

6. Secondary Meaning; Acquired Distinctiveness

{This chapter assembled by EEJ in 2026.}

6.1 Prof. Grynberg on secondary meaning

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6.1.1. Secondary meaning

Secondary meaning. There are a variety of judicial definitions of secondary meaning, but they center on the same concept, the point at which consumers identify a term as designating a product's source. *See, e.g., Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 118 (1938) (secondary meaning is the point at which “the primary significance of the term in the minds of the consuming public is not the product but the producer”). In a similar vein, section 2 of the Lanham Act (15 U.S.C. § 1052) provides that certain non-distinctive marks may be registered if they have “become distinctive of the applicant's goods in commerce.”

Note, however, that this association with a word as designating a single source does not necessarily mean that the consumer knows precisely who that source is.

6.1.2. Proving secondary meaning

Courts are not entirely consistent in determining when secondary meaning exists, which is perhaps unsurprising given its status as a question of fact. In the absence of direct consumer testimony, surveys may provide something resembling direct evidence of consumer perception. Courts do not require that a majority of the relevant consumer class see the word as a mark. A substantial portion is often enough.

Courts also rely on more circumstantial evidence. Some forms of acceptable circumstantial evidence include the exclusive use of the term by one party as a mark, advertising, sales and customers, market position, and evidence that a defendant intentionally copied the mark. *See, e.g., Viacom Int'l v. IJR Capital Investments, L.L.C.*, 891 F.3d 178, 190 (5th Cir. 2018) (listing factors as “(1) length and manner of use of the mark or trade dress, (2) volume of sales, (3) amount and manner of advertising, (4) nature of use of the mark or trade dress in newspapers and magazines, (5) consumer-survey evidence, (6) direct consumer testimony, and (7) the defendant’s intent in copying the [mark].” (internal quotation and citation omitted)); *see also* 15 U.S.C. § 1052 (providing that the Trademark Office “may accept as prima facie evidence that the mark has become distinctive, as used on or in connection with the applicant’s goods in commerce, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date on which the claim of distinctiveness is made.”). Are these factors necessarily probative of secondary meaning? What about situations in which the descriptive term is sometimes used with an inherently distinctive mark and sometimes without?

Does it matter if a defendant copied the plaintiff’s mark? Might a defendant sometimes copy a term for descriptive (as opposed to trademark) purposes? Some Second Circuit cases have suggested that the New York law of unfair competition allows evidence of the deliberate copying of a non-inherently distinctive mark to substitute for proof of secondary meaning. The viability of this “New York Rule” is in doubt. *See generally* 2 MCCARTHY § 15:20.

As for the Trademark Office, 37 C.F.R. § 2.41 provides that proof of acquired distinctiveness includes:

(1) Ownership of prior registration(s). In appropriate cases, ownership of one or more active prior registrations on the Principal Register or under the Trademark Act of 1905 of the same mark may be accepted as prima facie evidence of distinctiveness if the goods or services are sufficiently similar to the goods or services in the application; however, further evidence may be required.

(2) Five years substantially exclusive and continuous use in commerce. In appropriate cases, if a trademark or service mark is said to have become distinctive of the applicant's goods or services by reason of the applicant's substantially exclusive and continuous use of the mark in commerce for the five years before the date on which the claim of distinctiveness is made, a showing by way of verified statements in the application may be accepted as prima facie evidence of distinctiveness; however, further evidence may be required.

(3) Other evidence. In appropriate cases, where the applicant claims that a mark has become distinctive in commerce of the applicant's goods or services, the applicant may, in support of registrability, submit with the application, or in response to a request for evidence or to a refusal to register, verified statements, depositions, or other appropriate evidence showing duration, extent, and nature of the use in commerce and advertising expenditures in connection therewith (identifying types of media and attaching typical advertisements), and verified statements, letters or statements from the trade or public, or both, or other appropriate evidence of distinctiveness.

6.1.3. Sliding scales

Sliding scales. Some courts vary the amount of evidence of secondary meaning required on how descriptive the term is. That is, terms closer to the suggestive/descriptive border may not require as much evidence of secondary meaning as a more obviously descriptive mark. *See, e.g.,* In re Steelbuilding.com, 415 F.3d 1293, 1300 (Fed. Cir. 2005) (“[T]he

applicant's burden of showing acquired distinctiveness increases with the level of descriptiveness; a more descriptive term requires more evidence of secondary meaning."); 2 MCCARTHY § 15:33.

6.1.4. "Secondary meaning in the making"

"*Secondary meaning in the making.*" What happens if someone uses, advertises, or otherwise invests in a descriptive mark, but fails to achieve secondary meaning before another, more powerful user, deliberately steps in with the same mark. Does the first user have a remedy? The judicial answer has largely been no.

6.2. Establishing Acquired Distinctiveness, In General

TMEP: 1212.01

General Evidentiary Matters

Whether acquired distinctiveness has been established is a question of fact. *Schlafly v. St. Louis Brewery, LLC*, 909 F.3d 420, 423 (Fed. Cir. 2018) (citing *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 1335 (Fed. Cir. 2015); *Hoover Co. v. Royal Appliance Mfg. Co.*, 238 F.3d 1357, 1359 (Fed. Cir. 2001)). The record must contain facts or evidence of acquired distinctiveness.

The burden of proving that a mark has acquired distinctiveness is on the applicant. *In re La. Fish Fry Prods., Ltd.*, 797 F.3d at 1335 (citing *In re Steelbuilding.com*, 415 F.3d 1293, 1297 (Fed. Cir. 2005)); *In re Guaranteed Rate, Inc.*, 2020 USPQ2d 10869, at *2 (TTAB 2020) (citing *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 1578-79 (Fed. Cir. 1988)).

The applicant may present any competent evidence to establish that a mark has acquired distinctiveness. Actual evidence of acquired distinctiveness may be submitted regardless of the length of time the mark has been used. See *Ex parte Fox River Paper Corp.*, 99 USPQ 173, 174 (Comm'r Pats. 1953).

"The amount and character of evidence required to establish acquired distinctiveness depends on the facts of each case and the nature of the mark sought to be registered." *In re Gen. Mills IP Holdings II, LLC*, 124 USPQ2d 1016, 1018 (TTAB 2017) (citing *Roux Labs., Inc. v. Clairol Inc.*,

427 F.2d 823, 829 (C.C.P.A. 1970); *In re Hebr Mfg. Co.*, 279 F.2d 526, 528 (C.C.P.A. 1960)).

Typically, more evidence is required where a mark is so highly descriptive that purchasers seeing the matter in relation to the named goods or services would be less likely to believe that it indicates source in any one party. See *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358 (Fed. Cir. 2018); *In re Steelbuilding.com*, 415 F.3d at 1300 (citing *In re Bongrain Int’l (Am.) Corp.*, 894 F.2d 1316, 1318 (Fed. Cir. 1990)); *City of London Distillery, Ltd. v. Hayman Grp. Ltd.*, 2020 USPQ2d 11487, at *16 (TTAB 2020) (quoting *In re Greenliant Sys. Ltd.*, 97 USPQ2d 1078, 1085 (TTAB 2010)); *Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1767 (TTAB 2013); *In re Seaman & Assocs., Inc.*, 1 USPQ2d 1657, 1659 (TTAB 1986); *In re Packaging Specialists, Inc.*, 221 USPQ 917, 919 (TTAB 1984); see also *Real Foods Pty. v. Frito-Lay N. Am.*, 128 USPQ2d 1370, 1378 (Fed. Cir. 2018) (“while evidence of substantially exclusive and continuous use may be sufficient to prove a prima facie case of acquired distinctiveness, this is not always the case. . . . ‘Particularly for a mark that is . . . highly descriptive like [Real Foods’ proposed marks], the [TTAB] was within its discretion not to accept [Real Foods’] alleged five years of substantially exclusive and continuous use as prima facie evidence of acquired distinctiveness.’”) (internal citations omitted); *In re La. Fish Fry Prods.*, 116 USPQ2d at 1265 (Board has discretion not to accept an applicant’s allegation of five years of substantially exclusive and continuous use as prima facie evidence of acquired distinctiveness when the proposed mark is “highly descriptive”). Research showing that third parties in applicant’s field or closely related fields use the same or substantially the same wording as the mark, or very similar wording as the mark, tends to indicate the mark is at least highly descriptive. See TMEP §1202.02(b)(i) regarding the heavy evidentiary burden for acquired distinctiveness of trade dress.

If the applicant has one or more prior federal registrations under Trademark Act §2(f) for a different depiction of the same mark (e.g., stylized vs. standard character) or a portion of the proposed mark, for the same goods and/or services, the examining attorney’s review of the records to assess the probative value of the prior registrations may assist in resolving whether the mark in question has acquired distinctiveness, and thereby

obviate the necessity of determining the issue on appeal. *In re Thomas Nelson, Inc.*, 97 USPQ2d 1712, 1713 (TTAB 2011).

