

TRADEMARK CASE DECISIONS: THE PAST YEAR IN THE COURTS AND AT THE TTAB

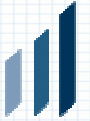
John L. Welch

July 2020



LITIGATION
PATENTS
TRADEMARKS
TRANSACTIONS

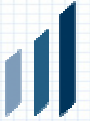




Eastham, MA

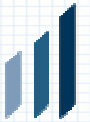
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LITIGATION PATENTS TRADEMARKS TRANSACTIONS **IP**



HOUSEKEEPING

Two Judges Added

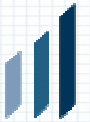


Melanye K. Johnson – Senior Counsel, Office of General Counsel at the US Department of Health and Human Services (HHS).



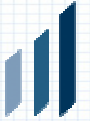
Mark Lebow – Private practice, most recently at Ladas & Parry in Alexandria, VA.

One Judge Retired

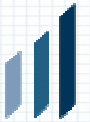


Susan Hightower – served as a TTAB Judge from 2012-2019. Now a United States Magistrate Judge at the US District Court for the Western District of Texas, in Austin, Texas.

Chief Judge Gerald F. Rogers

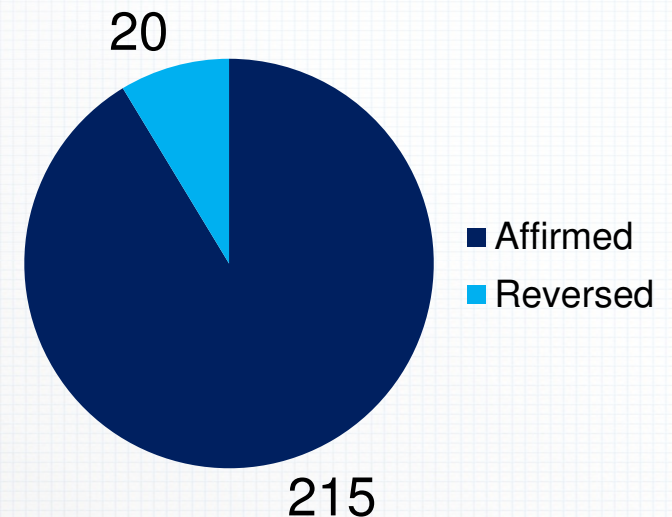


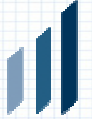
Likelihood of Affirmance of a 2(d) Refusal?



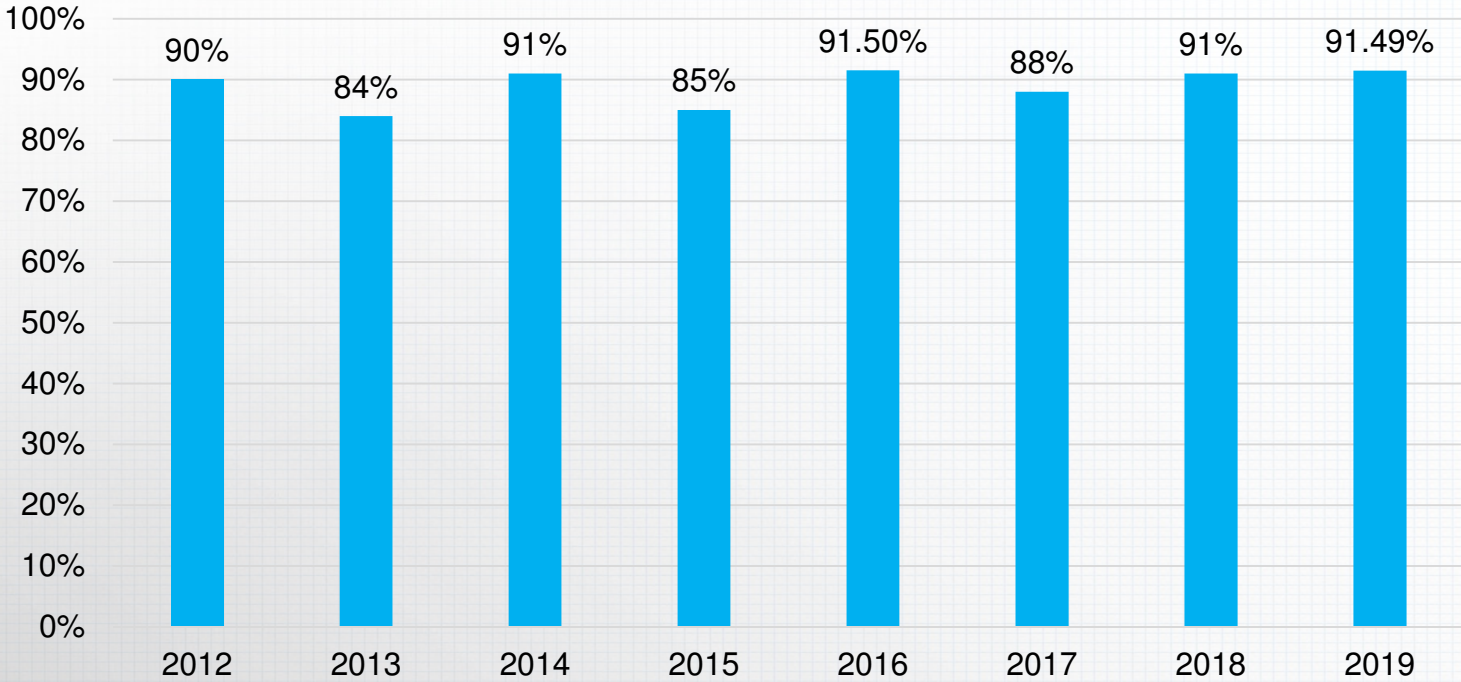
For the calendar year 2019, I counted 235 Section 2(d) refusals, of which 215 were affirmed and 20 reversed.

