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Hearing:  
28 NOV 2001

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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Primos, Inc.

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Serial No. 75/550,779

L. Grant Foster, Esq. of Foster & Foster L.L.C. for Primos, Inc.

Dominick John Salemi, Trademark Examining Attorney, Law Office 107 (Thomas Lamone, Managing Attorney).

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Before Holtzman, Rogers and Drost, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

Primos, Inc. (applicant) filed an application to register the mark HUNTING CALLS (in typed form) for "game calls" in International Class 28. The application (Serial No. 75/550,779) was filed on September 10, 1998, and it claims a date of first use and a date of first use in commerce of January 1993. The application, as filed, sought registration under Section 2(f) of the Trademark Act (15 U.S.C. § 1052(f)) as a result of the mark becoming

distinctive because of substantially exclusive and continuous use of the mark in commerce for more than five years preceding the filing date of the application. In response to the Examining Attorney's first Office action, applicant disclaimed the word "calls."

The Examining Attorney initially refused registration on the ground that applicant's mark was highly descriptive and that applicant's claim of five years use was not sufficient to establish that the mark had become distinctive when applied to the goods. Applicant responded to the refusal to register by submitting evidence of distinctiveness. This evidence included, inter alia, a declaration from applicant's president, copies of applicant's advertising, and copies of advertising materials of others. In his declaration, applicant's president states that applicant has sold over \$15,000,000 in game calls and it has spent more than \$1,230,000 in print advertising to promote calls sold under the "Hunting Calls" trademark.

In the second Office action, the Examining Attorney made the refusal final and relied on several printouts from an electronic database. In response to the final refusal, applicant filed a notice of appeal and a request for reconsideration. With its request for reconsideration,

applicant submitted 28 exhibits and a second declaration from its president. Applicant's president stated that "I cannot recall a single incident of a company referring to any of their products as 'hunting calls' or referring to their companies as 'hunting calls companies.'"

Declaration, p. 1. The exhibits consisted primarily of advertising of other companies that do not use the term "hunting calls" and applicant's advertising.

Responding to the request for reconsideration, the Examining Attorney maintained the refusal under Section 2(e)(1) and advised applicant that additional evidence shows the mark "to be a generic term for a type of hunting aid used by game and wildlife hunters." Office Action dated May 31, 2000, p. 1. The Examining Attorney included numerous printouts from an electronic database showing that the term "hunting calls" is used to refer to a hunting device.<sup>1</sup>

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<sup>1</sup> Applicant's objection to the evidence that the Examining Attorney submitted is not well taken. While the record should normally be complete prior to the filing of the appeal (37 CFR § 2.142(d)), in this case applicant filed a request for reconsideration and submitted additional evidence. Under these circumstances, the Examining Attorney may submit additional evidence. TMEP § 1105.04(g) ("If, in addressing the applicant's request for reconsideration, the examining attorney wishes to add additional evidence to the record, he or she may do so by including such evidence in the Office action which advises the applicant of the status of the application and that the refusal or requirement has not been withdrawn"). See also TBMP § 1207.04 ("When a timely request for reconsideration of an appealed action

Both applicant and the Examining Attorney filed briefs<sup>2</sup> and an oral hearing was subsequently held on November 28, 2001.

DESCRIPTIVENESS

For a mark to be merely descriptive, it must immediately convey knowledge of the ingredients, qualities, or characteristics of the goods or services. In re Gyulay, 820 F.2d 1216, 1217, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987); In re Quik-Print Copy Shops, Inc., 616 F.2d 523, 525, 205 USPQ 505, 507 (CCPA 1980). To be "merely descriptive," a term need only describe a single quality or property of the goods or services. Meehanite Metal Corporation v. International Nickel Co., 262 F.2d 806, 807, 120 USPQ 293, 294 (CCPA 1959). Descriptiveness of a mark is not considered in the abstract, but in relation to the particular goods or services for which registration is

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is filed (with or without new evidence), the Examining Attorney may submit, with his or her response to the request, new evidence directed to the issue(s) for which reconsideration is sought").