Facts based on events that occurred subsequent to the filing date of the application may be considered. Whether acquired distinctiveness has been established is determined in view of the facts that exist at the time registration is being sought. *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1354 (Fed. Cir. 2010) (quoting *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 1344 (C.C.P.A. 1982)); *Gen. Foods Corp. v. MGD Partners*, 224 USPQ 479, 486 (TTAB 1984) (citing *In re Thunderbird Prods., Corp.*, 406 F.2d 1389, 1391-92, 160 USPQ 730, 732-33 (C.C.P.A. 1969); *Hartford Fire Ins. Co. v. Structured Settlements Co.*, 215 USPQ 1145, 1150 (TTAB 1982)).

In determining whether a mark has acquired distinctiveness, the evidence is considered as a whole, guided by the following factors: (1) association of the applied-for mark with a particular source by actual purchasers (typically measured by customer surveys); (2) length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage of the product embodying the mark. *Converse, Inc. v. ITC*, 909 F.3d 1110, 1120 (Fed. Cir. 2018) (the *Converse* factors); *In re Uman Diagnostics AB*, Ser. No. 88960633, 2023 TTAB LEXIS 77, at *49 (2023); *City of London Distillery, Ltd.*, 2020 USPQ2d 11487, at *16 (quoting *In re Snowizard, Inc.*, 129 USPQ2d 1001, 1005 (TTAB 2018)); *In re Guaranteed Rate, Inc.*, 2020 USPQ2d 10869, at *2-3. “[N]o single factor is determinative.” *In re Steelbuilding.com*, 415 F.3d at 1300. Rather, all factors are weighed together in light of all the circumstances to determine whether the mark has acquired distinctiveness. *Id.*

6.3. Five Years’ Use as Proof

TMEP: 1212.05

Five Years of Use as Proof of Distinctiveness

Section 2(f) of the Trademark Act, 15 U.S.C. §1052(f), provides that “proof of substantially exclusive and continuous use” of a designation “as a

mark by the applicant in commerce for the five years before the date on which the claim of distinctiveness is made” may be accepted as prima facie evidence that the mark has acquired distinctiveness as used in commerce with the applicant’s goods or services. *See* 37 C.F.R. §2.41(a)(2).

The Trademark Act previously required that the relevant five-year period precede the filing date of the application. The Trademark Law Revision Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935 (1988), revised §2(f) of the Act to provide for a prima facie showing of acquired distinctiveness based on five years’ use running up to the date the claim is made. Under the revised provision, any five-year claim submitted on or after November 16, 1989, is subject to the new time period. This applies even if the application was filed prior to that date.

Section 2(f) of the Act and 37 C.F.R. §2.41(a)(2) state that reliance on a claim of five years’ use to establish acquired distinctiveness “may” be acceptable in “appropriate cases.” The USPTO may, at its option, require additional evidence of distinctiveness. *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 1336-37, 116 USPQ2d 1262, 1265 (Fed. Cir. 2015) (noting that the statute does not require the USPTO to accept five years’ use as prima facie evidence of acquired distinctiveness). Whether a claim of five years’ use will be deemed sufficient to establish that the mark has acquired distinctiveness depends largely on the nature of the mark in relation to the specified goods, services, or classes.

The following are general guidelines regarding the statutorily suggested proof of five years’ use as a method of establishing acquired distinctiveness.

1212.05(a) Sufficiency of Claim Vis-à-Vis Nature of the Mark

For most surnames, the statement of five years’ use will be sufficient to establish acquired distinctiveness.

For marks refused under §2(e)(1) or §2(e)(2), the amount of evidence necessary to establish secondary meaning varies. “[T]he greater the degree of descriptiveness the term has, the heavier the burden to prove it has attained secondary meaning.” *In re Bongrain Int’l Corp.*, 894 F.2d 1316, 1317 n.4 (Fed. Cir. 1990); *see Heritage All. v. Am. Pol’y Roundtable*, 133 F.4th 1063, 1070 (Fed. Cir. 2025) (citing *Yamaha Int’l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 1581 (Fed. Cir. 1988); *In re La. Fish Fry Prods.*,

Ltd., 797 F.3d 1332, 1336-37 (Fed. Cir. 2015)) (“Our case law . . . recognizes the Board’s discretion to weigh the evidence, especially for a highly descriptive mark.”); *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 1368-69 (Fed. Cir. 2018) (quoting *In re Steelbuilding.com*, 415 F.3d 1293, 1300 (Fed. Cir. 2005). For terms with a greater degree of descriptiveness, statements of length of use alone generally will not be sufficient to establish acquired distinctiveness. *See, e.g., Heritage All. v. Am. Pol’y Roundtable*, 133 F.4th at 1070 (holding the Board was within its discretion not to accept applicant’s allegation of five years’ use given the highly descriptive nature of the mark); *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 1336-37 (Fed. Cir. 2015) (holding the Board was within its discretion not to accept applicant’s allegation of five years’ use given the highly descriptive nature of the mark); *Spiritline Cruises LLC v. Tour Mgmt. Servs. Inc.*, 2020 USPQ2d 48324, at *11 (TTAB 2020) (holding applicant’s claim of use since 2003 not sufficient to show the mark CHARLESTON HARBOR TOURS had become distinctive because the term was highly geographically descriptive); *In re Yarnell Ice Cream, LLC*, 2019 USPQ2d 265039, at *10-11 (TTAB 2019) (holding applicant’s claim of use since 2012 not sufficient to show the mark SCOOP had become distinctive for ice cream because other circumstances undercut the significance of this claim of extended use); *In re Virtual Indep. Paralegals, LLC*, 2019 USPQ2d 111512, at *11-12 (TTAB 2019) (holding applicant’s claim of use for the last five years not sufficient to show the mark VIRTUAL INDEPENDENT PARALEGALS had become distinctive for various paralegal services due to the highly descriptive nature of the proposed mark); *In re Crystal Geyser Water Co.*, 85 USPQ2d 1374 (TTAB 2007) (holding applicant’s evidence of acquired distinctiveness, including a claim of use since 1990, sales of more than 7,650,000,000 units of its goods, and extensive display of its mark CRYSTAL GEYSER ALPINE SPRING WATER on advertising and delivery trucks and promotional paraphernalia, insufficient to establish that the highly descriptive phrase ALPINE SPRING WATER had acquired distinctiveness for applicant’s bottled spring water); *In re Kalmbach Publ’g Co.*, 14 USPQ2d 1490 (TTAB 1989) (holding applicant’s sole evidence of acquired distinctiveness, a claim of use since 1975, insufficient to establish that the

highly descriptive, if not generic, designation RADIO CONTROL BUYERS GUIDE had become distinctive of applicant's magazines).

For matter that is not inherently distinctive because of its nature (e.g., nondistinctive product design, overall color of a product, mere ornamentation, and sounds for goods that make the sound in their normal course of operation), evidence of five years' use is not sufficient to show acquired distinctiveness. In such a case, actual evidence that the mark is perceived as a mark for the relevant goods, services, or classes would be required to establish distinctiveness. *See generally In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116 (Fed. Cir. 1985) (color pink as uniformly applied to applicant's fibrous glass residential insulation); *In re R.M. Smith, Inc.*, 734 F.2d 1482 (Fed. Cir. 1984) (configuration of pistol grip water nozzle for water nozzles); *Nextel Commc'ns, Inc. v. Motorola, Inc.*, 91 USPQ2d 1393, 1401 (TTAB 2009) (noting that "the evidence required is in proportion to the degree of nondistinctiveness of the mark at issue" in relation to a sound mark emitted by cellular telephones in their normal course of operation); *In re ic! berlin brillen GmbH*, 85 USPQ2d 2021 (TTAB 2008) (configuration of an earpiece for frames for sunglasses and spectacles comprised of three "fingers" near the hinge); *In re Black & Decker Corp.*, 81 USPQ2d 1841, 1844 (TTAB 2006) (finding applicant successfully established acquired distinctiveness for the design of a key head for key blanks and various metal door hardware, where evidence submitted in support included twenty-four years of use in commerce and significant evidence regarding industry practice, such that the evidence showed that "it is common for manufacturers of door hardware to use key head designs as source indicators."); *Edward Weck Inc. v. IM Inc.*, 17 USPQ2d 1142 (TTAB 1990) (color green for medical instruments); *In re Cabot Corp.*, 15 USPQ2d 1224 (TTAB 1990) (configuration of a pillow-pack container for ear plugs and configuration of a pillow-pack container with trade dress (white circle surrounded by blue border) for ear plugs); *In re Star Pharm., Inc.*, 225 USPQ 209 (TTAB 1985) (color combination of drug capsule and seeds therein for methyltestosterone); *In re Craigmyle*, 224 USPQ 791 (TTAB 1984) (configuration of halter square for horse halters).

