

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB

Hearing:
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re National Council for Therapeutic Recreation
Certification, Inc.

Serial No. 75701344

David M. Kelly and Linda K. McLeod of Finnegan Henderson
Farabow Garrett & Dunner, L.L.P. for National Council for
Therapeutic Recreation Certification, Inc.

Michael S. Levy, Trademark Examining Attorney, Law Office
110 (Chris A.F. Pedersen, Managing Attorney).

Before Hohein, Hairston and Zervas, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by the National Council
for Therapeutic Recreation Certification, Inc. to register
CERTIFIED THERAPEUTIC RECREATION SPECIALIST on the
Principal Register in standard character form as a
certification mark for "recreational therapy and

recreational therapy counseling.”¹ Applicant’s certification statement reads as follows: “The certification mark, as used by persons authorized by the certifier, certifies that the designated person meets the certifier’s standards of competence in the field of recreation therapy and recreational therapy counseling, as indicated by experience and educational and training requirements, and the passage of a written examination.” During prosecution, the application was amended to seek registration pursuant to Section 2(f) of the Trademark Act, 15 U.S.C. §1052(f), based on applicant’s claim that the designation CERTIFIED THERAPEUTIC RECREATION SPECIALIST has become distinctive of applicant’s services.

The trademark examining attorney has finally refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the ground that the designation CERTIFIED THERAPEUTIC RECREATION SPECIALIST is either a generic term for applicant’s services, or in the alternative, that such designation is at least merely descriptive of such services and the showing of acquired distinctiveness furnished by applicant is insufficient to

¹ Application Serial No. 75701344, filed May 6, 1999, alleging dates of first use anywhere and in commerce of April 1982.

establish that the designation has become distinctive of applicant's services.

Applicant has appealed. Briefs have been filed and an oral hearing was held before the Board.

Summary of arguments

The examining attorney argues that the "genus of the services" in this case is "therapeutic recreation specialists who have been certified" (Examining Attorney's Brief at 16-17); that the evidence of record shows "CERTIFIED" and "THERAPEUTIC RECREATION SPECIALIST" to be, individually, generic; and that the joining of these terms creates a compound word in the same manner as did the term SCREENWIPE in *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110 (Fed. Cir. 1987). According to the examining attorney, CERTIFIED THERAPEUTIC RECREATION SPECIALIST may be found to be a compound word, notwithstanding that it consists of more than two words with spaces between them. Alternatively, the examining attorney argues that the evidence of record shows that the relevant public understands CERTIFIED THERAPEUTIC RECREATION SPECIALIST itself to primarily refer to the genus of services in this case. With respect to applicant's claim of acquired distinctiveness, the examining attorney argues that "the Board does not need to examine the evidence submitted by

applicant in support of its Section 2(f) claim" because "no amount of secondary meaning can rescue a generic designation." (Applicant's Brief at 12). Nonetheless, having reviewed applicant's evidence of acquired distinctiveness, the examining attorney maintains that at most, the evidence shows that applicant's certification services have achieved commercial success, but not that the designation CERTIFIED THERAPEUTIC RECREATION SPECIALIST has become distinctive of applicant's certification services.

Applicant, in urging reversal of the refusal to register, argues that the examining attorney "has improperly construed the genus at issue too narrowly." (Applicant's Brief at 8). Applicant maintains that the genus of services consists of the certification process itself, as well as all of the factors involved in the certification process, e.g., establishing evaluative standards for the certification and recertification of professionals, monitoring adherence to these standards by the certificants, offering on-line verification services, and promoting the availability and benefits of certification. Further, applicant argues that the examining attorney's reliance on Gould is misplaced; that the designation CERTIFIED THERAPEUTIC RECREATION SPECIALIST is a phrase consisting of multiple words, not a compound

word; and therefore akin to the designation SOCIETY FOR REPRODUCTIVE MEDICINE which was found to be a phrase in In re American Fertility Society, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999). Applicant argues that the examining attorney has not established by clear evidence that the designation CERTIFIED THERAPEUTIC RECREATION SPECIALIST is a generic term for applicant's services because the vast majority of uses of "therapeutic recreation specialist" and "certified therapeutic recreation specialist" submitted by the examining attorney are references to persons certified by applicant. Further, applicant argues that certification marks serve an important role in protecting critical public interests; and that the relevant public has relied upon the designation CERTIFIED THERAPEUTIC RECREATION SPECIALIST in making health-related decisions. Finally, applicant argues that it has presented substantial evidence to demonstrate that the designation CERTIFIED THERAPEUTIC RECREATION SPECIALIST has become distinctive of applicant's certification services.

The Record

The examining attorney and applicant have submitted extensive evidence in support of their respective positions.

Examining attorney's evidence

To demonstrate that the individual terms "certified" and "therapeutic recreation specialist" are generic, and that the composite designation "certified therapeutic recreation specialist" is generic as applied to applicant's services, the examining attorney submitted numerous excerpts of stories from searches of the NEXIS database. With his November 18, 1999 Office action, the examining attorney submitted excerpts of stories from searches of "NO CAPS (CERTIFIED THERAPEUTIC RECREATION SPECIALIST)" and "NO CAPS (THERAPEUTIC RECREATION SPECIALIST)." The former search retrieved 69 stories of which the examining attorney made of record 26 stories; the latter search retrieved 218 stories of which the examining attorney made of record 10 stories.

