here's a look at what's happening at the Orange County Fair today:
... "Hoot 'n Nanny Hoe Down" contest
"Los Angeles Times," July 8, 1995

...And maybe that's the reason sultry singer Victoria Boone is roping in country-music fans with her hoote-nanny blend of country and R&B. "Essence," April 1995

Again, we are not persuaded by this argument. These variant spellings would still be clearly perceived as referring to the word for which dictionaries give the correct spelling as "hootenanny." As such, the articles provide evidence as to the generic nature of this term.⁹

At this point, we think it appropriate to make some general comments about the evidence from the NEXIS data base submitted by the Examining Attorney. First, applicant points out that some of the articles made of record by the Examining Attorney are from foreign publications. We have not considered such articles, nor have we considered any articles which are identified only as press service reports, since we have no way of knowing whether they actually appeared in newspapers. Applicant also,

⁹ As an aside, we note that, as opposed to applicant, who has adopted the dictionary spelling of "hootenanny," often applicants who wish to register a generic term will apply for a variant spelling of that term, and argue that it is different from the actual generic term. That argument, too, is unavailing. See **Weiss Noodle Company v. Golden Cracknel and Specialty Company**, 290 F.2d 845, 129 USPQ 411 (CCPA 1961) (defendant's mark HA-LUSH-KA held common descriptive name even though Hungarian word spelled "haluska" because hyphenating the phonetic version of a term does not destroy its identity).

throughout his brief, refers dismissively to the articles as being hand-picked, and suggests that all the other articles retrieved by the Examining Attorney's searches would have favored applicant. A review of the file shows that the Examining Attorney submitted results from various NEXIS searches with each of the four Office actions. In the first Office action, nine stories were retrieved, and excerpts from all nine were made of record.¹⁰ With the second Office action, six entire articles were provided. The file does not reflect the number of articles retrieved. The exhibits attached to the third Office action show that the Examining Attorney originally did a search for the word "hootenanny," and 1985 references were found. Of these, the Examining Attorney printed five articles of the first nine. Apparently the Examining Attorney decided to refine the search, rather than read through almost 2000 articles, because he then did another search for "hootenanny" within 10 words of "music." That search retrieved 236 articles, and he printed 16 of the first 42. He then did the same search, and printed 8 articles of the first 53. Thus, he submitted approximately 24 articles of the first 53

¹⁰ The Examining Attorney subsequently submitted complete versions of the articles with his appeal brief, as discussed in footnote 2.

articles which were retrieved. It would appear from this that he did not read all 236 articles, but stopped his review after reading approximately the first 53. With the final Office action he did another search of "hootenanny" which retrieved 2285 references. He printed 19 of the first 20 articles, then refined the search further, searching "hootenanny" within ten words of either "performance" or "music" or "concert." This search retrieved 380 articles (presumably including the 236 found in the earlier search with this same strategy), and he made of record 41, taken from the first 145. Again, presumably he stopped his review of the articles at about this point. He also did a search of "hootenanny" within ten words of "rock" or "jazz," which retrieved 85 articles, of which he printed 43.¹¹

We find no fault with the Examining Attorney's decision not to make of record every article retrieved by the NEXIS searches. On the contrary, this Board has often criticized Examining Attorneys for overburdening the file with repetitive or irrelevant articles, as may happen when a NEXIS search will retrieve "noise." In this case, the Board would not expect the Examining Attorney to review

¹¹ Some of the articles submitted with the final Office action were duplicates.

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almost 2300 articles retrieved by the various searches, and would certainly not want the Examining Attorney to make all these articles of record. This is also true of a search which retrieves 236 articles, or 380. As we have said before, it is not necessary that an Examining Attorney submit all stories found, especially where there are a large number of them. It is only necessary that a sufficient number of them should be made available to enable a determination to be made as to the meaning of the term to the relevant public. **In re Homes & Land Publishing Corporation**, 24 USPQ2d 1717 (TTAB 1992). The number of articles made of record in this case by the Examining Attorney--well over 100--is certainly sufficient for that purpose. We have also said that the Examining Attorney should indicate whether the articles submitted constitute a representative sample of the whole of the search results. Id. The Examining Attorney did not make such a representation in this case. However, our review of the articles shows that they were not hand-picked to show only generic usage. Applicant himself says that some of the articles refer to his own musical events. And we note that some of the articles use "hootenanny" as an adjective, to indicate a particular style, or in an analogous sense, to refer to something with the characteristics of a

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"hootenanny."¹² Thus, this is not a situation in which we must assume that the articles which were not submitted support applicant's position that HOOTENANNY is not generic. Cf. **In re The Monotype Corporation PLC**, 14 USPQ2d 1070 (TTAB 1989).

