

**This Opinion is Not a
Precedent of the TTAB**

Hearing:
December 8, 2015

Mailed:
May 23, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Royal Crown Company, Inc. and Dr Pepper/Seven Up, Inc.
v.
The Coca-Cola Company
—

Opposition Nos. 91178927 (Parent Case); 91180771; 91180772; 91183482;
91185755; 91186579; 91189847; and 91190658¹
—

The Coca-Cola Company
v.
Royal Crown Company, Inc. and Dr Pepper/Seven Up, Inc.
—

Opposition No. 91184434²
—

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Lehrman & Zissu, P.C., for Royal Crown Company, Inc. and Dr Pepper/Seven Up,
Inc.

Bruce W. Baber, Kathleen E. McCarthy, and Emily B. Brown of King & Spalding LLP
for The Coca-Cola Company.

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Before Zervas, Hightower, and Lynch,
Administrative Trademark Judges.

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¹ Consolidated on February 29, 2008; June 30, 2008; October 17, 2008; June 2, 2009; and
June 18, 2009.

² Consolidated on October 17, 2008.

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Opinion by Hightower, Administrative Trademark Judge:

In these consolidated proceedings, Opposers Royal Crown Company, Inc. and Dr Pepper/Seven Up, Inc. (collectively, “RC” or “Opposers”) oppose registration of 17 applications by The Coca-Cola Company (“TCCC” or “Applicant”) to register marks incorporating the term ZERO. RC asserts that ZERO is either generic for zero-calorie soft drinks or descriptive without acquired distinctiveness and thus cannot be registered without a disclaimer of TCCC’s exclusive right in that term.

TCCC, in turn, opposes registration by RC of two marks incorporating the term ZERO on the ground that they are likely to cause confusion with its ZERO-formative marks.

Both parties filed briefs, and each was represented by counsel at an oral hearing held before this panel on December 8, 2015.

The oppositions are sustained in part and dismissed in part, as explained fully *infra*.

I. Involved Applications

The 19 applications at issue in these proceedings are:³

Opposition No.	Application No.	Mark	Filed/Basis	First Use	Goods (all in Class 32)
91180771	78316078	SPRITE ZERO	Oct. 20, 2003 1(b)	Sept. 13, 2004	Beverages, namely carbonated soft drinks; syrups, concentrates and powders for making same

³ First use dates listed are those claimed in applications filed pursuant to Section 1(a) of the Trademark Act, or in statements of use for applications filed under Section 1(b) (intent-to-use). No statement of use has been submitted for the nine applications listed in the chart as filed pursuant to Section 1(b) for which the “First Use” date cell is blank. First use dates established by other evidence are discussed in the text where relevant. As noted, the marks COKE ZERO ENERGY and COKE ZERO BOLD have not been used.

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Opposition No.	Application No.	Mark	Filed/ Basis	First Use	Goods (all in Class 32)
91178927	78580598	COCA-COLA ZERO	March 4, 2005 1(b)	June 13, 2005	Beverages, namely soft drinks; syrups and concentrates for the making of the same
91186579	78620677	FANTA ZERO	May 2, 2005 1(b)		Beverages, namely, soft drinks, syrups and concentrates for the making of the same
91180772	78664176	COKE ZERO	July 6, 2005 1(a)	June 13, 2005	Beverages, namely soft drinks; syrups and concentrates for the making of the same
91190658	78698990	VAULT ZERO	Aug. 24, 2005 1(b)	Dec. 2, 2005	Non-alcoholic beverages, namely, soft drinks and energy drinks; syrups and concentrates for making soft drinks and energy drinks
91183482	77097644	PIBB ZERO	Feb. 2, 2007 1(a)	July 2005	Non-alcoholic beverages, namely, soft drinks and concentrates for the making of the same
91185755	76674382	COKE ZERO ENERGY	March 22, 2007 1(b)	Has not been used	Non-alcoholic beverages, namely, soft drinks and energy drinks; syrups and concentrates for making soft drinks and energy drinks
91185755	76674383	COKE ZERO BOLD	March 22, 2007 1(b)	Has not been used	Non-alcoholic beverages, namely, soft drinks and energy drinks; syrups and concentrates for making soft drinks and energy drinks
91183482	77175066	COKE CHERRY ZERO	May 8, 2007 1(a)	Jan. 29, 2007	Non-alcoholic beverages, namely, soft drinks
91183482	77175127	CHERRY COCA-COLA ZERO	May 8, 2007 1(b)		Non-alcoholic beverages, namely, soft drinks