1212.05(b) “Substantially Exclusive and Continuous”

The five years of use in commerce does not have to be exclusive, but must be “substantially” exclusive. 15 U.S.C. §1052(f); 37 C.F.R. §2.41(a)(2). This makes allowance for use by others that may be inconsequential or infringing, which does not necessarily invalidate the applicant’s claim. *L.D. Kichler Co. v. Davoil, Inc.*, 192 F.3d 1349, 1352, 52 USPQ2d 1307, 1309 (Fed. Cir. 1999). Thus, when evaluating whether an applicant has had “substantially” exclusive use of a mark, the determination is based on “whether any use by a third party [is] ‘significant’ or whether it [is] merely ‘inconsequential or infringing.’” *Galperti, Inc. v. Galperti S.R.L.*, 17 F.4th 1144, 1147, 2021 USPQ2d 1115, at *2 (Fed. Cir. 2021).

The existence of other applications to register the same mark, or other known uses of the mark, does not automatically eliminate the possibility of using this method of proof, but the examining attorney should inquire as to the nature of such use and be satisfied that it is not significant or does not otherwise nullify the claim of distinctiveness. *See Galperti, Inc.*, 17 F.4th at 1148, 2021 USPQ2d 1115, at *4 (“a significant amount of marketplace use of a term not as a source identifier for those users does tend to undermine an applicant’s assertion that its own use has been substantially exclusive”); *Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 1403, 222 USPQ 939, 940-41 (Fed. Cir. 1984) (“When the record shows that purchasers are confronted with more than one (let alone numerous) independent users of a term or device, an application for registration under Section 2(f) cannot be successful, for distinctiveness on which purchasers may rely is lacking under such circumstances.”); *In re Jasmin Larian, LLC*, 2022 USPQ2d 290, at *40-41 (TTAB 2022) (finding “the widespread use, sale of and discussions/comments about bamboo handbag designs similar to [a]pplicant’s applied-for mark” showed that “[a]pplicant’s use [was] not ‘substantially exclusive’”); *In re Dimarzio, Inc.*, 2021 USPQ2d 1191, at *13-25 (TTAB 2021) (finding the examining attorney’s evidence of extensive third-party use of applicant’s proposed color mark on the same goods showed that applicant’s use was not substantially exclusive); *Spiritline Cruises LLC v. Tour Mgmt. Servs. Inc.*, 2020 USPQ2d 48324, at *11 (TTAB 2020) (finding “the substantially non-exclusive use of CHARLESTON HARBOR TOURS . . . interfere[d] with the relevant public’s perception of the designation as an indicator of a single

source”); *In re MK Diamond Prods., Inc.*, 2020 USPQ2d 10882, at *21 (TTAB 2020) (“[w]hile absolute exclusivity is not required for a Section 2(f) registration, . . . the widespread use of other substantially similar [designs] . . . is inconsistent with the ‘substantially exclusive’ use required by the statute”); *Milwaukee Elec. Tool Corp. v. Freud Am., Inc.*, 2019 USPQ2d 460354, at *25 (TTAB 2019) (finding evidence of third-party use of the proposed mark showed that registrant’s use had not been “substantially exclusive either at the time of registration or thereafter”); *In re Gen. Mills IP Holdings II, LLC*, 124 USPQ2d 1016, 1024 (TTAB 2017) (finding that “the presence in the market of yellow-packaged cereals from various sources . . . would tend to detract from any public perception of the predominantly yellow background as a source-indicator pointing solely to Applicant”); *Ayoub, Inc. v. ACS Ayoub Carpet Serv.*, 118 USPQ2d 1392, 1404 (TTAB 2016) (finding that, because of widespread third-party uses of the surname Ayoub in connection with rug, carpet and flooring businesses, applicant’s use of the applied-for mark, AYOUB, was not “substantially exclusive” and thus the mark had not acquired distinctiveness in connection with applicant’s identified carpet and rug services); *Nextel Commc’ns, Inc. v. Motorola, Inc.*, 91 USPQ2d 1393, 1408 (TTAB 2009) (finding opposer’s contemporaneous use of the mark in connection with services closely related to applicant’s goods rose to the level necessary to rebut applicant’s contention of substantially exclusive use); *Target Brands, Inc. v. Hughes*, 85 USPQ2d 1676, 1682-83 (TTAB 2007) (finding substantial use of mark by opposer’s parent company and additional use of mark by numerous third parties “seriously undercuts if not nullifies applicant’s claim of acquired distinctiveness.”); *Marshall Field & Co. v. Mrs. Fields Cookies*, 11 USPQ2d 1355, 1357-58 (TTAB 1989) (“[T]he existence of numerous third party users of a mark, even if junior, might well have a material impact on the Examiner’s decision to accept a party’s claim of distinctiveness.”); *Flowers Indus. Inc. v. Interstate Brands Corp.*, 5 USPQ2d 1580, 1588-89 (TTAB 1987) (“[L]ong and continuous use alone is insufficient to show secondary meaning where the use is not substantially exclusive.”); *see also TBL Licensing, LLC v. Vidal*, 98 F.4th 500, 519-520 (4th Cir. 2024) (“Even when the record ‘does not establish the exact extent,’ widespread third-party use of substantially similar designs suggests the at-

issue design lacks secondary meaning.” (quoting *Echo Travel, Inc. v. Travel Assocs., Inc.*, 870 F.2d 1264, 1269 (7th Cir. 1989)).

The use of the mark during the five years must also be continuous, without a period of “nonuse” or suspension of trade in the goods or services in connection with which the mark is used. 15 U.S.C. §1052(f); 37 C.F.R. §2.41(a)(2).

1212.05(c) Use “as a Mark”

The substantially exclusive and continuous use must be “as a mark.” 15 U.S.C. §1052(f); see *In re Craigmyle*, 224 USPQ 791, 793 (TTAB 1984) (finding registrability under §2(f) not established by sales over a long period of time where there was no evidence that the subject matter had been used as a mark); *In re Kwik Lok Corp.*, 217 USPQ 1245, 1248 (TTAB 1983) (holding declarations as to sales volume and advertising expenditures insufficient to establish acquired distinctiveness. “The significant missing element in appellant’s case is evidence persuasive of the fact that the subject matter has been used *as a mark*.”).

1212.05(d) Form of the Proof of Five Years’ Use

If the applicant chooses to seek registration under §2(f), 15 U.S.C. §1052(f), by using the statutory suggestion of five years of use as proof of distinctiveness, the applicant should submit a claim of distinctiveness. The following is the suggested format for a claim for a trademark or service mark, for a certification mark, for a collective membership mark, and for a collective trademark or collective service mark, based on 37 C.F.R. §2.41(a)(2), (b)(2), (c)(2), and (d)(2).

For a *trademark or service mark*, the claim of distinctiveness should read as follows, if accurate:

The mark has become distinctive of the goods/services through the applicant’s substantially exclusive and continuous use of the mark in commerce that the U.S. Congress may lawfully regulate for at least the five years immediately before the date of this statement.

See 37 C.F.R. §2.41(a)(2).

For a *certification mark*, the claim of distinctiveness should read as follows, if accurate:

The mark has become distinctive of the certified goods/services through the authorized users' substantially exclusive and continuous use of the mark in commerce that the U.S. Congress may lawfully regulate for at least the five years immediately before the date of this statement.

See 37 C.F.R. §2.41(d)(2).

For a *collective membership mark*, the claim of distinctiveness should read as follows, if accurate:

The mark has become distinctive of indicating membership in the collective membership organization through the members' substantially exclusive and continuous use of the mark in commerce that the U.S. Congress may lawfully regulate for at least the five years immediately before the date of this statement.

See 37 C.F.R. §2.41(c)(2).

For a *collective trademark or collective service mark*, the claim of distinctiveness should read as follows, if accurate:

The mark has become distinctive of the goods/services through the applicant's members' substantially exclusive and continuous use of the mark in commerce that the U.S. Congress may lawfully regulate for at least the five years immediately before the date of this statement.

See 37 C.F.R. §2.41(b)(2).

The claim of five years of use is required to be supported by a properly signed affidavit or declaration under 37 C.F.R. §2.20. *See* 37 C.F.R. §2.41(a)(2), (b)(2), (c)(2), (d)(2). The affidavit or declaration must be signed by a person properly authorized to sign on behalf of applicant under 37 C.F.R. §2.193(e)(1). *See* TMEP §611.03(a).

The following are guidelines regarding the form and language appropriate for a claim of five years of use:

(1) Use of the precise statutory wording is desirable, but variations may be accepted if they do not affect the essential allegations.