With his June 12, 2003 Office action, the examining attorney submitted excerpts of stories from searches of "NO CAPS (CERTIFIED SERVICE PROVIDER)" and "NO CAPS (CERTIFIED PROVIDER)." The former search retrieved 209 stories of which the examining attorney made of record 19 stories; the latter search retrieved 388 stories of which the examining attorney made of record 20 stories. Also with this Office action, the examining attorney submitted excerpts of stories from an updated search of "NO CAPS CERTIFIED

THERAPEUTIC RECREATION SPECIALIST" and a search of "NO CAPS (THERAPEUTIC RECREATION SPECIALIST) AND NOT CERTIFIED."

The former search retrieved 74 stories of which the examining attorney made of record 39 stories; the latter search retrieved 183 stories of which the examining attorney made of record 40 stories.

The following are representative examples of uses of "certified provider" and "certified service provider":

Microsoft will offer direct support as an option, and is expanding the program so systems integrators and resellers can be *certified service providers*, too. (InformationWeek, February 10, 2003);

Volland Electric Equipment has been named by Rockwell Reliance Electric as a *certified service provider*. That means it has exclusive access to information files for the commercial repair of any Rockwell Reliance motor, drive and gearbox. (Buffalo News, November 25, 2001);

People who get health and personal care in their homes from Medicare-*certified providers* can now get more information about how good that care is. (The Charleston Gazette, May 3, 2003);

Since the last meeting in February, Children Services officials checked the names of 520 county-*certified providers* and found they had investigated 221 - 43 percent - for abuse or neglect. (Columbus Dispatch, March 27, 2003); and

The centers are staffed with career counselors. Funds are available to eligible individuals to pay for training from one of more than 40 *certified providers*. (The Virginian-Pilot, June 27, 2002).

The following are representative examples of uses of "therapeutic recreation specialist":

"The idea is to create a playground where individuals of all abilities can play together," said Elaine Adams, *therapeutic recreation specialist* for Chattanooga Parks, Recreation, Arts and Culture. (Chattanooga Times Free Press, April 13, 2003);

Before being one of the four coaches for the wheelchair basketball team, Winterstein was a *therapeutic recreation specialist* at the Rehabilitation Institute of Michigan in Detroit. As part of her job, she introduced sports into the lives of people with disabilities to help them develop socially and physically. (Detroit Free Press, December 12, 2002);

Christina Bishop, a *therapeutic recreation specialist* with the county Recreation Department, will talk to parents about the programs available to young children, such as gymnastics class, which is open to children age 1 and older who are walking; and for 3- and 4-year olds, self-defense class and dance class. (The Washington Post, April 18, 2002);

Recreation therapists, also referred to as *therapeutic recreation specialists*, provide treatment services and recreation activities for individuals with disabilities, illnesses or other disabling conditions. (The San Diego Union-Tribune, December 17, 2001);

"We were happy to have this unique program in the county, because it is hard for parents to find any activities for kids with multiple disabilities," said Charlie Butler, a *therapeutic recreation specialist* for the Montgomery Recreation Department. (The Washington Post, May 16, 1996);

Hospital has openings for a GS 4 clerk-typist, GS 4-9 psychiatric nurse; GM (merit pay) 14 supervisory psychiatric nurses; GS 7-9 education

therapist, and GS 9 openings for a *therapeutic recreation specialist*, medical technologist and vocational rehabilitation specialist.

(The Washington Post, August 29, 1986);

Each patient in the rehabilitation program is assigned a *therapeutic recreation specialist* who develops an individualized treatment plan designed to help them develop skills and techniques for dealing with real-life...

(The Atlanta Journal and Constitution, October 28, 1999);

Debbie Williams, the pool's *therapeutic recreation specialist*, has seen scores of patients rehabilitated since the aqua therapy opened in February 1998.

(The Daily Oklahoman, September 7, 1999); and

"We get a large number of kids who are at risk," explains Randi L. Klein, one of PAL's *therapeutic recreation specialists*.

(The Village Voice, August 10, 1999).

The following are representative examples of uses of "certified therapeutic recreation specialist":

Although Ms. Ternay can no longer see the plants she works with, she can perceive them in other ways. Dawn Priess, a soft-spoken *certified therapeutic recreation specialist*, was helping her appreciate the plants' texture and smell.

(The New York Times, April 27, 2003);

The bride, a graduate of the State University College at Brockport, is a *certified therapeutic recreation specialist* at Loretto Nursing Home in Syracuse.

(Rochester Democrat and Chronicle, October 23, 2002);

The popular card game is also near-perfect therapy for Alzheimer's patients in the early stages of the disease, said *certified therapeutic recreation specialist* Janet Larghi, because it

provides a focal point in the ever advancing fog that slowly envelopes even the most active minds. (Daily News (New York) September 27, 2002);

Sabella holds a master's degree in community recreation from Columbia University and is a state *certified therapeutic recreation specialist*. (Newsday, August 2, 1999);

The bride, a graduate of the University of Florida, is a *certified therapeutic recreation specialist* and a licensed massage therapist. (The Palm Beach Post, May 9, 1999);

"Recreational activities unite families together," said Joy Stein, who as a *certified therapeutic recreation specialist* would know." (The Baltimore Sun, April 11, 1999);

JoClare Hanshew and Shelly Brown, employees of American Facilities Management, have become nationally *certified therapeutic recreation specialists*. Hanshew is the company's activity program coordinator; Brown is activities coordinator for the company in Wyoming County. (Charleston Daily Mail, January 4, 1999); and

Pastorek is a *certified therapeutic recreation specialist* and was previously employed in the recreation department of Forbes Nursing Center in Pittsburgh and at St. John Lutheran Care ... (Pittsburgh Post Gazette, August 20, 1997).