<sup>2</sup> With its appeal brief, applicant attached a third declaration from its president and 28 exhibits. Evidence attached to an appeal brief will not normally be considered by the Board. 37 CFR 2.142(d). While some of the evidence simply duplicates what is in the record, some, such as the declaration of applicant's president dated April 2, 2001, clearly does not. While the Examining Attorney has not objected to the evidence, he does not "discuss[] the new evidence or otherwise affirmatively treat[] it as of record" in his brief. TBMP § 1207.03. Therefore, to the extent applicant's appeal brief contains evidence not previously of record, we will not consider it. We do not hesitate to add that even if all of applicant's belated evidence were considered, it would not change the outcome of this case.

sought. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978). We must consider the mark as a whole and not simply view its individual components to determine if it is descriptive. P.D. Beckwith, Inc. v. Commissioner, 252 U.S. 538, 545-46 (1920) ("The commercial impression of a trade-mark is derived from it as a whole, not from its elements separated and considered in detail"). However, "[i]t is perfectly acceptable to separate a compound mark and discuss the implications of each part thereof ... provided that the ultimate determination is made on the basis of the mark in its entirety." In re Hester Industries, Inc., 230 USPQ 797, 798 n.5 (TTAB 1986).

Applicant now argues that "[t]he mark "Hunting Calls" is at best suggestive, not merely descriptive, of game calls." Applicant's Br. at 17. However, applicant filed its application under the provision of Section 2(f) of the Trademark Act. 15 U.S.C. § 1052(f). Filing under Section 2(f) is an admission that the mark is merely descriptive. Yamaha International Corp. v. Hoshino Gakki Co., 840 F.2d 1571, 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 distinctiveness as an established fact") (emphasis in original). While an applicant may amend its application

to seek registration under the provision of Section 2(f) in the alternative, applicant did not do so in this case.

TMEP § 1212.02(c) ("Unlike the situation in which an applicant initially seeks registration pursuant to §2(f) or amends its application without objection, the alternative claim does not constitute a concession that the matter sought to be registered is not inherently distinctive"). In this case, applicant made no such conditional amendment and it unambiguously filed its application under Section 2(f). Therefore, it has conceded that its mark is not inherently distinctive.

#### ACQUIRED DISTINCTIVENESS

The key issue in this case is whether applicant's term has acquired distinctiveness under the provision of Section 2(f) of the Trademark Act. 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").

Applicant maintains that the Examining Attorney's statements concerning genericness should be disregarded. Applicant's Br. at 4. Our review of the record indicates that the Examining Attorney has only refused registration

based on applicant's mark being descriptive and not having acquired distinctiveness. In re Northland Aluminum Products, 777 F.2d 1556, 227 USPQ 961, 962 (Fed. Cir. 1985) (Two types of refusals for generic terms, Section 2(e)(1) and Sections 2 and 45). See also In re Men's International Professional Tennis Council, 1 USPQ2d 1917, 1918 n.2 (TTAB 1986) ("Examining Attorney's choice of Section 2(e)(1), rather than §§ 2 (preamble) and 45, as statutory basis does not automatically rule out genericness as a ground of refusal"). However, the evidence that the Examining Attorney has submitted is relevant to the issue of acquired distinctiveness because the more descriptive the mark, the greater the evidence needed to establish acquired distinctiveness. Yamaha, 6 USPQ2d at 1008 ("[L]ogically that standard becomes more difficult as the mark's descriptiveness increases"). In re Bongrain International (American) Corp., 894 F.2d 1316, 13 USPQ2d 1727, 1729 n.9 (Fed. Cir. 1990) (same).<sup>3</sup> Applicant was on notice from the first Office Action that the Examining Attorney considered the mark to be "highly descriptive." First Office Action, p. 2. "The name of a thing is the ultimate in

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<sup>3</sup> We agree with applicant that applicant must prove acquired distinctiveness by the preponderance of the evidence, and not by clear and convincing evidence. Yamaha, 6 USPQ2d at 1008.

descriptiveness." Weiss Noodle Co. v. Golden Cracknel & Specialty Co., 290 F.2d 845, 129 USPQ 411, 413 (CCPA 1961). See also In re Lantech Inc., 222 USPQ 977, 979 (TTAB 1983) ("Genericness is the ultimate in descriptiveness"). To the extent that the evidence suggests that the mark HUNTING CALLS may be the name of the goods, this evidence indicates the difficulty applicant faces in trying to demonstrate that its mark has acquired distinctiveness.

#### Analysis

Applicant has submitted a large volume of evidence in its attempt to establish that its mark has acquired distinctiveness. Much of the evidence is advertising material of others in which the third party does not refer to its game calls as hunting calls. Other evidence consists of copies of its own advertising materials showing how it has used the term "Hunting Calls." In addition, there are declarations from applicant's president in which he states that applicant has spent over \$1.2 million advertising products sold under its mark and that it has had over \$15 million in sales of its products. Applicant submits that the lack of competitors' use, applicant's own use, the lack of dictionary definitions for "game call" or

"hunting call,"<sup>4</sup> media usage, and "testimony"<sup>5</sup> of persons in the trade support" its argument that its mark has acquired distinctiveness. Applicant's Br. at 11-12.