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- (2) The wording “substantially exclusive and continuous use of the mark in commerce” is essential. *See In re Olin Corp.*, 124 USPQ2d 1327, 1337 (TTAB 2017).
- (3) It must be clear from the record that the five years of use has been in commerce that may lawfully be regulated by the U.S. Congress. *See Blanchard & Co. v. Charles Gilman & Son, Inc.*, 239 F. Supp. 827, 145 USPQ 62 (D. Mass. 1965), *aff’d*, 353 F.2d 400, 147 USPQ 263 (1st Cir. 1965).
- (4) The use of the mark must cover the five years immediately before the date of the statement of five years’ use. Thus, wording that indicates that the use referred to is before the date of the statement is essential. Its omission can only be excused if the facts in the record clearly show that the use includes the five years before the date of the statement.
- (5) The affidavit or declaration should include a statement that the mark has become distinctive or that the applicant believes that the mark has become distinctive, but absence of this statement is not fatal. *See* TMEP §1212.07 for examples of various ways in which an applicant may assert a §2(f) claim.
- (6) If the claim of acquired distinctiveness applies only to a portion of the mark (a claim of §2(f) “in part”), the claim must be limited to the relevant portion of the mark. *See* TMEP §§1212.02(f)(i), 1212.02(f)(ii).
- (7) The affidavit or declaration must contain a reference to distinctiveness with respect to the applicant’s goods, services, or membership in the collective membership organization because the distinctiveness created by the five years’ use must relate to the goods/services/collective membership organization specified in the application. If there is doubt that the distinctiveness pertains to all or any of the goods/services/classes specified in the application, the examining attorney must inquire regarding that issue.
- (8) While a response clarifying a §2(f) claim does not have to be verified, a substitute statement regarding acquired distinctiveness based on five years’ use must be verified. For

example, if the applicant amends a §2(f) claim as to the entire mark to a claim of §2(f) in part, or vice versa, the amended claim of distinctiveness based on five years' use must be supported by a properly signed affidavit or a declaration under 37 C.F.R. §2.20.

6.4. By Actual Evidence

TMEP: 1212.06

Establishing Distinctiveness by Actual Evidence

Under Trademark Rule 2.41(a)(3), 37 C.F.R. §2.41(a)(3), an applicant may submit affidavits, declarations under 37 C.F.R. §2.20, depositions, or other appropriate evidence showing the duration, extent, and nature of the applicant's use of a mark in commerce that may lawfully be regulated by the U.S. Congress, advertising expenditures in connection with such use, letters, or statements from the trade and/or public, or other appropriate evidence tending to show that the mark distinguishes the goods or services.

Establishing acquired distinctiveness by actual evidence was explained as follows in *In re Owens-Corning Fiberglas Corp.*:

An evidentiary showing of secondary meaning, adequate to show that a mark has acquired distinctiveness indicating the origin of the goods, includes evidence of the trademark owner's method of using the mark, supplemented by evidence of the effectiveness of such use to cause the purchasing public to identify the mark with the source of the product.

774 F.2d 1116, 1125, 227 USPQ 417, 422 (Fed. Cir. 1985). The kind and amount of evidence necessary to establish that a mark has acquired distinctiveness in relation to goods or services depends on the nature of the mark and the circumstances surrounding the use of the mark in each case. *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 1581, 6 USPQ2d 1001, 1008 (Fed. Cir. 1988); *Roux Labs., Inc. v. Clairol Inc.*, 427 F.2d 823, 829, 166 USPQ 34, 39 (C.C.P.A. 1970) ; *In re Hebr Mfg. Co.*, 279 F.2d 526, 528, 126 USPQ 381, 383 (C.C.P.A. 1960) ; *In re Cap. Formation Couns., Inc.*, 219 USPQ 916, 918 (TTAB 1983) .

Evidence that only shows a mark used in conjunction with other wording may be insufficient to show that the mark has acquired

distinctiveness. *See In re Mogen David Wine Corp.*, 372 F.2d 539, 542, 152 USPQ 593, 595-96 (C.C.P.A. 1967) (holding evidence of a bottle design failed to prove secondary meaning where advertising depicting the bottle design always featured applicant's word mark); *In re Franklin Cnty. Hist. Soc'y*, 104 USPQ2d 1085, 1093 (TTAB 2012) (noting none of applicant's evidence showed use of the proposed mark "CENTER OF SCIENCE AND INDUSTRY" without the acronym "COSI," while other evidence only used the acronym to refer to applicant's services).

The following sections provide examples of types of evidence that have been used, alone or in combination, to establish acquired distinctiveness. No single evidentiary factor is determinative. The value of a specific type of evidence and the amount necessary to establish acquired distinctiveness will vary according to the facts of the specific case. In addition, see TMEP §1212.01 regarding the factors considered when determining whether a mark has acquired distinctiveness.

1212.06(a) Long Use of the Mark in Commerce

Long-term use of the mark in commerce is one relevant factor to consider in determining whether a mark has acquired distinctiveness. *See, e.g., In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 1336-37 (Fed. Cir. 2015) (holding evidence of long use insufficient to establish acquired distinctiveness of FISH FRY PRODUCTS where evidence involved uses of LOUISIANA FISH FRY PRODUCTS); *In re Audemars Piguet Holding SA*, Ser. No. 90045780, 2025 TTAB LEXIS 1, at *43-49, *57 n.97 (2025) (holding evidence of applicant's more than 50 years use of watch trade dress insufficient to establish its acquired distinctiveness where the evidence did not show the precise combination of the multiple design elements and applicant lacked substantial exclusivity); *In re Palacio Del Rio, Inc.*, 2023 USPQ2d 630, at *5-8, *12-13 (TTAB 2023) (holding evidence of applicant's nearly 55-years use of modular building trade dress for hotel services insufficient to establish its acquired distinctiveness where the examining attorney's evidence showed the trade dress was "based on design elements that are common to hotel building designs in general"); *In re Uman Diagnostics AB*, Ser. No. 88960633, 2023 TTAB LEXIS 77, at *51-53 (2023) (holding applicant's claim of use since at least as early as November 13, 2012 insufficient to show the mark NF-LIGHT had become

distinctive because the mark was highly descriptive and the record showed applicant's use had not been substantially exclusive in the relevant industry); *In re Guaranteed Rate, Inc.*, Ser. No. 87054820, 2020 TTAB LEXIS 265, at *22-23 (2020) (finding Trademark Act §2(f) claim based on applicant's use since 2000 not dispositive, even if the use was considered "substantially exclusive," due to the highly descriptive nature of applicant's mark and the nature and number of third-party descriptive uses in the record); *In re OEP Enters., Inc.*, Ser. No. 87345596, 2019 TTAB LEXIS 278, at *67-68 (2019) (finding applicant's evidence of use since 1998 of an umbrella trade dress design "supports a finding of acquired distinctiveness to some extent because there is no evidence that competitive double canopy umbrellas had a mesh design between 1998 and 2017"); *In re Hikari Sales USA, Inc.*, Ser. No. 86439012, 2019 TTAB LEXIS 73, at *58-59 (2019) (finding applicant's evidence of continuous use of ALGAE WAFERS since at least Oct. 31, 1991 and advertisement of the goods sold under the mark since at least Oct. 1992 did not convince the Board that "ordinary purchasers of fish food have come to view that term primarily as an indicator of source"); *In re Uncle Sam Chem. Co.*, Ser. No. 73392627, 1986 TTAB LEXIS 162, at *8 (1986) (holding §2(f) claim of acquired distinctiveness persuasive where applicant had submitted declaration of its president supporting sales figures and attesting to over eighteen years of substantially exclusive and continuous use).

To support a §2(f) claim, use of the mark must be use in commerce, as defined in 15 U.S.C. §1127. See TMEP §§901–901.04 regarding what constitutes use in commerce.

1212.06(b) Advertising Expenditures

Large-scale expenditures in promoting and advertising goods and services under a particular mark are significant to indicate the extent to which a mark has been used. However, proof of an expensive and successful advertising campaign is not in itself enough to prove acquired distinctiveness. *Mattel, Inc. v. Azrak-Hamway Int'l, Inc.*, 724 F.2d 357, 361 n.2 (2d Cir. 1983) (citing *Am. Footwear Corp. v. Gen. Footwear Co.*, 609 F.2d 655, 663 (2d Cir. 1979)); see *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332 (Fed. Cir. 2015) (finding evidence of sales and advertising expenditures insufficient to establish acquired distinctiveness of FISH FRY).

PRODUCTS where evidence involved uses of LOUISIANA FISH FRY PRODUCTS); *In re Boston Beer Co. L.P.*, 198 F.3d 1370 (Fed. Cir. 1999) (finding Trademark Act §2(f) claim based on annual sales under the mark of approximately eighty-five million dollars, and annual advertising expenditures in excess of ten million dollars – two million of which were spent on promotions and promotional items which included the phrase THE BEST BEER IN AMERICA – insufficient to establish distinctiveness, in view of the highly descriptive nature of the proposed mark); *TBL Licensing, LLC v. Vidal*, 98 F. 4th 500, 514 (4th Cir. 2024) (“Expenditures themselves do not, from a legal standpoint, establish secondary meaning without a showing that they translated into what counts—consumers associating the claimed design features with a single source.”).