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Opposition No.	Application No.	Mark	Filed/ Basis	First Use	Goods (all in Class 32)
91185755	77176099	VANILLA COKE ZERO	May 9, 2007 1(b)		Non-alcoholic beverages, namely, soft drinks; syrups and concentrates for making non-alcoholic beverages, namely, soft drinks
91183482	77176108	COCA-COLA VANILLA ZERO	May 9, 2007 1(b)		Non-alcoholic beverages, namely, soft drinks
91183482	77176127	CHERRY COKE ZERO	May 9, 2007 1(b)		Non-alcoholic beverages, namely, soft drinks; concentrates for making non-alcoholic beverages, namely, soft drinks
91183482	77176279	COCA-COLA CHERRY ZERO	May 9, 2007 1(a)	Jan. 29, 2007	Non-alcoholic beverages, namely, soft drinks; syrups and concentrates for making non-alcoholic beverages, namely, soft drinks
91186579	77257653	VANILLA COCA-COLA ZERO	Aug. 17, 2007 1(b)		Non-alcoholic beverages, namely, soft drinks
91186579	77309752	POWERADE ZERO	Oct. 22, 2007 1(b)	May 2008	Non-alcoholic beverages, namely, sports drinks
91189847	77413618	FULL THROTTLE ZERO	March 5, 2008 1(b)		Non-alcoholic beverages, namely, energy drinks
91184434	78576257	DIET RITE PURE ZERO	Feb. 28, 2005 1(b)		Soft drinks and syrups used in the preparation thereof
91184434	78581917	PURE ZERO	March 7, 2005 1(b)		Soft drinks, and syrups and concentrates used in the preparation thereof

All marks are in standard characters. TCCC claims acquired distinctiveness in the term ZERO in each of the marks it seeks to register and in COKE ZERO as a

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whole. TCCC disclaims the terms CHERRY, VANILLA, and ENERGY from the marks in which these terms appear.

In its two applications, listed last in the chart *supra*, RC disclaims ZERO apart from the marks DIET RITE PURE ZERO and PURE ZERO as a whole.

II. Evidentiary Objections and Record

On an evidentiary record comprising more than 5,700 pages (excluding the file histories of the 19 subject applications, which are automatically of record), the parties have devoted 108 pages – many in the form of single-spaced charts – to their statements of objections, responses, and replies.⁴ We have considered all objections. On the whole, the disproportionate volume of the parties' submissions does not reflect the gravity of their objections, most of which actually concern the weight due the evidence rather than its admissibility. Lest we devote a similarly excessive number of pages to ruling on these objections individually, we address here only certain evidence that could be material to our outcome-determinative findings of fact. Otherwise, we have kept the objections in mind in considering the evidence, and comment as needed on its probative value elsewhere in the opinion. *See Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1104 (TTAB 2007). We also urge the parties to remember that our proceedings are tried before judges not likely to be easily confused or prejudiced and lodge their objections more judiciously in future proceedings.

⁴ 146, 151, 152, 155, 156, and 160 TTABVUE. Citations to the record are to the TTABVUE docket history system. Parties also are encouraged to cite to evidence in TTABVUE. TBMP § 801.03 (2015); *Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

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The following evidence is excluded from the trial record: Because foreign trademark registration is irrelevant to the registrability of TCCC's marks in the United States, we grant TCCC's motion to exclude what RC characterizes as decisions from the United Kingdom rejecting TCCC's application to register ZERO as a mark because it is generic for beverages.⁵ *See, e.g., Double J of Broward Inc. v. Skalony Sportswear GmbH*, 21 USPQ2d 1609, 1612 (TTAB 1991).

