

THIS DECISION IS NOT  
CITABLE AS PRECEDENT  
OF THE TTAB

Hearing:  
June 4, 2002

Paper No. 26  
TJQ

Mailed: September 25, 2002

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Council on Professional Standards for Kinesiotherapy

Serial No. 75/300,422

Michael A. Grow, Leo M. Loughlin and Sarira D. Alexander of  
Arent Fox Kintner Plotkin & Kahn for applicant.

Caroline E. Wood, Trademark Examining Attorney, Law Office  
110 (Chris A.F. Pedersen, Managing Attorney).

Before Simms, Quinn and Drost, Administrative Trademark  
Judges.

Opinion by Quinn, Administrative Trademark Judge:

Council on Professional Standards for Kinesiotherapy  
filed an application to register the certification mark  
REGISTERED KINESIOTHERAPIST R.K.T. for "medical services,  
namely, the treatment of the effects of disease, injury and  
congenital disorders through the use of therapeutic  
exercise and education."<sup>1</sup> The application indicates that

<sup>1</sup> Application Serial No. 75/300,422, filed May 30, 1997, alleging  
first use anywhere on August 17, 1987, and first use in commerce  
on May 23, 1998.

"[t]he Certifier has adopted and is exercising legitimate control over the use of the certification mark in commerce." The application also includes the following statement: "The certification mark, as used by authorized persons, certifies that such persons meet the standards and tests of competency and skill and knowledge in the field of the treatment of disease, injury and congenital disorders as established by the certifier." Applicant claims that the words "Registered Kinesiotherapist" have acquired distinctiveness under Section 2(f) of the Trademark Act.

The Trademark Examining Attorney has made final the requirement to disclaim the words "Registered Kinesiotherapist" apart from the mark. The Examining Attorney maintains that the words are generic and, thus, must be disclaimed pursuant to Section 6 of the Act. The Examining Attorney further states that even if the term "REGISTERED KINESIOTHERAPIST" in the proposed mark is found to be not generic, it is highly descriptive, and the evidence of acquired distinctiveness is insufficient to allow registration without a disclaimer.

When the requirement was made final, applicant appealed. Applicant and the Examining Attorney have filed briefs, and an oral hearing was held before this panel.

The Examining Attorney maintains that the term "kinesiotherapist" is generic, and that the term "registered kinesiotherapist" is the name of a category of medical professionals, namely kinesiotherapists who have met applicant's standards and, thus, who are registered in a roster maintained by applicant. The Examining Attorney is not persuaded by the existence of third-party registrations of marks that applicant argues are similar to its own. According to the Examining Attorney, the term is generic and must be disclaimed apart from the mark. In support of the refusal, the Examining Attorney has relied upon the following evidence: a dictionary definition of the term "registered"; excerpts retrieved from the Internet showing uses of the term "kinesiotherapist"; and NEXIS excerpts showing uses of the term "registered kinesiotherapist."

Applicant argues that the term REGISTERED KINESIOTHERAPIST is not generic, and that the record establishes that the term has acquired distinctiveness as used in connection with applicant's certified medical services. Applicant contends that the Office has not met its burden of proving genericness with clear and convincing evidence, and that any doubt on this matter must be resolved in applicant's favor. In support of its

contentions, applicant submitted the following: declarations (and related exhibits) of applicant's employees, namely, Jerry W. Purvis, coordinator, Martha Mincey, a director of continuing competency, Doris A. Woods, director, registration board, and Bridget Collins, a director of continuing competency; a blank application to apply for registration on applicant's roster; form declarations of over ninety individuals, most (if not all) of whom are listed in applicant's roster and authorized to use "REGISTERED KINESIOTHERAPIST"; a copy of a final judgment in a civil action (not involving applicant or its mark); and copies of third-party registrations.