In further support of his contention that "therapeutic recreation specialist" is a generic term when applied to applicant's services, the examining attorney also submitted with his June 12, 2003 Office action two printouts from Internet websites. The first printout is from the web site of the North Carolina Recreation Therapy Association

(<http://www.nctra.org>), the relevant portion of which is set forth below:

Promoting the Benefits Therapeutic Recreation Specialists & Therapeutic Recreation Assistants Bring to North Carolina

What is a Therapeutic Recreation Specialist?

A therapeutic recreation specialist (TRS), sometimes referred to as a recreation or recreational therapist, works with individuals who have mental, physical, emotional and/or developmental disabilities.

The second printout is from the web site

<http://www.lemoyne.edu> and is a job description for a

"Therapeutic Recreation Specialist/Recreational Therapist."

The relevant portion of this printout is set forth below:

Therapeutic recreation specialists (TRS) use recreation and leisure activities to help people with illnesses or disabilities.

Also with his June 12, 2003 Office action, and in further support of his position that the composite designation "certified therapeutic recreation specialist" is generic when applied to applicant's services, the examining attorney submitted a printout of the first ten "hits" from a Google search for "certified therapeutic recreation specialist." In addition, the examining attorney submitted Internet printouts showing use of "certified therapeutic recreation specialist." The following are representative examples:

This web site is managed by the North Carolina Recreation Therapy Association (NCRTA), a non-profit, professional organization of *certified therapeutic recreation specialists*, therapeutic recreation assistants, and persons/organizations who support recreation therapy services in North Carolina.

(<http://www.nctra.org>)

This course is designed for the therapeutic recreation student or professional who knows the underlying principles of their profession and wishes to develop the competencies that will enable them to be effective programmers. In addition, the course is designed to assist in the development and mastery of the skills, attitudes and competencies necessary to become a *certified therapeutic recreation specialist*.

(<http://cehd.ewu.edu>)

Traditionally, the focus in community therapeutic programs has been on the provision of normalized, accessible recreation opportunities for citizens with disabilities. Community employers of *certified therapeutic recreation specialists* include: park and recreation programs, senior centers, special organizations such as Easter Seals, camps, and wilderness adventure organizations. The focus of therapeutic recreation programs in clinical settings has become increasingly more oriented to the provision of leisure related treatment services. Clinical and human service settings which employ *certified therapeutic recreation specialists* include: psychiatric facilities, addictions programs, long term care facilities, rehabilitation centers, oncology units, burn units, day treatment programs, outpatient programs and residential programs.

(<http://www.unlv.edu>)

One who is already taking part is Shari Policicchio, a *certified therapeutic recreation specialist* and PLAY supervisor, who has worked with Alex. She notes the importance of training parents not to try to "teach" their child but to

follow their child's lead and join them to bring them along.

(<http://www.med.umich.edu>)

Level 1 facilities with dementia care units must offer therapeutic activities seven days a week. A *certified therapeutic recreation specialist*, qualified therapeutic recreation specialist, or activity consultant must be available eight hours a month to consult with activities staff.

(<http://pmic.carescout-elderanswers.com>)

Good Shepherd-Fairview Home offers all residents activities to meet a variety of interests. These activities take place in the Home and out in the community. In addition, therapeutic activities are provided for nursing facility residents. The activities staff works under the supervision of a *certified therapeutic recreation specialist*.

(<http://gfshome.com>)

Applicant's evidence

Applicant submitted declarations, Internet printouts, and copies of third-party registrations as evidence that CERTIFIED THERAPEUTIC RECREATION SPECIALIST is perceived as an indication of source for applicant's services.

Applicant, in particular, challenges the examining attorney's NEXIS evidence showing use of "certified therapeutic recreation specialist" and "therapeutic recreation specialist." In this regard, applicant's former Executive Director, Peg Connolly, states in her declaration that of the 36 NEXIS stories identified by the

examining attorney in the November 18, 1999 Office action² that refer to "certified therapeutic recreation specialist" and "therapeutic recreation specialist," 8 stories are duplicates, 2 stories refer to educational classes and not actual people, 3 stories do not give enough information to ascertain the name of the person mentioned, and 21 of the remaining 23 stories, as confirmed by applicant through its database, name individuals certified by applicant.

Applicant's current Executive Director, Bob Riley, states in his declaration that of the 39 NEXIS stories identified by the examining attorney in the June 12, 2003 Office action that refer to "certified therapeutic recreation specialist," at least 3 stories are duplicates, 2 stories do not give enough information to ascertain the name of the person mentioned, and 31 of the remaining 34 stories, as confirmed by applicant through its database, name individuals certified by applicant. Further, Mr. Riley states that of the 40 stories identified by the examining attorney in this same Office action that refer to "therapeutic recreation specialist," at least 28 of the individuals identified therein, as confirmed by applicant

² Although Ms. Connolly refers to this as the August 10, 2001 Office action, these materials in fact accompanied the examining attorney's November 18, 1999 Office action.

through its database, name individuals certified by applicant.