Both parties objected to some advertisements introduced through witnesses who testified that they were not certain the ads had appeared publicly. Although we do not exclude them, we give no weight to such advertisements. *See, e.g., Wet Seal Inc. v. FD Mgmt. Inc.*, 82 USPQ2d 1629, 1637 (TTAB 2007). Such ads specifically include TCCC Exhibits 118 through 121 to the testimony deposition of Russell Baker, who testified on cross-examination that he did not know whether the ads were ever deployed in the marketplace.⁶ We disagree with TCCC that "it does not matter whether he knows if the specific documents were ever deployed" because they were

⁵ Exhibits RC 282-83 to Opposer's Notice of Reliance on Official Records, 102 TTABVUE 1042-87. RC contends that TCCC's own statement during prosecution has made these decisions relevant, but arguments concerning foreign registration also are irrelevant.

⁶ Baker Tr. at 141:9-148:6, 232:18-237:2, 168 TTABVUE 139-46, 230-35, 278-82 (exhibits). Mr. Baker explained that knowledge of the retail execution specifics was lacking because TCCC's bottling organization deploys these types of materials. *Id.* at 144:22-146:21, 168 TTABVUE 142-44. Consistent with this testimony, in its Supplemental Response to RC's Interrogatory No. 8, which sought specific information concerning "all advertising, marketing and promotional campaigns or activities that have included more than one of TCCC's Marks," TCCC stated in part that "while TCCC has generated various advertisements that have been released for use by retailers, customers and others in print and/or outdoor media and that show and could be used to advertise multiple products bearing TCCC's ZERO Marks, as shown in the documents previously produced to RC, TCCC does not receive or maintain information regarding the specific uses made of such advertisements, including the specific media outlets, time frames or geographic areas in which such materials are used." Opposer's Second Notice of Reliance on Discovery Responses, Exhibit RC 302, 118 TTABVUE 73-78.

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“representative of the kinds of promotions TCCC did for more than one ZERO product” one to two years later.⁷ Although parties are permitted to produce representative samples of information sought in discovery requests, *see Carefirst of Maryland Inc. v. FirstHealth of the Carolinas Inc.*, 77 USPQ2d 1492, 1499-1500 (TTAB 2005), *aff'd*, 479 F.3d 825, 81 USPQ2d 1919 (Fed. Cir. 2007); Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 414(2) (2015), we find these specific advertisements to have no probative value in the absence of evidence that they ran.

Similarly, we give no weight to Exhibit RC 18 to the Trial Declaration of Chris Barnes, who could testify neither that the graphics shown in the exhibit were actually used as subway advertising nor that they were approved by the companies represented in the ads – including TCCC – other than his own employer (Dr Pepper Snapple Group).⁸

A. RC's Evidence

Opposers submitted the following evidence:

- Opposer's Notice of Reliance, with the following exhibits:
 - Stipulated documents,⁹ including, e.g., press releases, advertising and marketing materials, printouts from websites and TTAB proceedings, and copies of settlement agreements between TCCC and third parties (Exhibits RC 56-101, 94 TTABVUE);

⁷ TCCC's Response to RC's Statement of Objections at 15, 151 TTABVUE 16.


⁸ *See* Trial Declaration of Chris Barnes at ¶ 9, Barnes Tr. at 25:10-26:16, 36:23-37:3, 44:25-45:9, 131 TTABVUE 7 (declaration), 10-12 (exhibit), 37-38, 48-49, 56-57 (testimony).

⁹ The parties entered into a “Stipulation Regarding Authentication and use of Documentary Evidence at Trial,” pursuant to which they authenticated and identified particular produced documents and agreed that business records would not be subject to hearsay objection. 87 TTABVUE; approved by Board at 90 TTABVUE.