The ultimate test in determining whether a designation has acquired distinctiveness is applicant’s success, rather than its efforts, in educating the public to associate the proposed mark with a single source. *In re Sausser Summers, PC*, 2021 USPQ2d 618, at *23 (TTAB 2021); *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1480 (TTAB 2016) (citing *In re Redken Lab’ys, Inc.*, 170 USPQ 526, 529 (TTAB 1971)). The examining attorney must examine the advertising material to determine how the mark is being used, the commercial impression created by such use, and what the use would mean to purchasers. *In re Redken Lab’ys, Inc.*, 170 USPQ at 528-29 (finding §2(f) evidence insufficient to establish acquired distinctiveness of THE SCIENTIFIC APPROACH for lectures concerning hair and skin treatment, notwithstanding ten years of use, over \$500,000 in promotion and sponsorship expenses, and the staging of over 300 shows per year where advertising and promotional material showed only descriptive usage of applied-for mark); see *In re Audemars Piguet Holding SA*, Ser. No. 90045780, 2025 TTAB LEXIS 1, at *40-49 (2025) (finding evidence of acquired distinctiveness deficient in part because applicant’s ads did not direct consumers to “look for” the claimed features of applicant’s watch trade dress but merely showed a photo of the entire watch, many depicted different or more features than the combination of features in question, and most included one or more of applicant’s word marks on the watch faces); see *In re Palacio Del Rio, Inc.*, 2023 USPQ2d 630, at *12 (TTAB 2023) (finding evidence of acquired distinctiveness deficient in part because

of low advertising figures in the “hundreds of thousands” when viewed against almost 55-years use of the mark, as well as a lack of “look for” advertising promoting recognition of applicant’s hotel building trade dress as a service mark); *In re OEP Enters., Inc.*, 2019 USPQ2d 309323, at *25 (TTAB 2019) (finding evidence of acquired distinctiveness deficient in part because “[a]pplicant’s consumer facing advertisements, like its ones to the trade, do little more than show the products, and they do not establish that consumers associate the features of the applied-for trade dress mark with [a]pplicant”); *In re Chevron Intell. Prop. Grp. LLC*, 96 USPQ2d 2026, 2031 (TTAB 2010) (finding evidence of acquired distinctiveness deficient in part because of the lack of advertisements promoting recognition of pole spanner design as a service mark); *Mag Instrument Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1723 (TTAB 2010) (finding absence of “look for” advertisements damaging to attempt to demonstrate acquired distinctiveness of proposed configuration mark); *Nextel Commc’ns, Inc. v. Motorola, Inc.*, 91 USPQ2d 1393, 1408 (TTAB 2009) (sustaining opposition on the ground that sound mark had not acquired distinctiveness in part because applicant failed to provide evidence corroborating that the mark was used in advertisements in such a way that it would be recognized as a source identifier for cellular telephones); *In re ic! berlin brillen GmbH*, 85 USPQ2d 2021, 2023 (TTAB 2008) (affirming refusal to register product configuration for spectacles and sunglasses, as the applicant failed to prove acquired distinctiveness chiefly because of the “absence of evidence of the advertising and/or promotion by the applicant of the earpiece design as a trademark”); *In re E.I. Kane, Inc.*, 221 USPQ 1203, 1206 (TTAB 1984) (affirming refusal to register OFFICE MOVERS, INC., for moving services, notwithstanding §2(f) claim based on, *inter alia*, evidence of substantial advertising expenditures. “There is no evidence that any of the advertising activity was directed to creating secondary meaning in applicant’s highly descriptive trade name.”); *In re Kwik Lok Corp.*, 217 USPQ 1245, 1247-48 (TTAB 1983) (finding evidence insufficient to establish acquired distinctiveness for configuration of bag closures made of plastic, notwithstanding applicant’s statement that advertising of the closures involved several hundred thousands of dollars, where there was no evidence that the advertising had any impact on purchasers in perceiving the configuration as a mark); *cf. In re Haggard Co.*, 217 USPQ 81, 84

(TTAB 1982) (holding background design of a black swatch registrable pursuant to §2(f) for clothing where applicant had submitted, *inter alia*, evidence of “very substantial advertising and sales,” the Board finding the design to be, “because of its serrated left edge, something more than a common geometric shape or design”).

If the applicant prefers not to specify the extent of its expenditures in promoting and advertising goods and services under the mark because this information is confidential, the applicant may indicate the types of media through which the goods and services have been advertised (e.g., national television) and how frequently the advertisements have appeared.

1212.06(c) Affidavits or Declarations Asserting Recognition of Mark as Source Indicator

Affidavits or declarations that assert recognition of the mark as a source indicator are relevant in establishing acquired distinctiveness. However, the value of the affidavits or declarations depends on the statements made and the identity of the affiant or declarant. *See Heritage All. v. Am. Pol’y Roundtable*, 133 F.4th 1063, 1070-71 (Fed. Cir. 2025) (affirming the Board’s according little weight to the three declarations because they were “all essentially identical in form,” came from volunteers from opposer’s organization and not random consumers, and failed to provide any explanation for the belief that the marks were distinctive); *In re Chem. Dynamics Inc.*, 839 F.2d 1569, 1571 (Fed. Cir. 1988) (finding conclusory declaration from applicant’s vice-president insufficient without the factual basis for the declarant’s belief that the design had become distinctive); *In re Palacio Del Rio, Inc.*, 2023 USPQ2d 630, at *11-13 (TTAB 2023) (finding declaration from applicant’s vice-president of sales and revenue insufficient where conclusory statements about uniqueness of applicant’s trade dress were not supported by evidence, statements about 55-years use in U.S. commerce only appeared in San Antonio, advertising figures viewed in context of length of use were not significant, and sales figures lacking industry context were not probative).

Proof of distinctiveness also requires more than proof of the existence of a relatively small number of people who associate a mark with the applicant. *See Heritage All. v. Am. Pol’y Roundtable*, 133 F.4th at 1070-71 (affirming the Board’s according little weight to the three declarations from

volunteers at opposer's organization rather than random consumers and where there was no record evidence of the size and nature of the customer base that would allow an inference the declarations meaningfully reflected consumer perception of the marks in the marketplace); *In re Palacio Del Rio, Inc.*, 2023 USPQ2d 630, at *7 (“the [four] customer declarations . . . [were] too few in number and [were] in many ways identical or ‘cookie cutter,’ diminishing their persuasiveness in these appeals;” and “have minimal probative value to the extent they purport to espouse legal conclusions on the ultimate issue of distinctiveness”); *In re The Paint Prods. Co.*, 8 USPQ2d 1863, 1866 (TTAB 1988) (“Because these affidavits were sought and collected by applicant from ten customers who have dealt with applicant for many years, the evidence is not altogether persuasive on the issue of how the average customer for paints perceives the words ‘PAINT PRODUCTS CO.’ in conjunction with paints and coatings.”); *see also Mag Instrument Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1723 (TTAB 2010) (finding sixteen declarations of little persuasive value, as they were nearly identical in wording and only one of the declarants was described as an end consumer); *In re Gray Inc.*, 3 USPQ2d 1558, 1560 (TTAB 1987) (finding affidavit of applicant’s counsel expressing his belief that the mark has acquired secondary meaning of “no probative value whatsoever” because, among other reasons, the statement is subject to bias); *In re Petersen Mfg. Co.*, 2 USPQ2d 2032, 2035 (TTAB 1987) (finding declarations from customers which stated that designs used by applicant indicate to the declarant that the applicant is the source of the goods, but which did not refer to or identify the designs with any specificity, not persuasive); *In re Bose Corp.*, 216 USPQ 1001, 1005 (TTAB 1983), *aff’d*, 772 F.2d 866 (Fed. Cir. 1985) (deeming retailer’s statement that he has been in contact with many purchasers of loudspeaker systems of whom a substantial number would recognize the depicted design as originating with applicant competent evidence of secondary meaning); *In re Flex-O-Glass, Inc.*, 1977 TTAB LEXIS 3, at *2, *7-8 (1977) (finding nine affidavits to be persuasive evidence of distinctiveness where they had similar wording, were signed by different classes of purchasers, and explained how the purchasers believed the mark was distinctive, noting “the fact that the affidavits may be similar in format and expression is of no particular

significance . . . since the affiants have sworn to the statements contained therein.”).

1212.06(d) Survey Evidence, Market Research and Consumer Reaction Studies

Survey evidence, market research, and consumer reaction studies are relevant in establishing acquired distinctiveness. *See In re Hikari Sales USA, Inc.*, 2019 USPQ2d 111514, at *14-15 (TTAB 2019) (citing *Schlafly v. St. Louis Brewery, LLC*, 909 F.3d 420, 424, & n.2 (Fed. Cir. 2018)) (“Consumer surveys can, when conducted properly, be a form of direct evidence of acquired distinctiveness.”); *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 43 (1st Cir. 2001) (“Although survey evidence is not required, ‘it is a valuable method of showing secondary meaning.’” (quoting *I.P. Lund Trading ApS v. Kohler Co.*, 163 F.3d 27, 42 (1st Cir. 1998))).