That's an affirmance rate of 91.49%, very slightly above last year's rate.

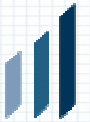




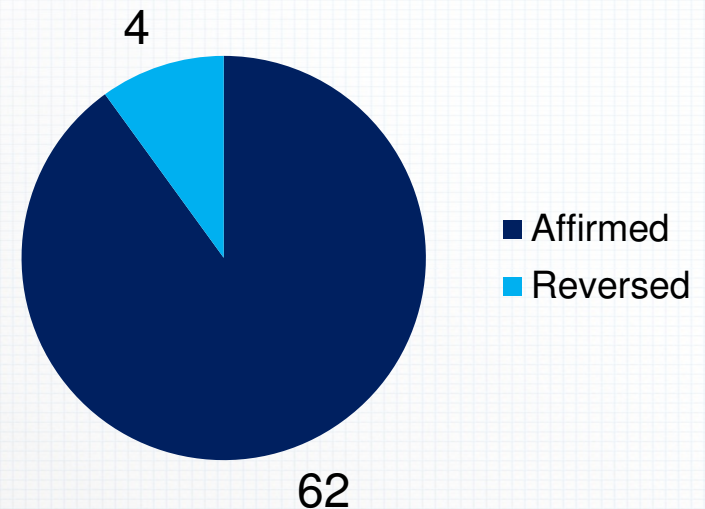
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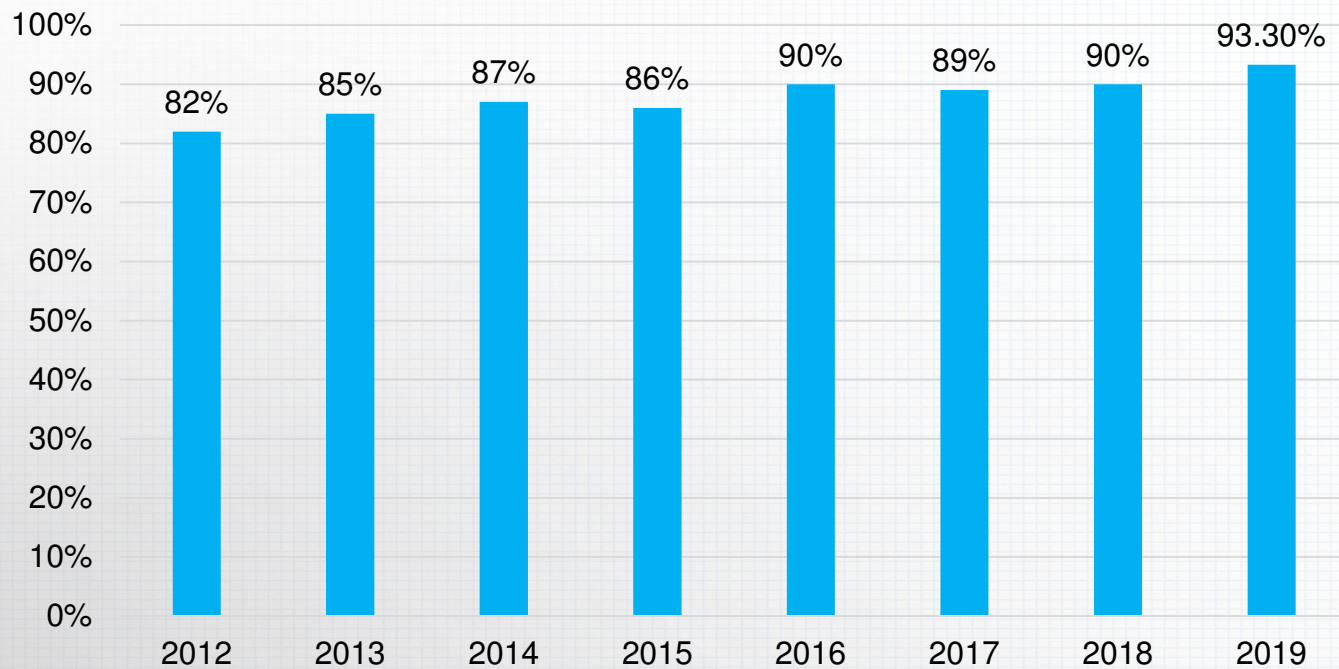
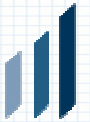
What About Section 2(e)(1) Descriptiveness Refusals?

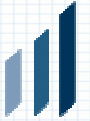


Of the 66 Section 2(e)(1) mere descriptiveness refusals, 62 were affirmed and a mere 4 reversed, for an affirmance rate of 93.3%. That is a jump from last year's 90% rate.