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- Discovery responses, including TCCC responses to RC's interrogatories and requests for admission (Exhibits RC 120-125, 98 and 136 TTABVUE);
- Excerpts from the discovery deposition testimony of TCCC witnesses William Herbert Gray IV, Russell Wiley Baker ("Baker Discovery Tr."), and Maurice Cooper II, with exhibits (Exhibits RC 126-28, 99-100 TTABVUE);
- Printed publications, including printouts from the websites of third parties and Opposers and media references (Exhibits RC 129-91, 101 TTABVUE);
- Official records of the U.S. Patent and Trademark Office ("USPTO"), in particular, applications, registrations, and prosecution history for marks containing the term ZERO for beverage goods, including Opposers' pleaded marks and an abandoned application by TCCC for



the mark , as well as oppositions to third-party ZERO marks filed by TCCC (Exhibits RC 192-281, 102 TTABVUE);

- The testimony deposition transcript of Robert Marciano, executive vice president, chief sales and marketing officer for Arizona Beverages USA, LLC, who appeared by subpoena, with exhibits (114-15 TTABVUE);
- The trial declaration and transcript of the cross-examination of Mario Ortiz, a paralegal for Opposers' counsel, with exhibits (116 and 130 TTABVUE);¹⁰
- Opposer's Second Notice of Reliance, with the following exhibits:
 - Discovery responses, including additional TCCC responses to RC's interrogatories and requests for admission (Exhibits RC 299-302 and 304 (Supplemental Response to Request No. 26),¹¹ 118 TTABVUE);
 - Additional excerpts from discovery deposition testimony of TCCC witnesses William Herbert Gray IV, Russell Wiley Baker, and Maurice Cooper II, and RC witnesses Andrew David Springate, Russell Schleiden, and Tony Jacobs, with exhibits (Exhibits RC 306-08 and RC 314-16, 119 and 121-23 TTABVUE);

¹⁰ The parties stipulated to enter direct trial testimony of party and counsel employees by sworn declaration or affidavit, subject to oral cross-examination. 89 TTABVUE; approved by Board at 90 TTABVUE.

¹¹ RC also submitted certain other of TCCC's responses to document requests, but they generally are not admissible by notice of reliance except when the responses are objections or statements that no such documents exist. *Hunter Indus., Inc. v. Toro Co.*, 110 USPQ2d 1651, 1657 n.13 (TTAB 2014). The stipulations between the parties did not cover responses to document requests, only produced documents proposed for use at trial.

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- Additional printed publications, including printouts from the websites of third parties (Exhibits RC 309-13, 120 TTABVUE);
- The trial declaration and transcript of the cross-examination of Chris Barnes, director, corporate communications, Dr Pepper Snapple Group, with exhibits (“Barnes Tr.,” 131 TTABVUE);
- The transcript of the testimony deposition of Christopher John Reed, CEO of Reed’s, Inc., with exhibits (132-33 TTABVUE);
- Two trial declarations and transcripts of two cross-examinations of Andrew D. Springate, senior vice-president, marketing services and long-range planning, Dr Pepper Snapple Group, with exhibits (134-35 and 139-40 TTABVUE);
- The transcript of the testimony deposition of Esperanza Teasdale, senior director of marketing for PepsiCo, with exhibits (137-38 TTABVUE);
- A CD with a 30-second advertisement for RC’s DIET RITE PURE ZERO cola (Exhibit RC 7, 141 TTABVUE); and
- The transcript of the testimony deposition of Harold Miller, owner and managing member of Southern Group Enterprises, Inc., with exhibits (142-43 TTABVUE).