Other than criticizing the evidence submitted by the Examining Attorney, applicant's only response to the evidence of genericness (and in support of his claim of acquired distinctiveness) are his two declarations, one from March 2000 and the second dated October 2, 2000. The October declaration, aside from the exhibits, is an expanded and updated version of the earlier declaration, and we therefore report the information in the later one. Applicant states that the mark HOOTENANNY has been in substantially exclusive and continuous use in commerce for entertainment services in the nature of live musical performances for over five years; that applicant has offered six large festivals which included live musical performances under the mark HOOTENANNY, specifically HOOTENANNY '95, HOOTENANNY '96, HOOTENANNY '97 and so on through HOOTENANNY 2000. Approximately 40,000 people

¹² For example, "It was the largest Evangelical mass meeting of its kind in history and turned into a sort of leftist hootenanny....." "National Review," Oct. 18, 1985.

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attended the six concerts, ranging from a low of 3900 in 1997 to a high of 10,000 in 1999. He has spent over \$100,000 advertising the six HOOTENANNY festivals, ranging from \$10,000-\$12,000 in 1995, 96 and 97 to \$25,000 in 1999 and 2000. The advertisements appeared in "LA Weekly," "San Diego Dipper," "The Los Angeles Times," "a variety of local and lifestyle newspapers and magazines," and on KROQ radio. Applicant also states that his advertising has been disseminated throughout the United States. It appears to the Board that several of the exhibits submitted as evidence of these advertisements are flyers or press releases.

Applicant also states that the HOOTENANNY festivals have received unsolicited attention, including articles in "The Los Angeles Times," "The San Diego Union Tribune," "Rolling Stone" "Hot Rod Magazine" and "hundreds of local and lifestyle magazines," as well as segments aired on ABC and MTV.

Applicant has also made sales "through the use of the HOOTENANNY mark," with gross revenues from the HOOTENANNY festivals of over \$1.3 million. The flyers/advertisements submitted by applicant with his declaration refer to merchandise, recordings and a "custom car show, beer, food, vendors," while the July 2, 1999 "Orange County Register"

article submitted by applicant advises people who attend Hootenanny '99 to "bring lots of extra money; you'll have plenty of stores, vintage clothes booths, vintage toy booths and food vendors to spend it on." These activities may be the source of the gross revenues. Finally, applicant states that he owns a registration for HOOTENANNY for a series of musical sound recordings.

A review of the "unsolicited articles," which are generally reviews of the HOOTENANNY festivals or calendar announcements of upcoming events, shows that they are primarily from local papers, in particular, "OC Weekly" (Orange County, CA); "Los Angeles Times" (generally the Orange County edition); "The Orange County Register"; "The Press-Enterprise" (Riverside, CA); and "The San Diego Union-Tribune."¹³ Many of these articles are about

¹³ There is one article from "The Detroit News," (December 10, 1998) in the group submitted by applicant which includes a brief reference to "Holiday Hootenanny '98" appearing at Cobo Arena in Detroit. It is not clear to us whether this reference is to applicant's services; not only is the mark different, but all of the other articles refer to an event held in Southern California. Further, in applicant's declaration he states that he has put on only six events, and does not mention Holiday Hootenanny '98. Moreover, the NEXIS evidence submitted by the Examining Attorney include articles about the Holiday Hootenanny in Detroit, which indicates it was a charitable event, and applicant is not listed as one of the organizers. Accordingly, we have not considered this article to support applicant's claim that HOOTENANNY is not generic or that it has acquired distinctiveness.

particular artists, and mention the HOOTENANNY event tangentially.

Applicant has also submitted articles from "Custom Rodder" and "Hot Rod Deluxe"; these articles highlight the car show portion of the HOOTENANNY events.

The determination of whether a mark is generic is made according to a two-part inquiry: "First, what is the genus of the goods or services at issue? Second, is the term sought to be registered...understood by the relevant public primarily to refer to that genus of goods or services." **In re Dial-A-Mattress Operating Corporation**, 240 F.3d 1341, 57 USPQ2d 1807 (Fed. Cir. 2001), quoting **H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.**, 782 F.2d 987, 990, 228 USPQ 528, 530 (Fed Cir. 1986).

The answer to the first inquiry, the genus of the services at issue in this case, is "entertainment services in the nature of live musical performances," as applicant's own identification makes clear. As for the second question, the dictionary and NEXIS evidence submitted by the Examining Attorney make clear that the term HOOTENANNY is understood by the relevant purchasing public--those who attend such musical events--to refer to live musical performances. We have quoted extensively from the NEXIS evidence in order to show that "hootenanny" is not an

arcane word that one or two newspaper reporters may use. Rather, the numerous mentions, in newspapers from all over the country, show that those who read about musical performances, presumably the potential purchasers of the services, have been exposed to this term. Moreover, the frequent use of the term without explanation reflects an understanding on the part of newspaper reporters and editors that the public is aware of the meaning of the word.