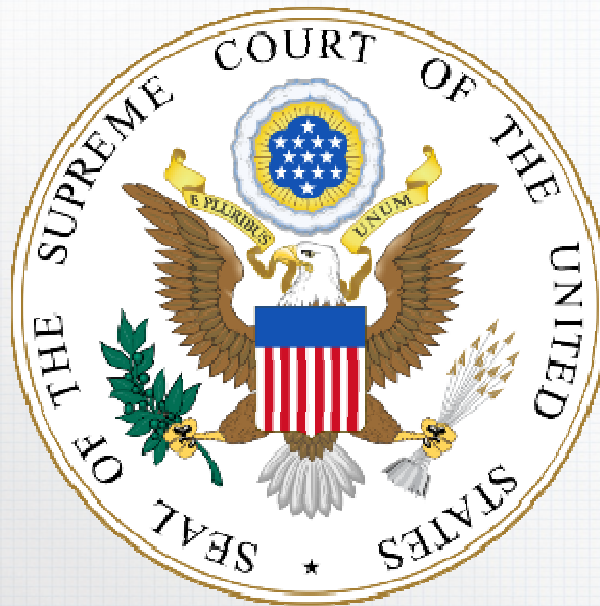
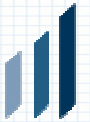
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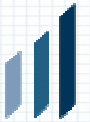


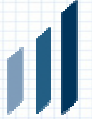
IN THE COURTS

Supreme Court Cases



Expenses on § 1071(b) Review?



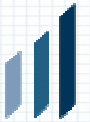


Peter v. NantKwest, Inc.

On December 11, 2019, the Supreme Court unanimously upheld an *en banc* decision of the CAFC, ruling that the USPTO is not entitled to recover its attorney's fees in an appeal from an adverse USPTO decision via a civil action under Section 145 of the Patent Statute.

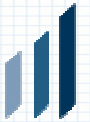


Peter v. NantKwest, Inc.



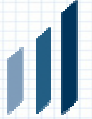
That statutory provision says that the applicant must pay “[a]ll the expenses of the proceedings.” The Court found no reason to depart from the “American Rule” that requires each party to pay its own attorney's fees.

US Patent & Trademark Office v. Booking.com B.V.



On the trademark side, the US District Court for the Eastern District of Virginia granted the USPTO's motion for an award of its "expenses" in the **BOOKING.COM** case, pursuant to Section 1071(b)(3) of the Trademark Act. The Fourth Circuit affirmed, following its own *Shammas* decision.

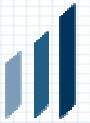
The Booking.com logo is displayed within a dark blue rectangular box. The word "Booking" is in white, and ".com" is in a lighter blue color.



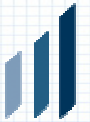
Booking.com B.V. v. USPTO

On July 2, 2020, the Supreme Court granted Booking.com's petition for a writ of certiorari regarding the attorney's fees issue: "The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Peter v. NantKwest, Inc.*, 589 U. S. ____ (2019)."

CAFC Decisions



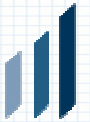
In re Forney Industries, Inc. (CAFC)



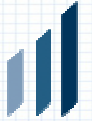
We know that packaging trade dress, unlike product configurations, can be inherently distinctive. What about colors applied to packaging?



In re Forney Industries, Inc. (CAFC)



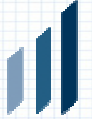
Applicant Forney sought to register a mark comprising the colors “red into yellow with a black banner located near the top as applied to packaging” for metal hardware, welding equipment, safety goods and marking products.



In re Forney Industries, Inc. (CAFC)

The TTAB relied on *Wal-Mart* and *Qualitex* in concluding that “a particular color on a product or its packaging’ . . . can never be inherently distinctive and may only be registered on a showing of acquired distinctiveness.”

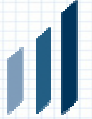
The TTAB saw no distinction between a single color and multiple colors “without additional elements, e.g., shapes or designs.”



In re Forney Industries, Inc. (CAFC)

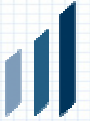
The CAFC disagreed. It said that the Supreme Court has not gone that far: The Court has not so ruled *as to product packaging*. The CAFC then held that “color marks can be inherently distinctive when used on product packaging, depending upon the character of the color design.”

Is this decision in conflict with the broad statement in *Wal-Mart*? Or is Wal-Mart referring to a **single color**?



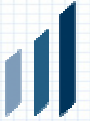
TTAB Decisions





SANCTIONS

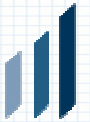
SFM, LLC v. Corcamore, LLC



After four years of misconduct by Respondent Corcamore, LLC, the Board granted Petitioner SFM's motion for judgment under Trademark Rule 2.120(h)(1) and pursuant to the Board's inherent authority to sanction.

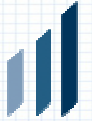


SFM, LLC v. Corcamore, LLC



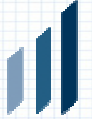
Corcamore committed numerous discovery violations and repeatedly flouted the Board's orders, rules, and procedures.

It continued to file unnecessary or procedurally improper motions in violation of a Board order to first obtain permission from the Board, and it failed to comply with an order that it contact a Board interlocutory attorney to conduct a case conference.