#### The Record

We first turn to take a closer look at the evidentiary record. The website of the American Kinesiotherapy Association indicates that applicant is "an organization whose function is to insure that kinesiotherapy practitioners meet the standards for education, credentialing, and professional competence, which [applicant] has established." The record includes a dictionary definition of the term "registered" which means, in pertinent part, "to enter in an official register; to enroll officially or formally, especially in order to vote or attend classes; to place or cause placement of one's

name in a register." The American Heritage Dictionary of the English Language (3<sup>rd</sup> ed. 1992). In addition, there are articles retrieved from the Internet and the NEXIS database showing generic uses of the term "kinesiotherapist" as the name of a specific occupation in the health care field. This evidence shows that a "kinesiotherapist" is a health care professional who, under the direction of a physician, treats the effects of disease, injury and congenital disorders, through the use of therapeutic exercise and education.<sup>2</sup>

The record also includes NEXIS articles showing what the Examining Attorney views as generic uses of the term "registered kinesiotherapist." Examples include the following:

Meyer has 20 years of experience as a registered kinesiotherapist...  
(The Union Leader, August 30, 1999)

Brown, a four-year letterman on the golf team, is a registered kinesiotherapist.  
(The Advocate, April 28, 1996)

Denver Broncos linebacker Robert Felton, a registered kinesiotherapist...  
(Los Angeles Times, November 20, 1992)

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<sup>2</sup> The job and career information found at [www.humankinetics.com](http://www.humankinetics.com) indicates that the "kinesiotherapy profession is not recognized by the American Medical Association," and that "kinesiotherapists do not enjoy the same respect or status given to physical therapists."

In response to the just-cited NEXIS articles, applicant submitted the declarations of Bridget Collins and Martha Mincey, applicant's directors of continuing competency. The declarants state that each of the individuals named in the articles is a "Registered Kinesiotherapist" who has met applicant's qualifications and is authorized by applicant to identify himself/herself as a "Registered Kinesiotherapist."

Also introduced by applicant is the declaration of Doris Woods, applicant's director of its registration board. Ms. Woods states that the mark has been in substantially exclusive and continuous use since 1987, and has been so used in interstate commerce at least as early as January 1993.<sup>3</sup> Ms. Woods goes on to assert that hundreds of individuals have met standards set by applicant and that such persons are authorized to use the mark; that applicant is the only organization in the country that can issue such certifications; that for about eight years, the mark has been used on over 10,000 mailings per year to those in the health care field; that to remain eligible to use the mark, a "Registered Kinesiotherapist R.K.T." must receive continuing education credits each year; and that the mark

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<sup>3</sup> Applicant earlier submitted the Section 2(f) declaration of its coordinator, Jerry Purvis.

sought to be registered has become highly distinctive and well known to the trade and the relevant public. The declaration is accompanied by a patch worn by, and a certificate that may be displayed by, persons who have been certified by applicant and who are authorized to use the mark. The certificate indicates that the recipient "having submitted satisfactory evidence of completion of the qualifications as determined by this Board [The American Board for Registration of Kinesiotherapists] and the Council of Professional Standards for Kinesiotherapy is hereby awarded this Certificate in Kinesiotherapy and is entitled to be listed in the *Official Roster of Registered Kinesiotherapists* maintained by the Council and is entitled to use the certification mark Registered Kinesiotherapist R.K.T."

Applicant also submitted a final judgment in a civil action wherein, inter alia, the court found the third-party certification marks OCCUPATIONAL THERAPIST REGISTERED OTR and OCCUPATIONAL THERAPY ASSISTANT to be valid and enforceable, and not generic.<sup>4</sup> Also of record are copies of twelve third-party registrations of marks which, according

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<sup>4</sup> National Board for Certification in Occupational Therapy, Inc. v. American Occupational Therapy Association, in the United States District Court for the District of Maryland, Southern Division, Civ. No. AMD 97-767 (dated March 25, 1999).

to applicant, are similar to its mark, thereby demonstrating that applicant's mark should join them on the register.

Finally, the record includes form declarations of 93 individuals, all of whom appear to be kinesiotherapists, and many, if not all, of whom have completed the qualifications determined by applicant so as to be listed in applicant's "Official Roster of Registered Kinesiotherapists." Each declarant states that he/she is engaged in the health care field as a health care professional, and is employed as such. Each declarant goes on to state the following:

I am familiar with the certification mark REGISTERED KINESIOTHERAPIST R.K.T. and the treatment and therapy services offered by those individuals who have met the standards prescribed for the use of this mark.

I recognize that only persons who have met the standards and tests of skill and competency established by [applicant] are permitted to use the mark REGISTERED KINESIOTHERAPIST, alone or in combination with the letters "RKT."