B. TCCC’s Evidence

Applicant submitted the following evidence:

- Applicant’s Notice of Reliance, with the following exhibits:
 - Additional excerpts from discovery deposition testimony of TCCC witnesses William Herbert Gray IV, Russell Wiley Baker, Maurice Cooper II, and RC witnesses Andrew David Springate, Russell Schleiden, and Tony Jacobs, with exhibits (106-09 and 111-12 TTABVUE);
 - Official USPTO records, including documents relating to third-party applications and oppositions filed by TCCC, both for marks incorporating the term ZERO or the numeral “0” (TCCC Exhibits 206-61, 110 and 117 TTABVUE);
 - Printed publications, including TCCC press releases and articles from print and electronic publications (TCCC Exhibits 262-79, 110 TTABVUE);

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- Discovery responses, including RC responses to TCCC's requests for production and interrogatories¹² (TCCC Exhibits 280-81, 110 TTABVUE); and
- Third-party registrations (TCCC Exhibits 282-304, 110 TTABVUE);
- Applicant's Second Notice of Reliance, with additional excerpts from discovery deposition testimony of TCCC witnesses William Herbert Gray IV, Russell Wiley Baker, and Maurice Cooper II (124-26 TTABVUE);
- The testimony deposition transcript of Dr. Alexander Simonson, who conducted a secondary meaning survey on TCCC's behalf in 2008, with exhibits ("Simonson Tr.," 167 TTABVUE); and
- The testimony deposition transcript of Russell Wiley Baker, vice president of sales capabilities for the Coca-Cola Refreshments Business Unit of TCCC, with exhibits ("Baker Tr.," 168-69 TTABVUE).

The parties have designated much of the evidence as confidential. We have endeavored not to divulge information that the parties have maintained as confidential and not disclosed in their public briefs.

III. Standing

Standing is a threshold issue that must be proven by the plaintiff in every *inter partes* case. See *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *John W. Carson Found. v. Toilets.com Inc.*, 94 USPQ2d 1942, 1945 (TTAB 2010).

Neither party contests the other's standing. Ample record evidence demonstrates that the parties are competitors in the soft drink industry and have trademark applications pending for marks including the same disputed term. Thus, the parties presumptively have an interest in the outcome of these consolidated proceedings

¹² As noted in n.11 *supra*, only RC's responses to document requests consisting of objections or statements that no such documents exist are of record, i.e., responses to Requests No. 9-10, 14, 16-18, 21-23, and 28. See 110 TTABVUE 435-52.

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beyond that of the public in general. *Books on Tape Inc. v. Booktape Corp.*, 836 F.2d 519, 5 USPQ2d 1301, 1302 (Fed. Cir. 1987); *Plyboo Am. Inc. v. Smith & Fong Co.*, 51 USPQ2d 1633, 1634 (TTAB 1999); *Fed. Glass Co. v. Corning Glass Works*, 162 USPQ 279, 282-83 (TTAB 1969). We find that each party has proven its standing.

IV. Burdens of Proof

The parties disagree as to certain of the applicable burdens of proof. RC bears the burden of proving genericness as plaintiff in its oppositions. *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1830 & n.2 (Fed. Cir. 2015). It is TCCC, however, that bears the burden of proof of acquired distinctiveness in the term ZERO so as to be entitled to registration under the provisions of Section 2(f) of the Trademark Act. *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1006 (Fed. Cir. 1988). TCCC also bears the burden of proving that RC's ZERO marks are likely to cause confusion with TCCC's ZERO marks as plaintiff in its opposition. *Yamaha*, 6 USPQ2d at 1007. The standard of proof for genericness, acquired distinctiveness, and likelihood of confusion is a preponderance of the evidence. Nonetheless, "the applicant's burden of showing acquired distinctiveness increases with the level of descriptiveness; a more descriptive term requires more evidence of secondary meaning." *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005).

V. Genericness

We first consider RC's challenge to registration of TCCC's marks on the ground that they are unregistrable without disclaimer of the generic term ZERO. As the Court of Appeals for the Federal Circuit, our primary reviewing court, has explained:

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A generic term “is the common descriptive name of a class of goods or services.” *H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 989 [228 USPQ 528, 530] (Fed. Cir. 1986). Because generic terms “are by definition incapable of indicating a particular source of the goods or services,” they cannot be registered as trademarks. *Dial-A-Mattress [Operating Corp.]*, 240 F.3d 1341, 1344, 57 USPQ2d 1807, 1810 (Fed. Cir. 2001). “The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question.” *Marvin Ginn*, 782 F.2d at 989-90.