SFM, LLC v. Corcamore, LLC

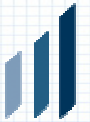
Corcamore refused to produce its Rule 30(b)(6) witness for deposition, failed to timely and fully provide supplemental discovery responses, and did not “Bates number” the documents it did produce, despite the Board’s order that it do so.



SFM, LLC v. Corcamore, LLC

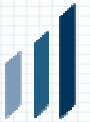
Its discovery violations, which were repeated and egregious, “demonstrate Respondent’s intent to thwart Petitioner’s discovery of information and documents the Board has already determined are discoverable.”

Fifth Generation Inc. v. Titomirov Vodka LLC



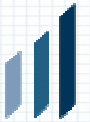
Entry of judgment as a sanction, under Rule 2.120(h), due to Defendant's failure to comply with various Board orders and for its "pattern and practice ... of avoiding its discovery obligations evidencing willful evasion."

Optimal Chemical Inc. v. Srills LLC



Finding that Petitioner Optimal Chemical had perpetrated a fraud on the Board through fabricated evidence and untruthful testimony, the TTAB invoked its inherently authority to sanction Optimal by dismissing its petition for cancellation.

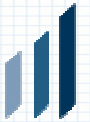
Busy Beauty, Inc. v. JPB Group, LLC



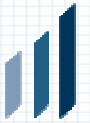
The Board refused to consider certain of Petitioner's Busy Beauty's Instagram photographs and data because it had failed to preserve the corresponding electronically stored information (ESI).



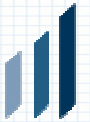
Busy Beauty, Inc. v. JPB Group, LLC



Although Petitioner was “at least careless” in its data preservation, there was no proof that it intended to deprive Respondent of this information, and so the Board declined to enter the severe sanctions of an adverse inference or adverse judgment.



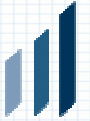
He's Back !!!



Leo Stoller, possibly the most sanctioned party ever to appear before the TTAB, is out of jail and back at it.

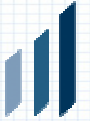
In the last month he has filed applications to register:

- WASHINGTON REDSKINS for clothing
- AUNT JEMINA (note spelling) for pancake syrup
- ESKIMO PIE for ice cream



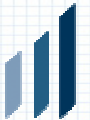
US ATTORNEY REQUIRED

Cloudworks Consulting Services Inc. v. Ongoing Operations, LLC



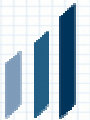
As of August 3, 2019, the USPTO amended its rules to require that all applicants, registrants, or parties to a proceeding before the TTAB whose **domicile** is not within the United States or its territories, be represented by an attorney who is an active member in good standing of a US bar.

Cloudworks Consulting Services Inc. v. Ongoing Operations, LLC

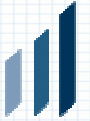


In a three-page Order, the Board ruled that a party domiciled in Canada, despite the appearance of an authorized Canadian trademark attorney/agent on its behalf, must appoint a qualified attorney licensed to practice law in the United States, or in a commonwealth or territory of the United States.

Cloudworks Consulting Services Inc. v. Ongoing Operations, LLC

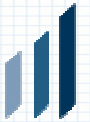


This requirement is not satisfied if a party, like Petitioner, is represented by a foreign attorney or agent, even if that attorney or agent has been granted reciprocal recognition by the USPTO.



STANDING

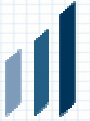
AT&T Mobility LLC v. Mark Thomann and Dormitus Brands LLC



Applicants claimed that opposer had stopped using the mark CINGULAR when it became AT&T, but the Board found that “[o]pposer is the owner of a majority share in a company named AT&T Mobility II LLC, which in turn holds a 100% interest in New Cingular, which uses the term CINGULAR in its trade name.”

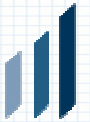


AT&T Mobility LLC v. Mark Thomann and Dormitus Brands LLC



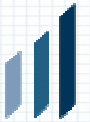
Opposer's four claims included a claim of false suggestion of a connection under Section 2(a). The Board noted that if opposer established its standing under Section 2(a), it was entitled to “rely on any available statutory grounds for opposition set forth in the Trademark Act.”

AT&T Mobility LLC v. Mark Thomann and Dormitus Brands LLC

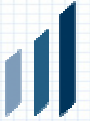


For a Section 2(a) claim, standing “does not rise or fall on the basis of a plaintiff’s proprietary rights in a term; rather, a Section 2(a) plaintiff has standing by virtue of who the plaintiff is, that is, the plaintiff’s personality or ‘persona.’”

AT&T Mobility LLC v. Mark Thomann and Dormitus Brands LLC

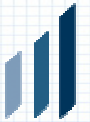


“We see no categorical legal bar precluding a corporate or institutional plaintiff from claiming, in a Board proceeding, a false suggestion of a connection with its trade name, where, as here, its allegations of standing are based on alleged injury from an unauthorized use of a mark that falsely suggests a connection with its persona.”



SECTION 2(e)(1) AND DISCLAIMERS

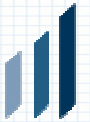
In re UST Global (Singapore) Pte. Ltd



The Board affirmed a refusal to register INFINITY LABS for various services in five classes, absent a disclaimer of the word LABS. Applicant had agreed to disclaim LABS in class 35 and some of the services in class 42.

