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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Listen, Inc.

Serial No. 76570324

J. Andrew McKinney, Jr. of Jones, Tullar & Cooper, P.C. for Listen, Inc.

Martha L. Fromm, Trademark Examining Attorney, Law Office 106 (Mary I. Sparrow, Managing Attorney).

Before Drost, Zervas and Cataldo,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Listen, Inc., a Massachusetts corporation, has applied to register the mark SOUNDCHECK, in standard character form, on the Principal Register for the following goods, as amended:

Quality control electro-acoustic performance testing equipment for use in a manufacturing environment, namely, computer hardware, microphones and computer software all for use in measuring audio transducer performance and electronic databases featuring quality control information on loudspeakers, microphones,

telephones, hearing aids and audio systems recorded on computer software.¹

The trademark examining attorney refused registration under Section 2(e)(1) of the Trademark Act on the ground that applicant's mark is merely descriptive of a feature or quality of applicant's goods.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs.

Applicant contends its proposed mark is just suggestive and does not immediately convey to consumers the nature of the goods. More specifically, applicant argues that the "phrase 'sound check' is most often used in performance art settings where, for example, a singer might utter the phrase 'check' into a microphone to determine whether audience members can hear, and so the phrase is descriptive of an activity"; that, however, applicant's use of SOUNDCHECK on its goods "is intended to be suggestive of that activity" (brief p. 2); and that consumers confronted with applicant's mark would not immediately recognize the specific nature of its goods. Applicant argues in addition that because Registration No. 1538144 for the mark SOUNDCHECK, cited by the examining attorney as a bar to

¹ Application Serial No. 76570324 was filed January 16, 2004, asserting July 12, 1995 as the date of first use of the mark anywhere and in commerce.

registration in the first Office action, is registered on the Principal Register, applicant's mark must be deemed suggestive or distinctive.²

The Examining Attorney maintains that the mark merely describes a feature or quality of the goods. In particular, the examining attorney argues that "soundcheck" is a common term used in connection with determining sound or acoustic quality; that applicant's goods include equipment used to examine the quality and test the sound performance of audio equipment as well as electronic databases featuring information about such tests; that applicant's goods thus are used to conduct "soundchecks;" and that, as a result, the mark SOUNDCHECK merely describes a function, feature or use of the identified goods. With her Office actions, the examining attorney submitted dictionary definitions of the words "check" and "acoustic," and made of record articles retrieved from the Nexis database and Internet web pages, including web pages from applicant's web site. Certain of these dictionary definitions as well as excerpts from the referenced

² Registration No. 1538144 was issued on May 9, 1989 for the mark SOUNDCHECK for "magazines directed to individuals working with technical support systems - namely, audio, video, lighting and related areas." Section 8 affidavit accepted; Section 15 affidavit acknowledged. The refusal to register under Section 2(d) of the Act was withdrawn in the final Office action issued on July 19, 2005.

articles and web pages are reproduced below (emphasis added):

...At the other end of the Hayward warehouse/music studio, band mate Andrew "A.J." Freschi leans toward a microphone for a **sound check**. (Alameda Times-Star, July 12, 2004)

The apprentices learn how to focus lights, hook up microphones, set up and operates sound boards and perform **soundchecks**. (The Santa Fe New Mexican, April 17, 2004)

Joking that the previous song had been the band's **soundcheck** for the evening, Landreth then took to the microphone for the first time with the title track to his 1995 release, "South of I-10." (The Boston Globe, March 19, 2004)

In the meantime, courts do what they can to protect the audio record: daily **sound checks** in every courtroom, spot-checks to make sure recorded information is being captured on disk and using backup... (The Sunday Oregonian, February 8, 2004)

A stop by the soundboard after the set revealed that Jagged Edge didn't even make it to **soundcheck**. That might have helped. (The Houston Chronicle, December 29, 2003)

Although I haven't been an Apple iPod owner from its inception, I have been a big fan starting with the 3rd generation 30gb model. I followed that up with my current 4th generation model. I wasn't that excited about the mini or the photo versions, but the newer shuffle did intrigue me...I found myself needing to adjust volume up or down every other song sometimes. This is strange since iTunes has a **sound check** feature built in. Go figure. (www.the-gadgeteer.com)

The DVD-LC also features a 5.1-channel Dolby Digital system **sound check** and interactive on-screen directions for both cleaning and **soundchecks** in 8 languages... (www.crutchfield.com)