The mark REGISTERED KINESIOTHERAPIST R.K.T. has been used for many years and has become well known as a distinctive certification mark among members of the health care industry and their prospective patients or customers.

I am aware that [applicant] has engaged in significant advertising and promotional efforts to publicize the certification mark REGISTERED KINESIOTHERAPIST R.K.T.

Through those advertising and promotional efforts, the mark has become recognized in the health care industry as a means of signifying that individuals providing services under the mark have met the standards of skill and competency established by [applicant].

### The Law

Certification marks are subject to the statutory bars to registration under Section 2 of the Trademark Act. There is no special exemption from the proscription of Section 2(e)(1) of the Act and, thus, a certification mark cannot be registered if it is generic or merely descriptive of the services it certifies. See: In re National Association of Legal Secretaries (International), 221 USPQ 50 (TTAB 1983); and In re Professional Photographers of Ohio, Inc., 149 USPQ 857 (TTAB 1966). See generally: J. McCarthy, McCarthy on Trademarks and Unfair Competition, §19:95 (4<sup>th</sup> ed. 2001).

We turn first to the issues of whether the term REGISTERED KINESIOTHERAPIST is generic, or whether it is just merely descriptive, when used in connection with the medical services rendered under the certification mark

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sought to be registered. A mark is merely descriptive if, as used in connection with the goods and/or services, it describes, i.e., immediately conveys information about, an ingredient, quality, characteristic, feature, etc. thereof, or if it directly conveys information regarding the nature, function, purpose, or use of the goods and/or services.

See: In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215 (CCPA 1978); In re Eden Foods Inc., 24 USPQ2d 1757 (TTAB 1992); and In re American Screen Process Equipment Co., 175 USPQ 561 (TTAB 1972). The issue is not determined in a vacuum, but rather the mere descriptiveness of the mark is analyzed as the mark is used in connection with the goods and/or services.

A mark is a generic name if it refers to the class or category of goods and/or services on or in connection with which it is used. In re Dial-A-Mattress Operating Corp., 240 F.3d 1341, 57 USPQ2d 1807 (Fed. Cir. 2001), citing H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc., 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986). The test for determining whether a mark is generic is its primary significance to the relevant public. Section 14(3) of the Act; In re American Fertility Society, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999); Magic Wand Inc. v. RDB Inc., 940 F.2d 638, 19 USPQ2d 1551 (Fed. Cir. 1991);

and H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc., supra. The United States Patent and Trademark Office has the burden of establishing by clear evidence that a mark is generic and thus unregistrable. In re Merrill Lynch, Pierce, Fenner and Smith, Inc., 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987). Evidence of the relevant public's understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers, and other publications. In re Northland Aluminum Products, Inc., 777 F.2d 1556, 227 USPQ 961 (Fed. Cir. 1985).

#### **Genericness**

There is no dispute about the genericness of the term "kinesiotherapist." The evidence clearly and convincingly establishes that the term names a specific type of health care professional and that the term is recognized and understood as such. And, at the oral hearing, applicant even offered to disclaim the term "kinesiotherapist" if that would advance the application toward registration.

With respect to genericness in this case, however, we must decide whether the term "REGISTERED KINESIOTHERAPIST" as a whole is generic. See: Estate of P.D. Beckwith, Inc. v. Comm'r of Patents, 252 U.S. 538, 545-46 (1920). We find that the term "REGISTERED KINESIOTHERAPISY" as a whole is

generic for the certified medical services rendered by applicant. Simply put, there is no better way than "REGISTERED KINESIOTHERAPIST" to name applicant's services which essentially provide a certification program for kinesiotherapists. Applicant maintains that there are other ways of identifying such services, by using the terms "certified," "professional," or "board certified." However, when "registered" is combined with the term "kinesiotherapist," the combined term "registered kinesiotherapist" would appear to be as generic as applicant's examples. See: In re Sun Oil Co., 426 F.2d 401, 165 USPQ 718, 719 (CCPA 1970) (Rich, J., concurring) [All of the generic names for a product belong in the public domain.](emphasis in original). Our view is that the term "REGISTERED KINESIOTHERAPIST" will be viewed in the same way as "registered nurse," which is a generic name for a specific medical professional.<sup>5</sup>

The designation "REGISTERED KINESIOTHERAPIST" as a whole is no less generic than its constituents, that is to say, the combination of the generic terms "registered" and

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<sup>5</sup> We take judicial notice of the dictionary definition of "registered nurse": "n. a graduate trained nurse who has been licensed by a state authority (as a board of nursing examiners) after successfully passing examinations for registration." Webster's Third New International Dictionary (unabridged ed. 1993).