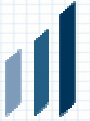


In re UST Global (Singapore) Pte. Ltd



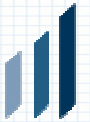
The Board affirmed the refusal in its entirety, extending to disclaimers “the well-settled principle that a ‘[i]f a mark is descriptive of any of the services in a class for which registration is sought, it is proper to refuse registration as to the entire class.’”

In re UST Global (Singapore) Pte. Ltd



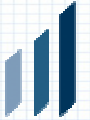
Class 36: The Board found that LABS is not merely descriptive of “incubation services, namely providing financing to freelancers, start-ups, existing businesses and non-profits,” since none of the evidence regarding the meaning of LABS related to the provision of financial services.

In re UST Global (Singapore) Pte. Ltd

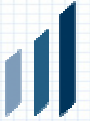


However, the Board found LABS to be merely descriptive of applicant's "think tank services in the nature of consultation services in the field of digital finance." It then required disclaimer of LABS as to the entire class.

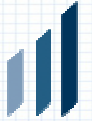
In re UST Global (Singapore) Pte. Ltd



Section 1213 of the *Trademark Manual of Examining Procedure* states (without cited authority) that “A disclaimer may be limited to pertain to only certain classes, or to only certain goods or services.” [Emphasis added].



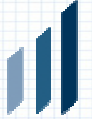
SECTION 2(d)



In re Guild Mortgage Company

On remand from the CAFC, the Board again affirmed a Section 2(d) refusal to register the mark **GUILD MORTGAGE COMPANY & Design** for mortgage banking services, in view of the registered mark **GUILD INVESTMENT MANAGEMENT** for “Investment advisory services.”

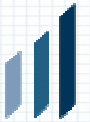




In re Guild Mortgage Company

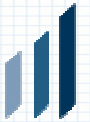
The CAFC had vacated the Board's earlier decision because the Board had “failed to consider pertinent evidence and argument under *DuPont* factor 8,” which requires consideration of “the length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” Guild had presented evidence of concurrent use of the two marks for more than 40 years without actual confusion.

In re Guild Mortgage Company



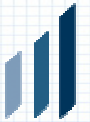
The Board observed that, as to the second, third, and fourth *DuPont* factors, the analysis must be based on the recitations of services **as set forth** in the application and the cited registration, and it may not consider evidence of how Applicant and Registrant **are actually rendering** their services in the marketplace. The eighth *DuPont* factor, however, requires consideration of the **actual market conditions**. [Emphasis by the Board].

In re Guild Mortgage Company



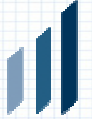
Although both Applicant and Registrant conduct their business in California, there was a lack of evidence “that **in the actual marketplace**, the **same** consumers have been exposed to **both** marks for the respective services, such that we could make a finding as to the ‘length of time during and conditions under which there has been concurrent use without evidence of actual confusion.’” Upon full consideration, we find the eighth *DuPont* factor to be neutral. [Emphasis by the Board].

In re St. Julian Wine Company, Inc.



In a rare case involving a geographic certification mark, the Board affirmed a Section 2(d) refusal of the mark **REAL MICHIGAN** for hard cider (MICHIGAN disclaimed), finding it likely to cause confusion with the two registered geographic certification marks shown below, for apples.

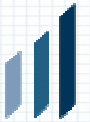




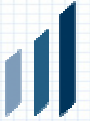
In re St. Julian Wine Company, Inc.

Section 2(e)(2), which bars registration of primarily geographically descriptive marks absent a showing of acquired distinctiveness under Section 2(f), 15 U.S.C. § 1052(f), does not apply to geographic certification marks.

In re St. Julian Wine Company, Inc.



Applicant contended that its mark “suggests a geographical area and a product that is not artificial” whereas the cited certification marks “suggest a geographical area and a fleshy round fruit (apple or apple-flavored) product.” The Board found that the involved marks convey a similar connotation and commercial impression: designating goods from the State of Michigan.



LACHES

Schiedmayer Celesta GmbH v. Piano Factory Group, Inc.



The Board granted a petition for cancellation of a registration for the mark **SCHIEDMAYER** for pianos, finding that the mark falsely suggests a connection with Petitioner in violation of Section 2(a).

Schiedmayer Celesta GmbH v. Piano Factory Group, Inc.

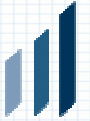
“The Board rejected Respondents' laches defense, finding that although Petitioner's delay of nearly seven and one-half years before filing its petition for cancellation was unreasonable, Respondents failed to prove any material damage resulting from the delay.”

Schiedmayer Celesta GmbH v. Piano Factory Group, Inc.

“Respondents’ claim of prejudice rings hollow where the only direct, marginal expense incurred in selling **SCHIEDMAYER**-labeled pianos is buying the **SCHIEDMAYER** labels from trophy or decal makers.

Schiedmayer Celesta GmbH v. Piano Factory Group, Inc.

“Indeed, virtually all of the money Respondents spent to offer **SCHIEDMAYER**-labeled pianos related to acquisition of the no-name pianos themselves, which could just as easily be labeled something else.”



SECTION 2(e)(1)

Spiritline Cruises LLC v. Tour Management Services, Inc.