To establish acquired distinctiveness, the survey must show that the consuming public views the proposed mark as an indication of the source of the product or service. *See In re Hikari Sales USA, Inc.*, 2019 USPQ2d 111514, at *11-12 (finding survey did not show the nature of the association a consumer perceived between the proposed mark and applicant and the other companies identified in survey answers as there were no follow-up questions inquiring as to the reason for identifying applicant or another company that would have established what the respondents understood); *Nextel Commc’ns, Inc. v. Motorola, Inc.*, 91 USPQ2d 1393, 1402-03 (TTAB 2009) (finding survey did not provide evidence of acquired distinctiveness as it was unclear if respondents associated the sound mark with applicant’s goods or opposer’s services). Moreover, the survey should reveal that the consuming public associates the proposed mark with a *single source*, and not that the applicant is the first among many parties associated with the designation. *See J. Thomas McCarthy, McCarthy on Trademarks & Unfair Competition* §15.42 (5th ed. June 2021) (citing *Am. Flange & Mfg. Co. v. Rieke Corp.*, 80 USPQ2d 1397, 1415 (TTAB 2006) , *withdrawn on other grounds*, 90 USPQ2d 1127 (TTAB 2009)); *see also In re Hikari Sales USA, Inc.*, 2019 USPQ2d 111514, at *11 ; *Brit. Seagull Ltd. v. Brunswick Corp.*, 28 USPQ2d 1197, 1202 (TTAB 1993) (finding survey did not provide convincing proof that

respondents believed all black engines came from the same source), *aff'd*, 35 F.3d 1527 (Fed. Cir. 1994).

To have any probative value, a survey must be conducted in accordance with accepted principles of survey research. *See, e.g., In re Van Valkenburgh*, 97 USPQ2d 1757, 1767 (TTAB 2011); *Zimmerman v. Nat'l Ass'n of Realtors*, 70 USPQ2d 1425, 1435-36 (TTAB 2004); *In re Wilcher Corp.*, 40 USPQ2d 1929, 1934 (TTAB 1996) (citing *Flowers Indus. Inc. v. Interstate Brands Corp.*, 5 USPQ2d 1580, 1582 n.4 (TTAB 1987)); *see also USPTO v. Booking.com B.V.*, 140 S. Ct. 2298, 2307 n.6 (2020); **TBMP §1208**; McCarthy, *supra*, §§32:158, 32:170-72. The applicant must document the procedural and statistical accuracy of this type of evidence and carefully frame the questions contained therein. *In re Van Valkenburgh*, 97 USPQ2d at 1767 (finding “no basis on which to conclude that the survey is based on scientifically valid principles” where the survey consisted of questionnaires distributed to an unknown number of people who filled them out and mailed them back to applicant’s counsel); *see In re Steelbuilding.com*, 415 F.3d 1293, 1300 (Fed. Cir. 2005) (deeming applicant’s Internet poll on name recognition unreliable, where the poll did not attempt to prevent visitors from voting more than once or to prevent interested parties such as friends or associates or employees of the applicant from voting multiple times, and the poll results did not indicate the number of actual participants); *In re Hotels.com, L.P.*, 87 USPQ2d 1100, 1109–10 (TTAB 2008) (finding applicant’s survey entitled to no probative weight as to the public’s perception of HOTELS.COM due to flaws including the order of the questions and an assumption that consumers understood the difference between a brand name and domain name), *aff'd*, 573 F.3d 1300 (Fed. Cir. 2009). Therefore, information regarding how a survey was conducted (the entire survey report, including all data and/or statistics gathered regarding participants responses), the complete questionnaire provided to participants, the criteria for selecting participants, the number of participants surveyed, all the individual responses to the questionnaire, the geographic scope of the survey, and an explanation of the survey method and/or design employed may assist the examining attorney in determining the probative weight of such evidence.

For a survey to be probative, the proper universe of participants must be surveyed. *In re Hikari Sales USA, Inc.*, 2019 USPQ2d 111514, at *12

(where identification broadly identified goods as fish food, survey universe was too narrow because it did not include people who purchased fish food for fish other than tropical fish) (citing *Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1322 (Fed. Cir. 2018) (where identification of goods broadly identified goods as meat and beef, survey universe too narrow because it eliminated from survey meat eaters who buy their meat from sources other than plaintiff); *In re FCA US LLC*, 126 USPQ2d 1214, 1226 (TTAB 2018) (survey was of limited relevance because it did not consider the entire universe of customers for automobiles, trim and structural parts but was limited to customers for vehicles capable of off-road driving); *Sheetz of Del., Inc. v. Doctor's Assocs. Inc.*, 108 USPQ2d 1341, 1363 n.41, 1371 (TTAB 2013) (finding survey universe too narrow and stating “[b]ased on the description of goods, the proper survey universe should include all people who purchase and eat sandwiches (defined to exclude only hot dogs)”; “[t]here may be an overreliance on patrons of ‘fast food’ establishments that skews the results because the proper universe is all consumers who purchase and eat sandwiches.”)).

A survey is probative only if it deals with conditions at the time registration is being sought, as acquired distinctiveness is a time-based concept: “it exists at a specific time, in a specific place, among a specific group of people who recognize that specified matter indicates commercial origin of a specified type of product or service from one unique commercial source.” *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 1371 (Fed. Cir. 2018) (quoting 4A Callmann on Unfair Competition, Trademarks, & Monopolies §20.23 (4th ed. 2017)) (finding a more than five-year-old survey submitted to show acquired distinctiveness had little probative value); see *In re Morton-Norwich Prods.*, 671 F.2d 1332, 1344 (Fed. Cir. 1982) (questioning the probative value of a four-year-old survey submitted to show acquired distinctiveness because “trademark rights are not static” and “the right to register must be determined on the basis of the factual situation as of the time when registration is being sought”); *In re Audemars Piguet Holding SA*, Ser. No. 90045780, 2025 TTAB LEXIS 1, at *54-55 (2025) (finding that a survey more than ten-years-old had little probative value to determine current consumer perception).

For registration of trade dress marks, a survey must use the drawing of the mark for which acquired distinctiveness is at issue, not a photograph of a product, since the drawing reflects the mark being registered. *In re Audemars Piguet Holding SA*, 2025 TTAB LEXIS 1, at *54 (citing *Kobler Co. v. Honda Giken Kogyo K.K.*, Opp. No. 91200146, 2017 TTAB LEXIS 450, at *137 (2017)). A photograph could introduce other features or irrelevant matter not part of the matter sought to be registered, which “reduces the survey’s probative value in proceedings concerning registrability.” *Kobler Co. v. Honda Giken Kogyo K.K.*, 2017 TTAB LEXIS 450, at *137 (quoting *Miles Laby’s Inc. v. Naturally Vitamin Supplements Inc.*, Opp. No. 62820, 1986 TTAB LEXIS 173, at *50-51 (1986)); see also *In re Audemars Piguet Holding SA*, 2025 TTAB LEXIS 1, at *54.

The Trademark Trial and Appeal Board has given little weight to surveys that do not include an education or pre-testing portion regarding the difference between a generic term and a trademark or such portion is insufficient to educate respondents. See *Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, 124 USPQ2d 1184, 1198-99 (TTAB 2017); *Sheetz of Del., Inc. v. Dr.’s Assocs. Inc.*, 108 USPQ2d 1341, 1361-62 (TTAB 2013); see also *In re Hikari Sales USA, Inc.*, 2019 USPQ2d 111514, at *11 (TTAB 2019) (citing David H.B. Bednall, *Color, Champagne, & Trademark Secondary Meaning Survs.: Devilish Detail*, 102 Trademark Rep. 967, 999 (July-Aug. 2012)); *Zimmerman*, 70 USPQ2d at 1435-36.

Evidence of acquired distinctiveness may be sufficient if it shows that a substantial portion of the consuming public associates the proposed mark with a single source. See *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 125 (4th Cir. 1990) (quoting *Food Fair Stores, Inc. v. Lakeland Grocery Corp.*, 301 F.2d 156, 161 (4th Cir. 1962)); McCarthy, *supra* §§15.45, 32.190; see also *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 1127 (Fed. Cir. 1985) (noting “the results show a syndetic relationship between the color ‘pink’ and Owens-Corning Fiberglas in the minds of a significant part of the purchasing public”). As noted by the Court of Customs and Patent Appeals (the predecessor to the Court of Appeals for the Federal Circuit), “proof of distinctiveness requires more than proof of the existence of a relatively small number of people” who associate the proposed mark with the applicant. *Roselux Chem. Co. v. Parsons Ammonia Co.*, 299 F.2d 855, 862 (C.C.P.A. 1962) . Although all evidence must be reviewed on a

case-by-case basis, generally, survey results showing less than 10% consumer recognition are insufficient to establish secondary meaning, and results over 50% are sufficient to establish secondary meaning. *See id.* (finding 10% insufficient to establish secondary meaning); *In re Owens-Corning Fiberglas Corp.*, 774 F.2d at 1127–28 (finding 50% probative in establishing secondary meaning given the totality of the evidence); McCarthy, *supra* §§15.45, 32.190. However, the probative value of a survey is significantly weakened, despite consumer recognition rates greater than 50%, if there are flaws in the way the survey is conducted. *See Stuart Spector Designs Ltd. v. Fender Musical Instruments Corp.*, 94 USPQ2d 1549, 1569–71 (TTAB 2009); *TBL Licensing LLC v. Vidal*, 98 F.4th 500, 513–514 (4th Cir. 2024).