Applicant's attorney, Linda McLeod, states in her declaration that she conducted a "Google" search of the designation "certified therapeutic recreation specialist;" that the search returned hits for 2,030 web pages containing this designation; that she was able to view 997 "hits"; that 2 of the hits were to applicant's website; that 21 of the hits did not actually contain the phrase; and that of the remaining 974 hits, they fell into the following categories:

All initial caps - 685
All upper case letters - 3
Initial cap on "Certified" - 10
Initial caps on Therapeutic Recreation Specialist - 22
All lower case letters - 254

In addition, Ms. McLeod states that she conducted a search of applicant's website which confirms that the majority of the individuals listed in the NEXIS articles and Internet printouts submitted by the examining attorney are actually certified by applicant.

Applicant also submitted Internet printouts which it maintains demonstrate that CERTIFIED THERAPEUTIC RECREATION SPECIALIST is a recognized certification mark of applicant. The following are representative examples:

The professional certification designation is *Certified Therapeutic Recreation Specialist* (CTRS). The credential requires a bachelor's degree or higher from an accredited institution of higher education in the area of therapeutic recreation (recreational therapy), an approved internship under the supervision of a professionally credentialed CTRS, and the passing of a national certification examination administered for the NCTRC by the Educational Testing Service (ETS). American Therapeutic Recreation Association.
http://www.atra-tr.org/benefits_integral.htm

By graduation, students will have obtained competencies sufficient to take the National Council for Therapeutic Recreation Certification... to become a *Certified Therapeutic Recreation Specialist*. University of Florida, Recreation, Parks, and Tourism.
<http://www.reg.ufl.edu02-03-catalog/colleges/hhp/rpt.html>

Activities therapy treatment services are delivered by qualified professionals with training and education in recreational/activities therapy service delivery and professionally certified by the National Council for Therapeutic Recreation Certification. The professional certification designation is *Certified Therapeutic Recreation Specialist* (CTRS) University of Iowa.
<http://www.uihealthcare.com/depts/rehabilitationtherapies>

Students complete a 14 to 16 week full-time clinical internship under the supervision of a *Certified Therapeutic Recreation Specialist* (CTRS)... Upon successful completion of this option, students are prepared to meet sitting requirements for the National Council for Therapeutic Recreation Certification Examination. University of New Hampshire School of Health and Human Services.
www.shhs.unh.edu.html

A recreation therapist must graduate from an accredited program and have passed a national certification exam to receive the credentials of a *Certified Therapeutic Recreation Specialist* (CTRS). Rehabilitation Hospital of the Pacific.
<http://www.rehabhospital.org>

Upon satisfactory completion of the major curriculum and a supervised RT internship, Mount graduates will be eligible to take the national certifying exam offered by the National Council for Therapeutic Recreation Certification. Passage of this exam confers the professional credential CTRS *certified therapeutic recreation specialist*. College of Mount St. Joseph.
<http://216.23.85.91/academics/majors/undergrad/rectherapy>

Further, applicant submitted numerous declarations in support of its claim of acquired distinctiveness: The declarations fall into four categories. First, applicant submitted the declarations, as previously mentioned, of its former and current Executive Directors, Peg Connolly and Bob Riley. Ms. Connolly states, in pertinent part, that:

...the mark "CERTIFIED THERAPEUTIC RECREATION SPECIALIST" has become distinctive, as applied to the applicant's services, by reason of substantially exclusive and continuous use thereof as a mark by the applicant in commerce since 1982.

...

... NCTRC actively promotes the availability and benefits of certification under the mark "CERTIFIED THERAPEUTIC RECREATION SPECIALIST," including an extensive marketing campaign conducted between 1989 and 1993 that included direct mail, press releases, newsletters for educators and students, attending conferences, developing and distributing a brochure for the employer market, holding focus groups of employers, and contacting the personnel

regulatory offices of all 50 states, the District of Columbia, and the territory of Puerto Rico. As a result of NCTRC's widespread marketing efforts, NCTRC currently has approximately 15,000 individuals who are actively certified by NCTRC to use the certification mark "CERTIFIED THERAPUETIC RECREATION SPECIALIST." There are approximately 3,000 more former certificants under the mark who are eligible to apply for re-entry.

NCTRC receives substantial revenues from its certification program. Between 1998 and 2000 alone, NCTRC received \$3,450,515 in income from certifying individuals under the certification mark CERTIFIED THERAPEUTIC RECREATION SPECIALIST. From these revenues, NCTRC invests significant sums in marketing and research activities.

NCTRC actively enforces its rights to the certification mark "CERTIFIED THERAPEUTIC RECREATION SPECIALIST" by policing against unauthorized uses of the mark. These efforts include: (1) NCTRC offers online verification services at its website where the public can search for certificants by certification ID number, their last name, or their social security number, (2) NCTRC and/or its counsel aggressively pursue unauthorized uses and misuses of the certification mark "CERTIFIED THERAPEUTIC RECREATION SPECIALIST" by sending cease and desist letters and following up to ensure that the infringing use has ceased, and (3) NCTRC regularly publishes newsletters and brochure articles reminding readers of the strict criteria for use of the certification mark "CERTIFIED THERAPEUTIC RECREATION SPECIALIST."

NCTRC's efforts to enforce its certification mark "CERTIFIED THERAPEUTIC RECREATION SPECIALIST Credential" amount to a comprehensive ongoing enforcement program.

...