Not surprisingly, the Board sustained an opposition to registration of **CHARLESTON HARBOR TOURS** for sightseeing tours on the ground that the proposed mark is primarily geographically descriptive under Section 2(e)(2).

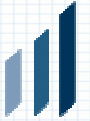


Spiritline Cruises LLC v. Tour Management Services, Inc.

Wayback Machine evidence was admitted to prove the dates of publication of various third-party website pages. The Board adopted the approach of a number of courts and overruled applicant's hearsay objections because a witness from the Internet Archive testified about how the Wayback Machine website works and how reliable its contents are.

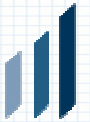
Spiritline Cruises LLC v. Tour Management Services, Inc.

“to the extent the Wayback Machine printouts are offered to show how the webpages appeared on particular dates – the ‘truth’ of the capture as of the archive date – Mr. Butler’s testimony establishes that the printouts qualify under the business records exception. *See Fed. R. Evid.* 801(c), 802.”



UNLAWFUL USE

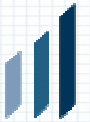
In re Stanley Brothers Social Enterprises, LLC



Finding that use of the mark **CW** for "Hemp oil extracts sold as an integral component of dietary and nutritional supplements" constitutes a per se violation of the Food, Drug & Cosmetics Act ("FDCA"), the Board affirmed a refusal to register under Sections 1, 2, and 45 of the Trademark Act.

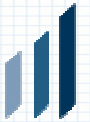


In re Stanley Brothers Social Enterprises, LLC



The USPTO presumes that the use of a mark in commerce is lawful unless the application record indicates a violation of federal law: either by (1) such as when a court or a federal agency responsible for overseeing activity in which the applicant is involved, and which activity is relevant to its application, has issued a finding of noncompliance under the relevant statute or regulation, or (2) when the applicant's application-relevant activities involve a per se violation of a federal law.

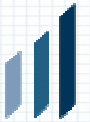
In re Stanley Brothers Social Enterprises, LLC



The evidence showed that Applicant Stanley Brothers' goods contain cannabidiol (CBD), an extract of the cannabis plant that is regulated under the FDCA as a drug.

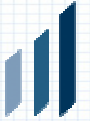
The FDCA prohibits “[t]he introduction or delivery for introduction into interstate commerce of any food to which has been added ... a drug or biological product for which substantial clinical investigations have been instituted and for which the existence of such investigations has been made public” 21 U.S.C. § 331(II).

In re Stanley Brothers Social Enterprises, LLC

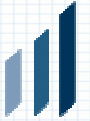


The examining attorney maintained that Applicant's "hemp oil extracts" are food to which CBD has been added, and that CBD was the subject of clinical investigations during prosecution of the involved application. The Board agreed, noting that under 21 U.S.C. § 321(ff) "a dietary supplement shall be deemed to be a food within the meaning of this chapter."

In re Stanley Brothers Social Enterprises, LLC

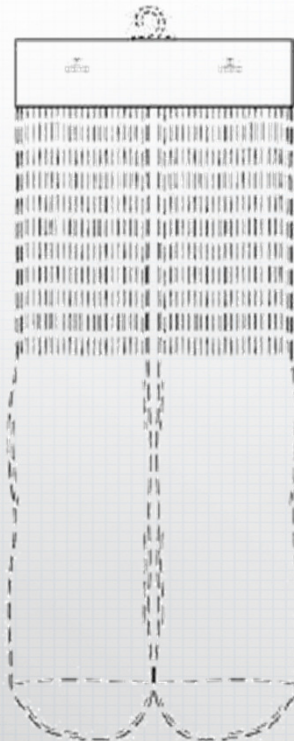
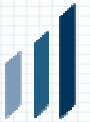


The exception in the 2014 Farm Bill that permitted the cultivation of “industrial hemp” under limited circumstances did not override the FDCA’s prohibition.



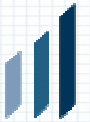
GENERICNESS

In re Odd Sox LLC



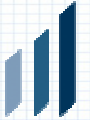
The TTAB affirmed a refusal to register the packaging design shown here, for “socks,” finding it to be generic for the goods because consumers would primarily regard the design as a common type of packaging rather than as a source indicator.

In re Odd Sox LLC



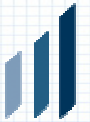
TTAB precedent teaches that a *product design* may be “so common in the industry that it cannot be said to identify a particular source.” *Stuart Spector Designs, Ltd. v. Fender Musical Instruments Corp.*, 94 USPQ2d 1549, 1554 (TTAB 2009). The Board here ruled that this standard applies to *product packaging*.

In re Odd Sox LLC

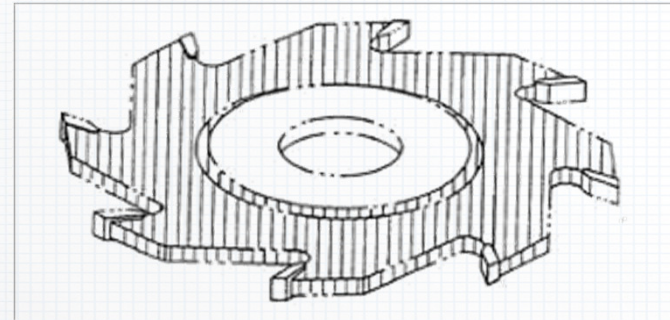


“rectangular packaging enabling the hanging of socks from front-to-back and side-by-side is so common in the industry that such packaging is not capable of indicating source, and rectangular packaging enabling the hanging of a single pair of socks side-by-side is at most a minor variation of the common form of packaging.”