6.5. Case: *In re Walsh* (“Performance Nutrition”) (TTAB 2016)

{This section by EEJ in 2026}

6.5.1. Advance Notes

The following is useful as a teaching case because it illustrates a number of aspects of how acquired distinctiveness may be proved, and it reaches a result that, at first blush, may seem surprising.

The applicant in this case has what would seem to be some impressive evidence of secondary meaning – including use since 1996, a website and blog with thousands of visitors per month, thousands of social media followers, six brick-and-mortar stores, advertising and marketing expenses within a single year of over \$100,000, and millions of dollars in sales.

But the applicant nonetheless loses as the TTAB decides the evidence is not enough to establish acquired distinctiveness. Why? It’s the sliding scale: The mark in this case, PERFORMANCE NUTRITION, is extremely descriptive, causing the applicant’s evidentiary burden to be enormous. Too big, in this case, to surmount.

6.5.2. Opinion

Note about editing marks: The superscript tilde ~ denotes a deletion from the text. The superscript hashmark # denotes a deletion limited to citation

matter. The superscript angle brackets indicate footnote material placed into the above-the-line text. These editing marks are intended as less-obtrusive ways of indicating edits while nonetheless memorializing the edits in a way that will maintain fidelity to the original text, be useful in an educational context, and facilitate further editing of these open-licensed materials by downstream users.

{Edit by EEJ in 2026. Footnotes and citations to record omitted without indication.}

In re Walsh General Ventures LLC

Trademark Trial and Appeal Board

March 22, 2016

This Opinion is not a Precedent of the TTAB. UNITED STATES PATENT AND TRADEMARK OFFICE. Mailed: March 22, 2016. Serial No. 85801902. Adam J. Bruno of Bay State IP, LLC, for Walsh General Ventures LLC. Lyndsey Kuykendall, Trademark Examining Attorney, Law Office 102, Mitchell Front, Managing Attorney. Before Richey, Deputy Chief Administrative Trademark Judge, Wellington, and Greenbaum, Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Walsh General Ventures LLC ("Applicant") seeks registration on the Principal Register of the mark PERFORMANCE NUTRITION (the word "NUTRITION" is disclaimed) for the following services:

Retail store services, namely, in the field of nutritional supplements, sports supplements, clothing and snack foods;
On-line retail store services, namely, in the field of nutritional supplements, sports supplements, clothing and snack foods;
Mail order services, namely, in the field of nutritional supplements, sports supplements, clothing and snack foods in International Class 35.

^{<1}Application Serial No. 85801902 was filed on December 13, 2012, based on an allegation of first use anywhere and in commerce on January 3, 1996, under Section 1(a) of the Trademark Act.>

The Trademark Examining Attorney issued a final refusal of registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that Applicant's proposed mark, when used on the identified goods, is merely descriptive thereof. The Examining Attorney also rejected Applicant's

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alternative claim that the proposed mark has acquired distinctiveness, under Section 2(f) of the Act, 15 U.S.C. § 1052(f).

Applicant and the Examining Attorney have filed briefs.

We affirm the refusal under Section 2(e)(1) and further agree that the Applicant's showing is insufficient for purposes of establishing the proposed mark has acquired distinctiveness.

Evidentiary Objection

As a preliminary matter, we note the Examining Attorney has objected to Applicant's attachment of copies of third-party registrations with its appeal brief on basis that they are untimely. The Examining Attorney's objection is overruled and we have decided to consider the copies of the registrations in our analysis of whether Applicant's applied-for mark is merely descriptive. We hasten to add, however, that their probative value has limitations. See TBMP Section 704.03.02 ("probative value [of third-party registrations] is limited ..., [but] may be entitled to some weight to show the meaning of a mark, or a portion of a mark, in the same manner as a dictionary definition") and authorities cited therein.

Mere Descriptiveness

A mark is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services.[#] A mark need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; rather, it is sufficient that the mark describes one significant attribute, function or property of the goods or services.[#]

Whether a mark is merely descriptive is not determined in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with the goods or services, and the possible significance that the mark would have to the average purchaser of the goods or services because of the manner of its use.[#] "The question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods or services are will understand the mark to convey information about them." *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002).

The Examining Attorney argues PERFORMANCE NUTRITION is merely descriptive because it "immediately and logically refers to nutritional products that enhance one's performance." In addition to the dictionary definitions for the individual words,⁶ the Examining Attorney relies on Internet evidence gathered from twenty-five different third-party websites showing "use [of] the wording PERFORMANCE NUTRITION as a category of various nutritional products that aid in one's performance." *Id.*

⁶ The definitions submitted with Office action issued on November 18, 2013 were obtained from the Collins English Dictionary website (www.collinsdictionary.com); however, the provided meanings were from the "British English" (as opposed to "American English") version of the dictionary and this version has been held on occasion to have little probative value because of differences between the versions. *See, e.g., In re Heatcon, Inc.*, 1374 n.19 (TTAB 2015); *In re Manwin/RK Collateral Trust*, 111 USPQ2d 1311, 1313 n.18 (TTAB 2014). Nevertheless, in this case and with respect to these two words, we take judicial notice of the American English version and note that the differences between the versions are insignificant. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006). Specifically, the "American English" version defines "**Performance**" as "the act of performing; execution, accomplishment, fulfillment, etc." and "**Nutrition**" is defined as "a nourishing or being nourished; esp., the series of processes by which an organism takes in and assimilates food for promoting growth and replacing worn or injured tissues."

The Examining Attorney highlighted many excerpts from these materials in her brief; we do not repeat these but note the following as examples (**bold** emphasis added):

Mark Wahlberg's New Line of **Performance Nutrition** Products ... Mark Wahlberg teamed up with GNC to produce a **complete line of performance nutrition supplements** to help you get [sic] meet your fitness & nutrition goals.

Secondary Meaning; Acquired Distinctiveness

[from website www.gymflow100.com]

Scivation is a **performance nutrition** and dietary supplement company committed to developing products of unparalleled quality using only fully efficacious amounts of active ingredients that are supported by science ... committed to providing our customers with high-quality, research supported products to enhance performance and quality of life.

[from website www.bodybuilding.com]

TRANSFORMATION UNITED STATES DEPARTMENT
OF DEFENSE

It's "all go, no crash" for HooAH! The **performance nutrition bar** first developed for the military has taken its "SteadyEnergy" blend to the commercial market.

[from website www.defense.gov]

ELEMENTZ NUTRITION

Proper **nutrition** and rest will ensure athletes are meeting their **performance** goals. If the fuel in the tank is inadequate, the **performance** will also be inadequate. **Nutrition** should focus on an athlete achieving the greatest benefit from the foods they consume. ... This is why we are focusing on **performance nutrition** to get each athlete to perform at their absolute best.

[from website www.elementznutrition.com]

HEALTHY PLANET VITAMINS

Our purest whey protein, purest glutamine and purest colostrum products fuel your body with the highest **performance nutrition** and give your body what it needs to maintain and increase cell growth.

Journal of Athletic Training

*National Athletic Trainers" Association Position Statement:
Evaluation of Dietary Supplements for **Performance
Nutrition***

[from website www.natajournals.org]

Again, these excerpts are merely representative of the Internet evidence submitted by the Examining Attorney. Taken in their entirety, they show highly descriptive use of the wording "performance nutrition" by numerous

third-parties in connection with food, including supplements, vitamins or additives, and particularly products touted as enhancing a person's physical or athletic performance. Several of the third-party websites involve the retail sale of the products thus putting them in competition with Applicant's online retail services in the field of nutritional supplements or sports supplements.

The record contradicts Applicant's argument that "consumers have to use some imagination to connect Applicant's mark to the fact that the mark is for a retail store selling vitamin, nutritional, and herbal supplements." The manner and apparent regularity with which the third-parties use "performance nutrition," to describe or advertise their goods, *e.g.*, nutritional supplements or additives, reflects an understanding that consumers do not need further explanation of the meaning of the wording. It is evident that consumers who view this wording have no trouble immediately understanding its meaning. Moreover, Applicant's argument implies that the test for descriptiveness should be whether someone can guess what Applicant's services are after viewing the mark. As indicated above, this is not the test; rather, the issue is whether PERFORMANCE NUTRITION conveys information about the involved services when the mark is viewed in the context of the services. Given the record before us, we have no doubt that consumers will immediately understand Applicant's mark as describing the very type of goods being featured through Applicant's retail store services.

Applicant also argues that "the combination of the terms used to form the PERFORMANCE NUTRITION mark creates a unitary mark with a nondescriptive meaning in relation to the goods [sic] and/or services." However, Applicant does not point to any supporting evidence or explain what new, non-descriptive meaning is conjured by the combination of the terms. In contrast, and as already discussed, the record reveals that the combination of these terms appears to have a unitary meaning that is *highly* descriptive.

Finally, Applicant's argument that the USPTO has allowed the registration of "marks that are analogous to the mark at issue," is not persuasive. As often stated, each case must be decided on its own merits and previous decisions by examining attorneys in approving other marks are without evidentiary value and are not binding on the Board. *In re Sunmarks Inc.*, 32 USPQ2d 1470 (TTAB 1994); *In re Perez*, 21 USPQ2d 1075 (TTAB 1991); and *In re J.M. Originals Inc.*, 6 USPQ2d 1393 (TTAB 1987). *Accord In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir.