NCTRC is the nationally recognized organization for the certification of therapeutic recreation personnel. Many employees insist on hiring those individuals who have been certified by NCTRC under the mark CERTIFIED THERAPEUTIC RECREATION SPECIALIST. In addition, most states do not have criteria specifically for practicing recreational

therapy. Those states do have various criteria within state job classification requirements, qualified provider regulations, health and human services codes, or agency codes, which apply to recreational therapy. However, two states do not specifically regulate the profession of therapeutic recreation through licensing and certification laws: Utah and North Carolina. Both states rely on the eligibility standards set by the NCTRC, and passing of the national exam for the CERTIFIED THERAPEUTIC RECREATION SPECIALIST credential as criteria for state approval. Still other states, like New Hampshire and North Dakota, expressly recognize the "CERTIFIED THERAPEUTIC RECREATION SPECIALIST" credential in their administrative or legislative codes, which certification entitles job applicants to a higher job classification and higher pay. Finally, NCTRC and its "CERTIFIED THERAPEUTIC RECREATIONAL (sic) SPECIALIST" mark are recognized as the only national certification program for recreational therapy in a number of occupational and career guide books, including: *Careers, Inc.*, *Encyclopedia of Careers and Vocational Guidance, Eighth Edition, Vol. 2*, *Job Hunter's Sourcebook: Where to Find Employment Leads and Other Job Search Resources*, *Occupational Outlook Handbook*, *Professional Careers Sourcebook*, *Top Professions: The 100 Most Popular, Dynamic, and Profitable Careers in America Today*

Mr. Riley, in his declaration, essentially reiterates the same statements as above, and further states that:

Between 2001-2003 alone, NCTRC received \$3,788,794 in income from certifying individuals under the certification mark CERTIFIED THERAPEUTIC RECREATION SPECIALIST.

...

Under the direction and legitimate control of NCTRC, the "CERTIFIED THERAPEUTIC RECREATION SPECIALIST" certification mark is used by persons authorized by NCTRC to certify that they possess

the training and experience necessary to practice in the field of recreational therapy and recreational therapy counseling. The "CERTIFIED THERAPEUTIC RECREATION SPECIALIST" certification mark also serves an important role of protecting the health, safety, and welfare of the public. Recreational therapists provide treatment services and recreation activities to, among others, individuals with illnesses or disabilities in acute care hospitals, rehabilitation facilities, health clubs, out-patient facilities, day-treatment facilities, and community-living facilities. The public is benefited by NCTRC's consistent application of the highest quality national standards and the promotion of qualified professionals in the field of therapeutic recreation in connection with the "CERTIFIED THERAPEUTIC RECREATION SPECIALIST" certification mark. NCTRC's "CERTIFIED THERAPEUTIC RECREATION SPECIALIST" certification mark also ensures that employers and patients have access to information regarding the qualifications of the certificants to provide therapeutic recreation services based on national standards, and with the full respect to the health and safety of the public.

Second, applicant submitted declarations from seven persons who are responsible for hiring and/or supervising recreation therapists or coordinating academic programs in the field of recreational therapy. Each of these persons states, in relevant part, that:

As part of my duties, I am familiar with the certification mark "CERTIFIED THERAPEUTIC RECREATION SPECIALIST" granted by The National Council for Therapeutic Recreation Certification (NCTRC"). I am aware that only qualified individuals who meet NCTRC's eligibility requirements, and who pass NCTRC's credentialing examination, are permitted to use the "CERTIFIED THERAPEUTIC RECREATION SPECIALIST" certification mark.

I recognize that NCTRC is solely responsible for granting use of the certification mark "CERTIFIED THERAPEUTIC RECREATION SPECIALIST," and that NCTRC provides verification to employers... . I am not aware of any other organizations that offer certification under the mark "CERTIFIED THERAPEUTIC RECREATION SPECIALIST."

In my experience, most healthcare and social service organizations, ... require that Recreation Specialists meet the standards for professional practice identified by NCTRC and that they are certified by NCTRC to use the "CERTIFIED THERAPEUTIC RECREATION SPECIALIST" certification mark as a condition of employment.

I believe that the "CERTIFIED THERAPEUTIC RECREATION SPECIALIST" certification mark is very important to assure that the individual is qualified and competent to practice in the profession under the standards established by NCTRC and to protect the health and safety of consumers of receiving services.

I am aware that the certification mark "CERTIFIED THERAPEUTIC RECREATION SPECIALIST" has been used by qualified individuals for many years. I am also aware that NCTRC has been engaged in advertising and promotional efforts to publicize the "CERTIFIED THERAPEUTIC RECREATION SPECIALIST" certification mark, and its importance to employers, the public, and the profession.

Through many years of advertising, promotion, and use, employers, practitioners, and consumers in the healthcare and social services field have come to recognize "CERTIFIED THERAPEUTIC RECREATION SPECIALIST" as a certification mark for individuals who have meet [sic] the standards of NCTRC, rather than as a job title or a type of service provider.

Third, applicant submitted declarations from seven experienced recreation therapists. Each of these persons states, in relevant part, that:

I have satisfied the eligibility and credentialing standards of The National Council for Therapeutic Recreation Certification

("NCTRC"), and I have been authorized to use the "CERTIFIED THERAPEUTIC RECREATION SPECIALIST" mark I am aware that only qualified individuals who meet NCTRC's standards, and who pass NCTRC's credentialing examination, are permitted to use the "CERTIFIED THERAPEUTIC RECREATION SPECIALIST" certification mark.

...

In my opinion, the "CERTIFIED THERAPEUTIC RECREATION SPECIALIST" certification mark is important to the profession to assure that only qualified and competent Recreation Therapists practice in the profession under the standards established by the NCTRC. I am also aware that the "CERTIFIED THERAPEUTIC RECREATION SPECIALIST" certification mark is important to consumers because it gives them assurance that their health and safety is in the care of a qualified Recreation Therapist.