While we have considered this evidence, we are not persuaded that it shows that applicant's mark has become distinctive when applied to applicant's goods. Merely because many game call manufacturers prefer to use the term "game calls" does not mean that applicant's mark has acquired distinctiveness. It has long been held that a product may have more than one generic name and, of course, it is even more obvious that many terms may be descriptive of a product or service. Roselux Chemical Co. v. Parsons Ammonia Co., 299 F.2d 855, 132 USPQ 627, 632 (CCPA 1962). Even novel ways of describing products have been held to be generic. Clairol, Inc. v. Roux Distributing Co., 280 F.2d 863, 126 USPQ 397, 398 (CCPA 1960) (HAIR COLOR BATH, novel way of describing liquid for hair coloring, held generic). The fact that manufacturers of game calls do not use the term "hunting calls" does not mean that applicant's term has acquired distinctiveness.

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<sup>4</sup> It is not clear how the lack of dictionary definitions for "hunting calls" provides much support for applicant's position when applicant's admittedly generic term "game calls" is not in the dictionary either.

<sup>5</sup> The "testimony" consists of declarations of applicant's president.

We also note that applicant's term consists of two words, "hunting" and "calls." As to "calls," applicant has disclaimed the term and applicant identifies its products as "game calls." The evidence that applicant has submitted clearly shows that the term "calls" is commonly used in the industry to refer to applicant's and others' products. Request for Reconsideration, Ex. A ("Lohman 2000, Game Calls and Hunting Accessories"); Ex. B ("Knight & Hale Code Blue 2000 Hunting Catalog 'Game Calls, Accessories, Attractants'"); Ex. E ("Adventure Game Calls, Inc. - Experienced Outfitters for the Serious Hunters"); and Ex. F ("Stanley Scruggs Game Calls and Lures - Quality Products for Hunters").

Also, while applicant argues that the products it sells are called "game calls," it is clear that there are many different names for its products such as "locator calls," "coyote calls," "predator calls," "elk calls," and "turkey calls." Response dated July 13, 1999, Ex. D. The record does not indicate that applicant's term would not be considered at least highly descriptive of applicant's goods. Therefore, there is nothing inconsistent with the Examining Attorney's determination that the term "Hunting Calls" would likewise be highly descriptive of applicant's products.

Furthermore, the only other word in applicant's mark is the word "hunting." It is no surprise to find that the word "hunting" is widely used to describe products for hunting. See Ex. A (Lohman 2000, Game Calls and Hunting Accessories"); Ex. B ("Knight & Hale Code Blue 2000 Hunting Catalog 'Game Calls, Accessories, Attractants'"); Ex. C ("Modern Call Products is a family owned and operated business ... Today as always we consider it a privilege to be part of the American hunting tradition") and Ex. Q ("[H]unters who rely on Sceery Game Calls for their hunting success").

Applicant has hardly demonstrated that its own use of the term would clearly be recognized by prospective purchasers as a trademark. See, e.g., Response dated July 13, 1999, Ex. E, p.14 (applicant's own catalog entitled "Primos Hunting Calls & Accessories"); Ex. F, p. 24 (Primos Champion Hunting Calls and Accessories Diaphragm Call Case"); Ex. F, p. 30 ("Predator Hunting Basic Calls & Tactics: The perfect instructional audio cassette on how to use predator calls. Includes hunting & calling tips!"); Applicant's specimens ("Warning: Primos hunting calls are so accurate that you might attract other hunters as well as game"). When prospective purchasers see applicant's use of the term, it is not clear why they would understand that

the term "hunting calls" is a trademark when it is used in such a highly descriptive manner by applicant.

Applicant's sales and its use of the term on packaging for its products hardly establish secondary meaning.

Bongrain International, 13 USPQ2d at 1728-29 (Sales "may indicate the popularity of the product itself rather than the recognition of the mark"). The Bongrain International court also noted that sales may indicate acceptance of the other trademark associated with the product. Id.

Similarly here, applicant uses the term "hunting calls" almost always with the mark Primos, which is often shown with a registration symbol. See specimens: "Primos® Hunting Calls." Evidence of acquired distinctiveness must relate to the specific mark for which registration is sought. In re K-T Zoe Furniture, Inc., 16 F.3d 398, 29 USPQ2d 1787, 1789 (Fed. Cir. 1994). Applicant's evidence of its own use and the use by the media appears to relate only to "Primos Hunting Calls" rather than "Hunting Calls," the mark applicant seeks to register.