The examining attorney also submitted the following information from the Internet website of applicant and one of its affiliates:

With SoundCheck, you are no longer constrained by the limitations of proprietary hardware-based systems for testing headphones, microphones, loudspeakers, telephone handsets, hearing aids and associated subcomponents. SoundCheck is a modern, Windows®-based system designed for both R&D and Production testing. Utilizing powerful measurement algorithms, SoundCheck can perform comprehensive tests, e.g. frequency response, phase, sensitivity, distortion, rub and buzz, impedance, directional characteristics and Thiele-Small parameters in a matter of seconds. (www.listeninc.com)

LISTEN Inc. was formed by Steve Temme who has been associated with Bruel & Kjar for several years. Using his electroacoustics knowledge and experience, Steve has developed this highly versatile, software-based system for the production line testing of loudspeakers, microphones, hearing aids, telephones and other acoustic transducers...SoundCheck has been optimized for fast production testing, and performs very rapid frequency response and distortion tests, typically in less than 2 to 4 seconds... (www.bksv.com)

In addition, the examining attorney recites several definitions of the term "check" and "acoustic." Based upon these definitions, "check" may be defined, *inter alia*, as "to examine the accuracy, quality, or condition of" or "an examination to check accuracy, quality, or condition."

"Acoustic" may be defined, *inter alia*, as "relating to sound or hearing."³

It is well settled that a term is considered to be merely descriptive of goods and/or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it immediately describes an ingredient, quality, characteristic or feature thereof or if it directly conveys information regarding the nature, function, purpose or use of the goods and/or services. See Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052. See also *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods and/or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or feature about them. Moreover, whether a term is merely descriptive is determined not in the abstract, but in relation to the goods and/or services for which registration is sought. See *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). Thus, "[w]hether consumers could guess what the product is from consideration of the

³ The examining attorney cites to the Compact Oxford English Dictionary (www.askoxford.com) for these definitions.

mark alone is not the test." See *In re American Greetings Corp.*, 226 USPQ 365 (TTAB 1985).

It is settled that excerpts from articles taken from the Nexis database are competent evidence of how a mark may be perceived. See *In re Shiva Corp.*, 48 USPQ2d 1957 (TTAB 1998). It is further settled that material obtained from the Internet is acceptable in ex parte proceedings as evidence of potential public exposure to a term. See *In re Fitch IBCA, Inc.*, 64 USPQ2d 1058 (TTAB 2002). In the instant case, the evidence made of record by the examining attorney, which consists of Nexis articles and Internet material, establishes that, as applied to applicant's goods, the term SOUNDCHECK would immediately describe, without conjecture or speculation, a significant characteristic or feature of the goods, namely, that they are used to examine the acoustic performance of loudspeakers, microphones, and audio systems recorded on computer software. In other words, prospective purchasers, upon confronting the term SOUNDCHECK used in connection with applicant's goods, would immediately perceive that a significant feature or characteristic of its goods is to evaluate, i.e. check, the acoustic, i.e. sound, qualities of various goods that generate, reproduce, transmit or amplify sound. Applicant's mark merely describes goods

used to perform a "sound check" on various audio related goods.

Applicant's assertions regarding the third-party registration for the mark SOUNDCHECK, previously cited as a bar to registration under Section 2(d) of the Act, are of little probative value in determining the registrability of the mark at issue in this case. First, we note that the goods identified in that registration are completely different from the goods identified in the application at issue herein. Further, and as often noted by the Board, each case must be decided on its own set of facts, and we are not privy to the facts involved with these registrations. See *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."] See also *In re Best Software Inc.*, 58 USPQ2d 1314 (TTAB 2001). While uniform treatment under the Trademark Act is highly desirable, our task here is to determine, based upon the record before us, whether applicant's mark is registrable.

We further note applicant's argument that its mark evokes the activity of a singer checking the volume of a

microphone prior to a performance; and that the mark thus is suggestive, rather than merely descriptive, of its goods." Applicant's Brief, p. 2. Applicant's argument regarding the possible connotation of its mark, however, is unpersuasive in view of the above-referenced Nexis and Internet excerpts demonstrating that SOUNDCHECK immediately conveys a significant quality or feature of applicant's acoustic performance testing equipment.

Accordingly, we find that applicant's mark is merely descriptive as contemplated by Section 2(e)(1) of the Act.

Decision: The refusal to register is affirmed.