Considering all the evidence of record, including the evidence of acquired distinctiveness submitted by applicant, which will be discussed later, we find that HOOTENANNY is a generic term for applicant's services, and that the refusal of registration on this basis must be affirmed.

We note that applicant has complained that the Examining Attorney has not discussed the Federal Circuit case **In re The American Fertility Society**, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999). In that case, which involved the question of whether the phrase SOCIETY FOR REPRODUCTIVE MEDICINE was generic, the Court found that a phrase could not be proved to be generic solely on the genericness of the constituent elements. However, that is not the situation before us, since the term sought to be

registered is the single word HOOTENANNY, and the evidence submitted by the Examining Attorney goes directly to that word. Thus, although the American Fertility case involved the issue of genericness, we do not otherwise find it relevant to our decision herein.

In view of our affirmance of the refusal of registration on the ground of genericness, the question of acquired distinctiveness is moot. However, in order to render a complete opinion, we will now consider applicant's claim of acquired distinctiveness, assuming for this discussion that applicant's mark is not generic. Even if not generic, though, applicant's mark must be deemed to be highly descriptive. The greater the descriptiveness of the term, the greater the evidence necessary to prove acquired distinctiveness. See **Yamaha International Corp. v. Hoshino Gakki Co.**, supra. Thus, the evidence necessary for applicant to prove acquired distinctiveness is great indeed.

After thoroughly reviewing the evidence, we find that applicant has not met his burden of demonstrating acquired distinctiveness. Applicant has discussed at some length that he has made a prima facie showing of distinctiveness through his statement that he has made substantially exclusive and continuous use of the mark in commerce.

However, the statute states that the Commissioner may accept such a statement as proof of acquired distinctiveness, not that the Commissioner must accept it. In this case, because of the high degree of descriptiveness of the term sought to be registered, more is required. Moreover, the Examining Attorney has rebutted any prima facie showing of distinctiveness by evidence that applicant's use has not been substantially exclusive. We note, in particular, the following:

Bring the family: Eclectic music,
storytelling, puppetry and interpretive
juggling are yours at the Haw River
Hootenanny today at the Skylight
Exchange, 405 W. Rosemary St., Chapel
Hill.
"The News and Observer" (Raleigh, NC),
March 24, 2000

Concert: The Woody Guthrie Birthday
Hootenanny featuring Arlo Guthrie, the
Kingston Trio and Country Joe McDonald
When: 7:30 p.m. Wednesday...
"Tulsa World," July 13, 1999

Old-Fashioned Hootenanny With Harry
Tuft. 8 p.m. May 8, Swallow Hill Music
Hall....
"Denver Westword," May 7, 1998

The Dallas Folk Music Society will hold
its Monthly Hootenanny at 7 p.m.
Saturday
"The Dallas Morning News," September 9,
1999

A benefit for JAMPAC, the local music industry's political activism organization, this self-proclaimed "Northwest Hootenanny" has a few predecessors. ...

In a recent phone interview, Southern Culture drummer Dave Hartman called the band's home-grown concert series....

"The Seattle Times," July 1, 1999

Independent Rock & Roll Hootenanny Series

Various locations in Western Washington and Oregon, 360-786-1133

Organized by members of local unsigned bands SoyLint Green and Frequency db, this series of small-town, all-ages shows....

"The Seattle Times," May 27, 1999

In connection with the city's annual Freedom Festival, the Del City Parade and Hootenanny will include the parade, live music and other entertainment....

"The Daily Oklahoman," August 19, 1998

Nor are the sales and advertising figures provided by applicant sufficient to demonstrate acquired distinctiveness. Applicant has put on six events, one each year, with a total attendance of 40,000. The events have all been held in Southern California. During this time, advertising expenditures have reached a total of \$100,000, and much of the advertising appears to be in the form of flyers. Although applicant has also received free publicity such as newspaper articles about the HOOTENANNY

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events, articles about performers in which the HOOTENANNY event is mentioned, and listings in newspaper calendars of upcoming events, virtually all of this publicity has been limited to Southern California and, in particular, Los Angeles, Orange County and San Diego.

The small number of entertainment events, the rather limited number of consumers of the services and the local reach of the advertising and other publicity are not enough to demonstrate that HOOTENANNY has acquired distinctiveness as a mark for entertainment services in the nature of musical performances, particularly in view of the number of third parties who use this term to refer to such services.

Decision: The refusal of registration is affirmed on the ground that HOOTENANNY is generic for the identified services and that, even if the term were not generic, the refusal of registration is affirmed on the ground that HOOTENANNY is merely descriptive and has not acquired distinctiveness as a mark.