Fourth, applicant submitted declarations from eight persons who have received therapeutic recreation services. Each of these persons indicates the type(s) of treatment he or she has received and states, in relevant part, that:

I am aware that the person who treated me was qualified as a "CERTIFIED THERAPEUTIC RECREATION SPECIALIST" by The National Counsel [sic] for Therapeutic Recreation Certification ("NCTRC"). I understand that only qualified individuals who meet NCTRC's standards are allowed to use the "CERTIFIED THERAPEUTIC RECREATION SPECIALIST" certification mark.

The "CERTIFIED THERAPEUTIC RECREATION SPECIALIST" certification mark is important to the health and safety of consumers like me because it assures that the Recreation Therapist is experienced and competent to render the services.

Whenever I hear "CERTIFIED THERAPEUTIC RECREATION SPECIALIST," I assume that the individual has been certified to meet the national standards set by NCTRC.

To me, "CERTIFIED THERAPEUTIC RECREATION SPECIALIST" signifies that the individual using

the designation is certified to perform the services, rather than a type of service provider or job title.

Finally, applicant has submitted third-party registrations for certification marks that include the term "CERTIFIED." Some of these registrations issued on the Supplemental Register; others issued on the Principal Register under Section 2(f); and still others issued on the Principal Register, without a Section 2(f) claim. Applicant argues that no distinction can be made between these marks and CERTIFIED THERAPEUTIC RECREATION SPECIALIST.

Genericness

"A generic term is the common descriptive name of a class of goods or services . . ." H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc., 782 F.2d 987, 989, 228 USPQ 528, 530 (Fed. Cir. 1986). The critical issue in genericness cases such as this one is whether members of the relevant public primarily use or understand the term sought to be registered to refer to the genus of goods or services in question. Our primary reviewing court has set forth a two-step inquiry to determine whether a mark is generic: First, what is the genus (category or class) of goods or services at issue? Second, is the term sought to be registered understood by the relevant public

primarily to refer to that genus (category or class) of goods or services? 228 USPQ at 530. The burden of proving genericness falls on the trademark examining attorney, who must present "clear evidence of generic use." See *In re Merrill Lynch, Pierce, Fenner, and Smith, Inc.*, 828 F.2d 1567, 1571, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987).

With respect to the first part of the inquiry, as previously noted, the examining attorney and applicant argue for different definitions of the involved genus or class of services in this case. The examining attorney argues that the genus of services is "therapeutic recreation specialists who have been certified." (Examining Attorney's Brief at 16-17). Applicant, on the other hand, argues that the examining attorney "has improperly construed the genus at issue too narrowly;" and that "the genus includes far more than 'therapeutic recreation specialists who have been certified.'" (Applicant's Brief at 8). Applicant maintains that the genus consists of the certification process itself, and all of the factors involved in the certification process, e.g., establishing evaluative standards for the certification and recertification of professionals, monitoring adherence to these standards by the certificants, offering on-line

verification services, and promoting the availability and benefits of certification.

In the case of *In re A La Vielle Russie Inc.*, 60 USPQ2d 1895, 1897 (TTAB 2001), relied on by the examining attorney, the Board stated:

In its application, applicant has identified its services as "dealership services in the field of fine art, antiques, furniture and jewelry." Based on the evidence of record, however, we find that this recitation of services is insufficiently definite to serve as the name of a genus of applicant's services, for purposes of our genericness analysis in this case. The evidence shows that 'Russian art' is a distinct genre or type of art for which there is a defined commercial market, and that applicant, and others, are known and referred to generically as dealers in Russian art. Therefore, we find that the genus of services involved in this case is "art dealership services in the field of Russian art," rather than merely "art dealership services" or, as applicant has argued, merely "dealership services."

Further, in *H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc.*, supra at 228 USPQ 528 (Fed. Cir. 1986), our primary reviewing court found the appropriate genus of goods to be not merely "magazines," but rather the defendant's particular "class of magazines," i.e., "magazines directed to the field of firefighting."

This case, however, is distinguishable from the above cases. The record herein shows that "recreational therapy and recreational therapy counseling" is a defined and

recognized health care field. In other words, the identification in this case is not indefinite or so expansive such that we need to narrow the genus of services in the manner urged by the examining attorney.

Neither do we believe it is appropriate to define the genus of services in the manner urged by applicant. In support of its position, applicant relies on *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420 (Fed. Cir. 2005). In that case, our primary reviewing court, in holding that the Board mistakenly defined the genus of applicant's services and goods too narrowly, stated at 1422:

As an initial matter, this court examines the Board's understanding of the genus of goods or services at issue. The applicant defined its goods and service, in its amended application, as "computerized on-line retail services in the field of pre-engineered metal buildings and roofing systems." Although the definitions of the applicant and of the Board appear nearly identical, the parties understand the phrase "computerized on-line retail services" differently. Applicant sells steel buildings on line, but the record indicates it provides services beyond mere sales.

The present case also is distinguishable from the above case because there is no evidence that applicant is providing under the certification mark sought to be registered services other than certifying "recreational therapy and recreational therapy counseling."