"kinesiotherapist" does not mean something distinct from the combined meanings of the individual terms. See: In re Gould Paper Corp., 834 F.2d 1017, 5 USPQ2d 1110 (Fed. Cir. 1987). Our view is supported by the NEXIS evidence showing that the authors of the articles perceived the combined term "registered kinesiotherapist" as a generic term. The articles show evidence of the public's understanding of the combined term inasmuch as the term is used as a generic noun in small letters to identify a specific job title in the medical profession. See: In re American Fertility Society, supra at 1836. Even though the articles may identify only individuals who are listed on applicant's roster, readers of the articles would perceive the uses of "registered kinesiotherapist" as a generic term. As such, the term is generic. See: In re Mortgage Bankers Association of America, 226 USPQ 954 (TTAB 1985) [CERTIFIED MORTGAGE BANKER is incapable of identifying source of services which essentially are the providing of a certification program for mortgage bankers]; American Speech-Language-Hearing Association v. National Hearing Aid Society, 224 USPQ 798 (TTAB 1984) ["Certified Audiologist" is incapable of distinguishing audiologists certified by an entity from audiologists that may be certified by other organizations or associations even if the entity is the

only such organization maintaining an ongoing certification program]; In re National Association of Legal Secretaries (International), supra [PROFESSIONAL LEGAL SECRETARY is incapable of exclusive appropriation, but rather should, in fairness, remain in the public domain]; and In re Professional Photographers of Ohio, Inc., supra ["Certified Professional Photographer" is not registrable as a certification mark because it is merely a title bestowed on an individual rather than a mark used in the sale or advertising of photography services rendered by that person].

In making our determination, we have considered the relevant public to be both medical professionals (e.g., kinesiotherapists) and the general public. Although applicant would have us conclude that the relevant public comprise the medical professionals only, we find that the relevant public is broader, and would include patients seeking the care of a kinesiotherapist who has met certain standards. In view of applicant's position on this point, it has not introduced any evidence bearing on how the general public, who might avail themselves of medical services offered by a kinesiotherapist listed in applicant's roster, perceive the term "registered kinesiotherapist."

We have carefully reviewed the NEXIS articles relied upon by the Examining Attorney, together with applicant's declarations in response thereto. The NEXIS articles show uses by others of the term "registered kinesiotherapist" in a generic manner. By referring to the name of a specific medical professional in small letters, the authors use "registered kinesiotherapist" as a generic noun. We note that the authors use the term "registered kinesiotherapist" per se, with no reference to "R.K.T." or to the entire designation "REGISTERED KINESIOTHERAPIST R.K.T."

We also have considered the declarations from the health care professionals. The declarations refer to the distinctiveness of the designation "REGISTERED KINESIOTHERAPIST R.K.T." as a whole. It may well be that the letter portion of the designation, that is, "R.K.T.", is the part that lends any distinctiveness to the mark as a whole. Although the individuals state that only persons who have met the standards and tests of skill and competency established by applicant are permitted to use "Registered Kinesiotherapist," no statement is made regarding distinctiveness of this term per se.

Although we have considered the third-party registrations, they do not compel a different result herein. In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d

1564, 1566 (Fed. Cir. 2001) ["Even if some prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such prior registrations does not bind the Board or this court."]. Our view is the same with respect to the court judgment regarding the validity of two marks, both of which are included in the third-party registrations. While uniform treatment under the Trademark Act is an administrative goal, our task in this appeal is to determine, based on the record before us, whether applicant's particular mark sought to be registered here is generic. As is often stated, each case must be decided on its own merits. See, e.g.: *In re Best Software Inc.*, 58 USPQ2d 1314 (TTAB 2001).

In sum, the designation "registered kinesiotherapist" is a combination of commonly understood terms that is generic when considered as a whole. The designation "registered kinesiotherapist" should not be subject to exclusive appropriation, but rather should remain free for others in the kinesiotherapy profession to use in connection with their health care services. *In re Boston Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999). Competition certainly would be hindered at the point when others in the field would begin to certify

kinesiotherapists. In re Tekdyne Inc., 33 USPQ2d 1949, 1953 (TTAB 1994). Accordingly, the term "Registered Kinesiotherapist" must be disclaimed apart from the mark.