2001) (“Even if 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.”); and *In re Loew’s Theatres, Inc.*, 769 F.2d 764, 226 USPQ 865 (Fed. Cir. 1985) (“each application for registration of a mark for particular goods must be separately evaluated”). Nevertheless, even after reviewing the registrations submitted by Applicant, we fail to see how they support Applicant’s contention that the descriptiveness refusal before us is inconsistent with the Office’s handling of similar marks. Of the twenty-two registered marks,⁸ twelve do not contain either term PERFORMANCE or NUTRITION. The remaining registrations either are on the Supplemental Register or contain a disclaimer of the term NUTRITION or have been registered based on a Section 2(f) claim of acquired distinctiveness. Furthermore, five of the registered marks are stylized and contain a design element. While we can speculate why these registrations issued, that would serve no purpose here. Rather, we address the unique circumstances of this appeal and remain focused on Applicant’s proposed mark and the services recited in the application. Suffice to say, we are not persuaded by Applicant’s argument and reliance on these registrations.

- 8 The registered marks are: NUTRITION WAREHOUSE; SUPPLEMENT WAREHOUSE; SMOOTHIE KING; VITAMIN WORLD; NUTRITION FOR HEALTH; NZ NUTRITION ZONE (stylized with a design); NUTRITION S’MART; NUTRITION DEPOT; NUTRITION DISCOUNTERS (stylized with a design); THE VITAMIN DEPOT; VITAMINCITY; NUTRITION CENTRAL (cancelled); PRO CITY SUPPLEMENTS (stylized with a design); NSS NUTRITIONAL SPORT SUPPLEMENTS (stylized with a design)(cancelled); PREFERRED MEDICAL SUPPLEMENTS (cancelled); WHOLESALE NUTRITION, INC. (stylized with a design); NATIONAL SUPPLEMENT CENTER (cancelled); STRONG SUPPLEMENT SHOP (on Supplemental Register); SAVE ON SUPPLEMENTS (on Supplemental Register); SUPPLEMENT XPRESS (on Supplemental Register); NUTRITION RITE; and SUPPLEMENT GIANT.

In sum, the record establishes that Applicant’s mark is highly descriptive of the services identified in the involved application. We see no incongruity in the combination of the terms “performance” and “nutrition.” Rather, there is

ample evidence showing PERFORMANCE NUTRITION will be easily and readily understood as identifying a significant feature of Applicant's services by identifying the goods being sold.

Acquired Distinctiveness in the Alternative

It is Applicant's burden to prove acquired distinctiveness by a preponderance of the evidence.[#] The amount and character of such evidence depends on the facts of each case[#], and more evidence is required where a mark is so highly descriptive that purchasers seeing the matter in relation to the goods or services would be less likely to believe that it indicates source in any one party.[#]

In determining whether the applied-for mark has acquired distinctiveness, the following factors are generally considered: (1) length and exclusivity of use of the mark in the United States by an applicant; (2) the type, expense and amount of advertising of the mark in the United States; and (3) an applicant's efforts in the United States to associate the mark with the source of the services, such as unsolicited media coverage and consumer studies.[#]

In considering the aforementioned factors, we note that there is no *per se* rule that any one certain type of evidence must be submitted; however, there must be sufficient circumstantial or direct evidence for the Board to make a finding that the mark has acquired distinctiveness. *In re Ennco Display Sys. Inc.*, 56 USPQ2d 1279, 1283 (TTAB 2000) ("Acquired distinctiveness may be shown by direct and/or circumstantial evidence. Direct evidence includes actual testimony, declarations or surveys of consumers as to their state of mind. Circumstantial evidence, on the other hand, is evidence from which consumer association might be inferred, such as years of use, extensive amount of sales and advertising, and any similar evidence showing wide exposure of the mark to consumers.")

We begin our analysis with a determination of the level of descriptiveness of the proposed mark. Here, the evidence in the record and described *supra* demonstrates that PERFORMANCE NUTRITION is highly descriptive of the involved services. As a result, "Applicant [has] the burden to show a concomitantly high level of secondary meaning." *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005).

In support of its acquired distinctiveness claim, Applicant relies on its statement that it has been "exclusively and continuously" using the proposed mark in connection with its retail store since at least as early as 1996, and the

declaration of its CEO and owner, Mr. Dominick Walsh, with accompanying exhibits. In his declaration, Mr. Walsh avers, *inter alia*, that Applicant's website receives "about 10,000 visitors per month and [Applicant's] blog receives about 4,000 views per month"; that Applicant's "Facebook page has been created and has 5,962 fans and services under the PERFORMANCE NUTRITION mark has an active email list of over 7,000 individuals"; that Applicant has six "brick-and-mortar stores throughout the New England area"; that Applicant's marketing efforts include "advertising on the ANS Website, email marketing, social media, and advertising in the areas that surround the brick-and-mortar stores" and its "advertising and marketing costs for January through October 2014 total \$104,966.28"; that Applicant distributes a PERFORMANCE NUTRITION newsletter "that has about 2,000 copies distributed per quarter"; and that Applicant "has a high number of sales (around \$4 million in 2012 and 2013 and is decidedly profitable (just under \$2 million in gross profits in 2012 and 2013)". The exhibits to Mr. Walsh's declaration include: a printout from Applicant's website homepage; a copy of an advertisement for Applicant's goods and listing six locations in Rhode Island, Massachusetts and New Hampshire; copies of "Profit & Loss" reports for January through December 2013 and 2014; and a copy of "an example of advertisement" and "first page of a PERFORMANCE NUTRITION newsletter". Exhibit E is described by Mr. Walsh as a "video of testimonials from loyal customers," but appears to be an aired commercial containing statements from three individuals stating why they shop at PERFORMANCE NUTRITION. There is no additional information explaining the extent of circulation of this video message.

We do not find Applicant's evidence, taken in its entirety, to be sufficient for purposes of establishing that PERFORMANCE NUTRITION has acquired distinctiveness. Applicant's use since 1996, even when combined with evidence of recent commercial success, is not conclusive or persuasive considering the highly descriptive nature of the mark sought to be registered and evidence of numerous third parties using the same wording to describe the very same type of goods that Applicant is selling. *See In re Packaging Specialists, Inc.*, 221 USPQ 917, 920 (TTAB 1984) (evidence submitted by applicant held insufficient to establish acquired distinctiveness of PACKAGING SPECIALISTS, INC., for contract packaging services, notwithstanding, *inter alia*, continuous and substantially exclusive use for sixteen years, deemed "a substantial period but not necessarily conclusive or

persuasive.”). We note in particular that the evidence of third-party use not only includes use of the wording PERFORMANCE NUTRITION in a purely descriptive fashion but also includes use of this term incorporated into the name of the business. See, *e.g.*, “Prime Performance Nutrition” (page 31 of Office Action issued November 18, 2013) and “True Performance Nutrition” (Id. at p. 33). This type of evidence challenges Applicant’s claim of exclusive use of the wording and, in turn, its claim of acquired distinctiveness. See *Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 222 USPQ 939, 940-941 (Fed. Cir. 1984) (“When the record shows that purchasers are confronted with more than one (let alone numerous) independent users of a term or device, an application for registration under Section 2(f) cannot be successful, for distinctiveness on which purchasers may rely is lacking under such circumstances.”). Even if Applicant was the initial user of PERFORMANCE NUTRITION or the most successful to do so, the marketplace no longer reflects substantially exclusive use by Applicant.

With regard to the sales and advertisement figures provided by Applicant, they show some success for the years 2012-2013 as well as significant marketing expenses for the most of 2014; however, we cannot make a finding that consumers understand PERFORMANCE NUTRITION to refer solely to Applicant’s services based on these numbers. Although they suggest that Applicant recently undertook substantial advertising and has enjoyed some commercial success of late, the span of time is too limited and too recent to provide meaningful evidentiary support. There is no specific information regarding the amount of sales, advertising expenses, or extent of advertising for the years prior to 2012. Furthermore, Applicant’s case for showing acquired distinctiveness is not helped by the lack of direct evidence, *e.g.*, consumer declarations attesting to the distinctiveness of a mark or surveys. Again, this type of direct evidence is not necessary, but it has been found to be very persuasive, and we must keep in mind that we are presented with a highly descriptive mark.

When all of the evidence of record is viewed as a whole, including evidence showing the degree of descriptiveness and use by third parties of PERFORMANCE NUTRITION, Applicant’s showing falls short of demonstrating that the proposed mark has acquired distinctiveness under Section 2(f).

Secondary Meaning; Acquired Distinctiveness

Decision: The refusal to register Applicant's mark is affirmed on the ground that PERFORMANCE NUTRITION is descriptive as applied to Applicant's services and has not been shown to have acquired distinctiveness.

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Secondary Meaning; Acquired Distinctiveness