We find the present case to be akin to *In re American Institute of Certified Public Accountants*, 65 USPQ2d 1972 (TTAB 2003), where the applicant sought registration of the mark UNIFORM CPA EXAMINATION for "printed matter, namely, practice accounting examinations; accounting exams; accounting exam information booklets; and prior accounting examination questions and answers." The examining attorney argued that the genus or class of goods should be defined as examinations used to determine one's qualifications to become a CPA, whereas the applicant sought to define the genus or class of goods as professional examinations used to determine an applicant's qualifications to enter a profession. While acknowledging that enlarging or narrowing the definition of the genus can substantially affect the final determination of whether a term is generic, the Board observed that "the respective suggestions ignore the identification of goods in applicant's application which specifies applicant's goods as 'practice accounting examinations; accounting exams; accounting exam information booklets; and prior accounting examination questions and answers.'" *Id.* at 1981. The Board found no support in Marvin Ginn for the examining attorney's argument that the Board should define the genus of goods more narrowly than the identification. Further,

the Board saw no basis for adopting applicant's definition which would have resulted in a broadening of the genus of goods. Rather, the Board found that the class of goods was adequately described by applicant's chosen identification of goods.

In this case, the identification reads "recreational therapy and recreational therapy counseling," not "certifying" or "certification of" "recreational therapy and recreational therapy counseling."³ Thus, we find no basis for defining the genus as "therapeutic recreation specialists who have been certified" or to include the certification process itself and the activities related thereto.

Here, we find that the identification of services, i.e., "recreational therapy and recreational therapy counseling," is sufficiently definite to serve as the name of the genus of applicant's services for purposes of our genericness analysis in this case.

Next, we must determine the relevant public for applicant's services. We find that the relevant public

³ Indeed, we note that TMEP Sections 1306(f) and (g) indicate that the goods or services that are certified are to appear in the identification and the language concerning "certifying" is to appear in the certification statement.

consists of persons in the recreational therapy field, i.e., recreational therapists who are candidates for applicant's certification, recreational therapists certified by applicant and who may use CERTIFIED THERAPEUTIC RECREATION SPECIALIST in listing their professional qualifications, persons involved in the hiring of recreational therapists, and coordinators of academic programs in the recreational therapy field; as well as persons needing/receiving recreational therapy.

Before determining the genericness issue in this case, we must address the difference of opinion between the examining attorney and applicant as to the appropriate case law to be applied in this determination. As previously noted, the examining attorney argues that the evidence of record shows "CERTIFIED" and "THERAPEUTIC RECREATION SPECIALIST" to be, individually, generic; and that the joining of these terms creates a compound word in the same manner as did the term SCREENWIPE in *In re Gould Paper Corporation*, 834 F.2d 1017, 5 USPQ2d 1110 (Fed. Cir. 1987). According to the examining attorney, CERTIFIED THERAPEUTIC RECREATION SPECIALIST may be found to be a compound word, notwithstanding that it consists of more than two words with spaces between them. Alternatively, the examining attorney argues that the evidence of record shows that the

relevant public understands CERTIFIED THERAPEUTIC RECREATION SPECIALIST itself to primarily refer to the genus of services in this case. Applicant, on the other hand, argues that the designation CERTIFIED THERAPEUTIC RECREATION SPECIALIST is a phrase consisting of multiple words, not a compound word; and therefore akin to the designation SOCIETY FOR REPRODUCTIVE MEDICINE which was found to be a phrase in *In re American Fertility Society*, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999).

We agree with applicant that the designation CERTIFIED THERAPEUTIC RECREATION SPECIALIST is a phrase. The examining attorney is correct that there is no authority that specifically holds that a designation which consists of more than two words is a phrase. Indeed, as pointed out by the examining attorney, in the recent case of *In re Eddie Z's Blinds and Drapery, Inc.*, 74 USPQ2d 1037 (TTAB 2005), this Board upheld the refusal to register the designation BLINDSANDDRAPERY.COM for retail stores and distributorships featuring blinds and draperies, finding the designation to be a compound word consisting of the generic term "blinds and drapery" and the generic TLD ".com." In that case, as in Gould, the individual terms, when joined, formed a unit. In the present case, "certified" and "therapeutic recreation specialist" are

simply multiple terms not joined in a manner other than as a phrase. Thus, in reaching our decision, we have been guided by American Fertility. In other words, evidence that "certified" and "therapeutic recreation specialist," considered individually, are generic is not sufficient to prove that the phrase CERTIFIED THERAPEUTIC RECREATION SPECIALIST is generic.

We turn then to the first of the two principal issues to be determined in this case, namely, whether the phrase CERTIFIED THERAPEUTIC RECREATION SPECIALIST is understood by the relevant public to refer to "recreational therapy and recreational therapy counseling." In making this determination, we have taken into consideration all evidence of record touching on the public perception of the designation, including the evidence submitted in connection with the claim of acquired distinctiveness. See *In re Recorded Books, Inc.*, 42 USPQ2d 1275 (TTAB 1997) and *In re The Paint Products Co.*, 8 USPQ2d 1863 (TTAB 1988).

Upon careful consideration of the entire record herein, we find that the designation CERTIFIED THERAPEUTIC RECREATION SPECIALIST has not been shown by clear evidence to be a generic term for "recreational therapy and recreation therapy counseling." Contrary to the examining attorney's contention, the evidence of record does not

demonstrate that the term designates, and is understood by those in the field of recreational therapy and persons who receive such services, as signifying a class or category of such therapy or therapy counseling.