In response to this evidence, the Examining Attorney submitted numerous examples of how the term would be perceived by prospective purchasers. Applicant argues that the evidence is not persuasive because the use of the term is "by a journalist who is not part of the relevant

purchasing public associated with the game call market." Applicant's Br. at 7 - 10. First, it is not clear on what basis applicant asserts that the journalist is not part of the relevant purchasing public. Second, the articles are from such papers as the *Washington Post*, *Orlando Sentinel*, the *Kansas City Star*, the *Plain Dealer*, and the *Washington Times*. Inasmuch as purchasers of hunting products would include members of the general public who would read these publications, these articles are evidence of how prospective purchasers, in general, may perceive the term. In re Omaha National Corp., 819 F.2d 1117, 2 USPQ2d 1859, 1860 (Fed. Cir. 1987) (As "evidence of such descriptive usage of 'first tier' in connection with banking services, the articles [from general and business publications] are competent"); In re Medical Disposables Co., 25 USPQ2d 1801, 1804 n.5 (TTAB 1992) ("Printout from articles which are made available from Lexis/Nexis data base are competent evidence when offered to illustrate common descriptive usage of a particular term").

The Examining Attorney's evidence shows that the term "hunting calls" is commonly used to, at the very least, describe game calls.

PRADCO also acquired Knight and Hale [see Request for Reconsideration, Ex. B], a **hunting call** maker since 1972. *The Plain Dealer*, July 4, 1997, p. 9D.

While **turkey-hunting calls**, camouflage clothing, guns and art dominate the exhibit hall... *Columbus Dispatch*, March 2, 1997, p. 11H.

[S]aid Harris, public-relations manager for Lohman Manufacturing [see Request for Reconsideration, Ex. A], which produces **hunting calls**. *Kansas City Star*, September 28, 1996, p. D11.

Today, fancy **hunting calls** are just as collectible as decorative waterfowl decoys. *Capital Times*, September 25, 1998, p. 6B.

First, there is page after page of camouflaging: camouflage coats, hats, gloves, mittens, vests and gun covers. Then there are all sorts of **hunting calls** to fool the animal. *Los Angeles Times*, December 10, 1989, p. E1.

The turkey-hunting experts from Quaker Boy **hunting calls** in Orchard Park, N.Y. [see Request for Reconsideration, Ex. I]. *Plain Dealer*, April 7, 2000, p. 11D.

Other exhibitors will display **hunting calls**, paraphernalia, and hunting related togs and gear. *The Record*, August 4, 1991, p. S13.

The old Luckinbach hardware store in Menard, Texas, is home to one of the world's great makers of **hunting calls**. *Arizona Republic*, November 16, 1997, p. T3.

The Mason-Dixon Writers Association's fishing/hunting flea market offers, rods, reels, lures, line, **hunting calls** and many other items. *Washington Times*, October 13, 1995, p, B6.

Items include fishing tackle, books, **hunting calls**, surf fishing equipment and tackle bags plus lots more. *Baltimore Sun*, September 24, 1995, p. 21D.

The Examining Attorney's evidence confirms that when the term "hunting" is combined with a generic term for hunting equipment, "calls," the result is, at a minimum,

highly descriptive of the goods. To establish that a term such as "hunting calls" for hunting equipment has acquired distinctiveness would require a large amount of very persuasive evidence. Applicant has not provided evidence of this type. Little evidence even suggests that potential purchasers recognize HUNTING CALLS as a trademark. While applicant has shown that many other game calls manufacturers do not use the term in their advertising, the evidence shows that the term has a highly descriptive, if not a generic, meaning. Indeed, several other game call manufacturers identified by applicant as non-users of "hunting calls" are nonetheless referred to as "hunting call" manufacturers in the periodical articles of record. While manufacturers may prefer to use the term "game call," perhaps because the calls can be used for more than hunting,<sup>6</sup> there can be little doubt that the evidence shows that the term "hunting calls" is at least highly descriptive of applicant's products. As the party alleging that the mark has acquired distinctiveness, applicant has the burden of showing that the mark has acquired distinctiveness. Applicant has not met its burden.

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<sup>6</sup> "Whether for the purpose of hunting, photography or the sheer pleasure of observing wildlife, this tradition of game calling has become one of the fastest growing hunting sports across the country." Request for Reconsideration, Ex. I, p. 4.

Therefore, we affirm the Examining Attorney's refusal to register applicant's mark on the ground that the mark is merely descriptive and the evidence does not demonstrate that the mark has acquired distinctiveness.

CONCLUSION

In summary, after careful consideration of the relevant authorities and the evidence and arguments submitted by applicant and the Examining Attorney, we find that HUNTING CALLS is merely descriptive of game calls and applicant has failed to submit sufficient evidence of acquired distinctiveness to warrant registration under Section 2(f) of the Trademark Act.

Decision: The refusal to register is affirmed.