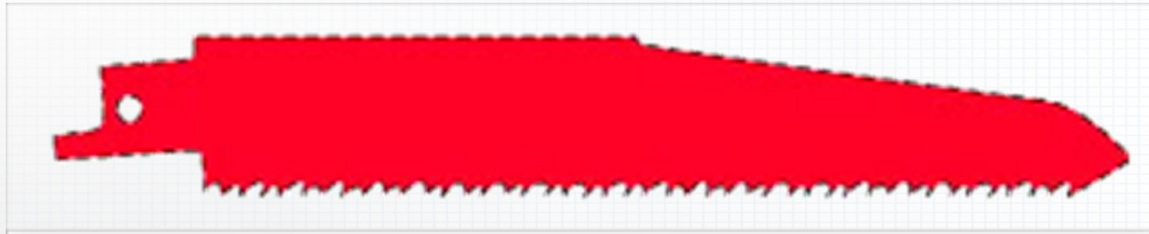
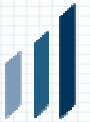
Milwaukee Electric Tool Corp. v. Freud America, Inc.



In the first TTAB decision finding a color to be generic, the Board granted petition for cancellation of two registrations for the color red for saw blades.

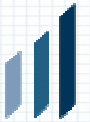


Milwaukee Electric Tool Corp. v. Freud America, Inc.



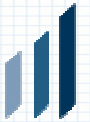
The CAFC has held that “generic name” in Section 14 encompasses anything that “potentially can but fails to serve to indicate source, including trade dress.”

Milwaukee Electric Tool Corp. v. Freud America, Inc.



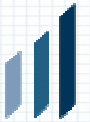
“Thus, as a form of trade dress, a single color applied to goods may be generic for those goods if it “fails to serve as an indicator of source.”

Milwaukee Electric Tool Corp. v. Freud America, Inc.



“[The] evidence overwhelmingly demonstrates that the color red on saw blades is so common in the industry that it cannot identify a single source for saw blades for power woodworking machines or saw blades for reciprocating power saws.”

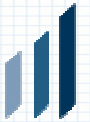
In re Twenty-Two Desserts, LLC



Finding that relevant consumers would understand the term MALAI to refer to a key aspect of applicant's ice cream products, the Board affirmed a refusal to register on the ground of genericness.



In re Twenty-Two Desserts, LLC



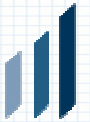
The Board agreed that there is no *per se* rule that the name of any ingredient in a product will necessarily be generic; but where, as here, the public understands the ingredient name “to refer to a key aspect or sub-category of the genus of the goods, it is generic for those goods.”

In re Humboldt Street Collective LLC [Not Precedential]

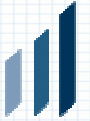


This brings to mind the Board's non-precedential decision finding **BLUEBERRY MUFFIN** for beer.

In re Humboldt Street Collective LLC

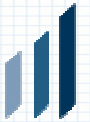


When a proposed mark “directly names the most important or central aspect or purpose of [an] applicant’s goods” and would be understood by the relevant consumers as referring to a category of those goods, the term is generic. *See In re Cent. Sprinkler Co.*, 49 USPQ2d 1194, 1199 (TTAB 1998) (finding ATTIC generic for automatic sprinklers for fire protection).



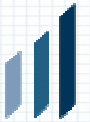
FAILURE TO FUNCTION

In re Yarnell Ice Cream, LLC



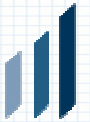
The Board affirmed a trifusal (TM) of **SCOOP** for “frozen confections and ice cream promoted and distributed by a mascot named SCOOP at product promotions and distributions of the frozen confections and ice cream.”

In re Yarnell Ice Cream, LLC

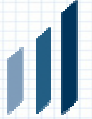


It found that the term **SCOOP** is merely descriptive of ice cream and lacks acquired distinctiveness, that it fails to function as a source indicator, and that Applicant Yarnell's specimens of use were unacceptable.

In re Yarnell Ice Cream, LLC



Relying on its findings as to the highly descriptive nature of **SCOOPS** and the nature of Yarnell's specimens of use, The Board agreed with the examining attorney: "**SCOOP** also fails to function as a mark for the identified goods because, at most, it merely informs purchasers of the serving size of the goods."

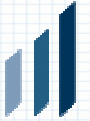


In re Ocean Technology, Inc

The Board affirmed refusals to register the word+design mark shown here for "crabmeat," on the ground that it is merely informational and fails to function as a trademark.

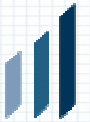


In re Ocean Technology, Inc

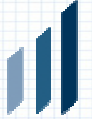


The Board found that the proposed mark, as displayed, “just conveys the contents of the package to consumers, and do not show any indication of source that may be perceived by the general public.”

In re Ocean Technology, Inc



Ocean Technology attempted to overcome this refusal by amending to the Supplemental Register, by claiming acquired distinctiveness, and by asserting inherent distinctiveness. However, the Board pointed out, matter that does not indicate source cannot be registered because it does not meet the statutory definition of a mark.