The examining attorney has submitted significant evidence to support the genericness refusal. Much of the evidence consists of NEXIS article excerpts showing uses of "certified therapeutic recreation specialist" in all lower case letters in the manner of a generic term. Applicant, however, has presented evidence establishing that the vast majority of the persons named in these articles in fact have been certified by applicant and thus are entitled to use the designation CERTIFIED THERAPEUTIC RECREATION SPECIALIST in rendering their services. Also, applicant has submitted the results of its Internet search which returned over 600 uses of "certified therapeutic recreation specialist" in all or initial upper case letters in the manner of a mark. These uses, which are from the websites of national associations, universities, hospitals, rehabilitation centers and local municipalities specifically reference applicant's certification program. Further, we note that the examining attorney's NEXIS searches were framed in such a manner that they would return only uses of the phrase "certified therapeutic

recreation specialist" in all lower case letters. The record also shows that several state codes and regulations recognize CERTIFIED THERAPEUTIC RECREATION SPECIALIST as applicant's certification. In short, while the examining attorney has submitted significant evidence to support the refusal, the record also includes numerous examples of CERTIFIED THERAPEUTIC RECREATION SPECIALIST being used by applicant and others as a source indicator for applicant's certification program. In other words, the evidence of generic use submitted by the examining attorney is offset by applicant's evidence that shows not only a substantial amount of proper certification mark use but also recognition of applicant's certification mark by persons in the recreational therapy field and persons receiving recreational therapy. Thus, in this respect, we find that this case is similar to that in *In re Merrill Lynch, Pierce, Fenner and Smith Inc.*, supra at 1143. ["The mixture of usages unearthed by the NEXIS computerized retrieval service does not show, by clear evidence, that the financial community views and uses the term CASH MANAGEMENT ACCOUNT as a generic, common descriptive term for the brokerage services to which Merrill Lynch first applied the term"] (footnote omitted). Here, the mixed record does not show, by clear evidence, that persons in

the recreational therapy field view and use the phrase CERTIFIED THERAPEUTIC RECREATION SPECIALIST as a generic, common descriptive term for recreational therapy and recreational therapy counseling. We find, therefore, that the phrase CERTIFIED THERAPEUTIC RECREATION SPECIALIST is not generic.

Acquired Distinctiveness

We turn next to the remaining principal issue of the sufficiency of applicant's claim of acquired distinctiveness. Applicant has the burden of proof to establish a prima facie case of acquired distinctiveness. *Yamaha International Corp. v. Hoshino Gakki Co., Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1006 (Fed. Cir. 1988). The examining attorney argues that applicant's evidence is insufficient because the phrase CERTIFIED THERAPEUTIC RECREATION SPECIALIST is "so highly descriptive." (Examining Attorney's Brief at p. 12.) The examining attorney argues that applicant's revenues as set forth in the Connolly and Riley declarations demonstrate only the commercial success of applicant's certification program, not that the relevant public has come to view the phrase CERTIFIED THERAPEUTIC RECREATION SPECIALIST as applicant's mark. Insofar as the other declarations are concerned, the examining attorney argues that they "are for the most part

pre-typed and merely signed by health care providers," and that in the case of a "declarant [who] is affiliated with the applicant," the declaration should be given little weight. (Examining Attorney's Brief, at p. 13).

We agree with applicant, however, that taken as a whole, the evidence it has furnished is sufficient to show acquired distinctiveness. In this case, applicant has claimed continuing use of the phrase CERTIFIED THERAPEUTIC RECREATION SPECIALIST for over twenty years beginning in 1982. Applicant is the national certifying organization in the recreational therapy field and there is no evidence of use of the phrase by other certifying organizations. Applicant has engaged in significant marketing activities and its revenues of over \$7 million are impressive for a certification mark that is used in a specialized health care field. We are mindful that this is not a case involving consumer goods or services where we would expect to see very large sums of sales and advertising figures in order to find that a term has become distinctive of a single source.

In addition, applicant has submitted a large number of declarations from persons in the field of recreational therapy and persons receiving recreational therapy. These declarations cover many classes of the relevant public.

While we recognize that the declarations are similar in content and therefore appear to have been drafted by applicant's counsel, we nonetheless find that they have probative value with respect to a showing of acquired distinctiveness, in combination with the other evidence presented by applicant. See, e.g., *In re Data Packaging Corp.*, 453 F.2d 1300, 172 USPQ 396, 399 (CCPA 1972) [fact that affidavits were drafted by applicant's attorney and were practically identical in wording "detracts little or nothing from their sufficiency to make out a prima facie case of trademark recognition"]. The declarations are probative to the extent that they show that persons with many years of experience in the recreational therapy field and persons who have received recreational therapy recognize CERTIFIED THERAPEUTIC RECREATION SPECIALIST as a source indicator of applicant's certification program. We recognize that some of the declarations are from recreation therapists who are certified by applicant, but we are not persuaded to accord these declarations little probative value because such persons may be said to be "affiliated"

with applicant. In any event, there are many other declarations from persons in the recreational therapy field⁴ and persons who have received recreational therapy with no apparent affiliation with applicant.

Accordingly, when viewed in its entirety, the evidence furnished by applicant is sufficient to establish that, as used in connection with its certification services, the phrase CERTIFIED THERAPEUTIC RECREATION SPECIALIST has acquired distinctiveness.

Decision: The refusal to register is reversed.

⁴ For example, such persons include the Chief Executive Officer of ReMed Recovery Care Center in Conshohocken, Pennsylvania; the Program Director of The Rocky Mountain MS Center King Adult Day Care Enrichment Program in Denver, Colorado; the Chief of the National Institutes of Health Recreation Therapy Section in Bethesda, Maryland; and the Operations Manager for Rehabilitation Medicine of New York Presbyterian Hospital in New York, New York.