**Mere Descriptiveness**

This point is not disputed by applicant. Indeed, applicant's reliance on Section 2(f) with respect to "REGISTERED KINESIOTHERAPIST" acts as a concession that the term is, at the very least, merely descriptive. Yamaha International Corp. v. Hoshino Gakki Co., Ltd., 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988); and In re Cabot Corp., 15 USPQ2d 1224, 1229 (TTAB 1990).

Even if we had not found REGISTERED KINESIOTHERAPIST to be generic, and even in the absence of a claim under Section 2(f), we nevertheless would find it to be merely descriptive. The term immediately conveys the impression that applicant's certification of medical services involves the registration of kinesiotherapists who meet certain certification qualifications set by applicant. In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). It is clear that the term "Registered Kinesiotherapist" has a specific and readily recognized meaning when it is used in connection with applicant's services.

**Acquired Distinctiveness**

In finding that the term REGISTERED KINESIOTHERAPIST is incapable of being a source identifier for applicant's certification services, we have considered, of course, all of the evidence touching on the relevant public's perception of the term, including the evidence of acquired distinctiveness. As to acquired distinctiveness, applicant has the burden to establish a prima facie case of acquired distinctiveness. *Yamaha International Corp. v. Hoshino Gakki Co., Ltd.*, supra at 1006.

As indicated above, applicant submitted the declarations of 93 individuals who are health care professionals, many, if not all, of whom are listed on applicant's "Official Roster of Registered Kinesiotherapists." Although we have considered the declarations, they hardly are the most impressive type of evidence in this situation. Most of the declarants appear to have met applicant's qualifications, passed applicant's test and received a certificate stating same. At the very least, these are persons who know the source of the certification services. See: *In re Edward Ski Products Inc.*, 49 USPQ2d 2001, 2005 (TTAB 1999). Given the individuals' relationship with applicant, their declarations play only a minor role in determining public

perception of the mark. More telling is the absence of declarations or any other direct evidence from applicant bearing on the perception of the general public, that is, patients who will be the recipients of the medical services certified under the mark, or even other medical professionals who might recommend a kinesiotherapist. What we do have is the NEXIS evidence introduced by the Examining Attorney that indicates that the public would view the term "registered kinesiotherapist" as generic, just as in the case of "registered nurse."

The evidence suggests that applicant has enjoyed a degree of success, with many individuals being certified under its auspices. Nonetheless, we have no idea about either the revenues generated under the mark or the expenditures made in promoting the mark. The issue here is the achievement of distinctiveness, and the evidence falls far short of establishing this. In re Bongrain International Corp., 894 F.2d 1316, 13 USPQ2d 1727 (Fed. Cir. 1990); and In re Recorded Books Inc., 42 USPQ2d 1275 (TTAB 1997). To be clear on this significant point, other than the not surprising recognition by individuals who have passed applicant's exam, we have no evidence that patients and others who avail themselves of medical services rendered by a "registered kinesiotherapist" recognize the

term as a distinctive term for applicant's services offered under the mark REGISTERED KINESIOTHERAPIST R.K.T.

Accordingly, even if the term REGISTERED KINESIOTHERAPIST were found to be not generic, but merely descriptive, given the highly descriptive nature of the term, we would need to see a great deal more evidence than what applicant has submitted in order to find that the term has become distinctive of applicant's certification services. That is to say, the greater the degree of descriptiveness, the greater the evidentiary burden on the user to establish acquired distinctiveness. *Yamaha Int'l. Corp. v. Hoshino Gakki Co.*, supra; and *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, supra.

Due to the generic nature of the term "registered kinesiotherapist," the mark REGISTERED KINESIOTHERAPIST may not be registered in the absence of a disclaimer of the term.

Decision: The refusal to register is affirmed in the absence of a disclaimer of the generic term "REGISTERED KINESIOTHERAPIST." Applicant is allowed thirty days from the date of this decision to submit a disclaimer of "REGISTERED KINESIOTHERAPIST" apart from the mark. Trademark Rule 2.142(g).