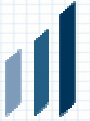


In re Wal-Mart Stores, Inc.

The Board rejected an application to register **INVESTING IN AMERICAN JOBS** for “promoting public awareness for goods made or assembled by American workers” and for various retail and online store services, finding that the phrase fails to function as a service mark.

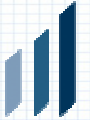


In re Wal-Mart Stores, Inc.



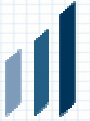
Looking first to Wal-Mart's own use of the phrase, its specimen of use appears on a shelf-talker in close proximity to products that are made by American workers. The phrase also appears on a web page with that phrase as the title, the web page stating, “We believe we can create more American jobs by supporting more American manufacturing.”

In re Wal-Mart Stores, Inc.



The Board therefore found that the applied-for mark would be perceived by consumers as merely an informational statement that Wal-Mart is selling certain goods that are made or assembled in America, and it would not be perceived as a service mark.

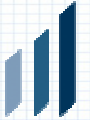
In re DePorter



Finding that the term **#MAGICNUMBER108** fails to function as a trademark for shirts, the TTAB affirmed a refusal to register under Sections 1, 2, and 45 of the Lanham Act.

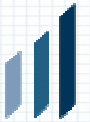


In re DePorter



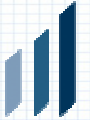
The Board concluded that the term conveys an informational message referring to the Chicago Cubs winning the World Series in 2016 after a 108-year drought, and does not serve as a source identifier.

In re DePorter

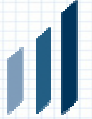


The Board observed that a hashtag, when used as part of an online social media search term, generally serves no source-identifying function. It “merely facilitate[s] categorization and searching within online social media.” TMEP Section 1202.18.

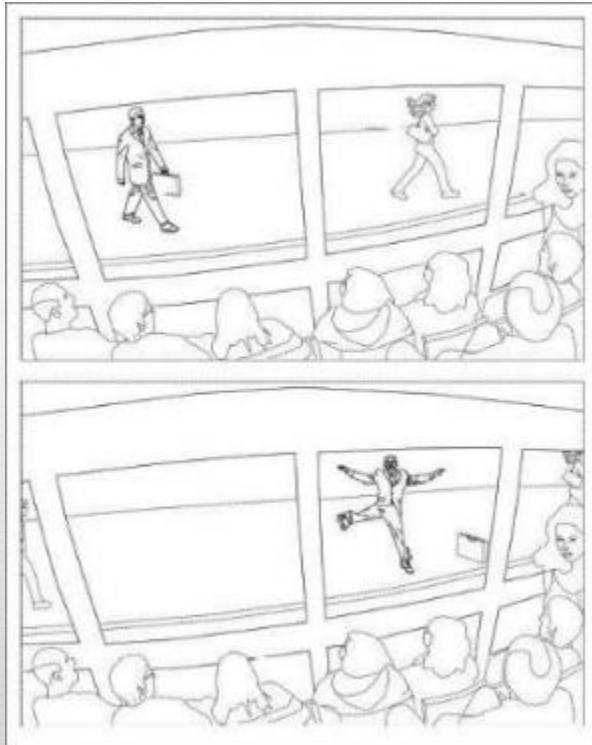
In re DePorter



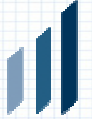
“Therefore, the addition of the term HASHTAG or the hash symbol (#) to an otherwise unregistrable term typically will not render the resulting composite term registrable.”



In re The Ride, LLC



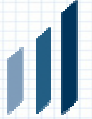
The Board affirmed three refusals to register a motion mark for “conducting sightseeing travel tours by bus:” failure-to-function, improper specimens, and inadequate description.



In re The Ride, LLC

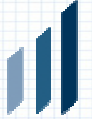
As to failure-to-function, the Board concluded that it “cannot infer ... that consumers will perceive the proposed mark, amid these other more traditional designations, as a source indicator.”

The evidence “appeared to establish that consumers view THE RIDE as Applicant’s mark.”



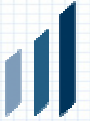
In re The Ride, LLC

Applicant submitted screenshots, photographs, and a .wmv video file, none of which displayed the motion mark as depicted in the drawing, and therefore the specimens were insufficient “to support use of the proposed mark to identify the source of Applicant's services.”



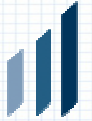
In re The Ride, LLC

Applicant's description did not clearly indicate what elements displayed in its drawing were claimed, beyond the suited individual and his briefcase. It also failed to indicate “that the trade dress is three-dimensional or whether, in the alternative, the trade dress is a two-dimensional mark that could be interpreted as three-dimensional.”



TOP TEN LOSING TTAB ARGUMENTS

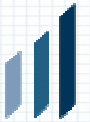




Top Ten Losing TTAB Arguments

1. Reading limitations into i.d. of goods/services
2. Mere descriptiveness as a guessing game
3. Third-party registrations without use
4. Fraud
5. Lack of actual confusion
6. Sophistication of customers
7. Competitiveness of products or services
8. Fame
9. Family of Marks
10. *Morehouse* defense

THE END



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