We have said that determining a mark’s genericness requires “a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered or retained on the register understood by the relevant public primarily to refer to that genus of goods or services?” *Id.* at 990. Evidence of the public’s understanding of the mark may be obtained from “any competent source, such as consumer surveys, dictionaries, newspapers and other publications.” *In re Northland Aluminum Prods., Inc.*, 777 F.2d 1556, 1559 [227 USPQ 961] (Fed. Cir. 1985).

Princeton Vanguard, 114 USPQ2d at 1830.

A. Genus of TCCC’s Goods

The parties disagree as to the genus of the goods at issue. TCCC argues that the genus is carbonated soft drinks, energy drinks, and sports drinks (and syrups and concentrates for making such drinks), as identified in its applications. RC contends that because the identified goods “encompass zero-calorie soft drinks, the Board must consider whether ‘ZERO’ is generic for zero-calorie soft drinks.”¹³

The genus of the goods is determined by focusing on the identification of goods in the subject applications. *See In re Cordua Rests., Inc.*, No. 2015-1432, --- USPQ2d ---, 2016 WL 2786364, at *4 (Fed. Cir. May 13, 2016); *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991); *Sheetz of Del., Inc. v. Doctor’s*

¹³ RC Brief at 36, 145 TTABVue 38.

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Assocs. Inc., 108 USPQ2d 1341, 1350 (TTAB 2013). As we have previously observed in determining the genus for a genericness inquiry, a product may be in more than one category. *In re Central Sprinkler Co.*, 49 USPQ2d 1194, 1197 (TTAB 1998).

Here, TCCC's goods fall into the broad category of soft drinks (and sports and energy drinks), which encompasses the narrower category of soft drinks (and sports and energy drinks) containing minimal or no calories.¹⁴ *See Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1761 (TTAB 2013) (for mark ANNAPOLIS TOURS, finding services identified as "conducting guided tours of historic districts and other areas of cities" adequately defined genus and were sufficiently broad to include tours of the city of Annapolis), *aff'd*, 565 Fed. Appx. 900 (Fed. Cir. 2014). Therefore, we find that the identifications in TCCC's applications adequately define the genus of the goods at issue as soft drinks, sports drinks, and energy drinks. In accordance with the bulk of the record evidence, we focus our analysis on these goods rather than the remaining identified goods – syrups, concentrates, and powders for making soft drinks – but note that registration is properly refused even if a term in an applied-for mark is generic for fewer than all identified goods and not disclaimed. *See Cordua Rests.*, 2016 WL 2786364, at *7 ("But a term is generic if the relevant public understands the term to refer to part of the claimed genus of goods or services, even if the public does not understand the term to

¹⁴ "Zero-calorie" beverages do not necessarily have zero calories. One of RC's witnesses testified that "any beverage that has fewer than five calories per serving is permitted to signify the number of calories on the nutritional panel as '0.'" Springate Decl. at ¶ 31 n.2, 134 TTABVUE 14 (filed under seal); RC Reply Brief at 23 n.10, 157 TTABVUE 24 (citing declaration and quoting 21 C.F.R. § 101.9(c)(1)).

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refer to the broad genus as a whole.”); *In re Analog Devices Inc.*, 6 USPQ2d 1808, 1810 (TTAB 1988), *aff’d*, 871 F.2d 1097, 10 USPQ2d 1879 (Fed. Cir. 1989).

B. Is ZERO Understood by the Relevant Public Primarily to Refer to Soft Drinks, Energy Drinks, or Sports Drinks, Particularly Those With Zero or Near Zero Calories?

Because there are no restrictions or limitations to the channels of trade or classes of consumers in the opposed applications, we find the relevant consuming public to be ordinary consumers who purchase and drink soft drinks, energy drinks, or sports drinks.

We turn once again to the decision in *Princeton Vanguard*, 114 USPQ2d at 1833, to provide the framework for the second step of our genericness inquiry:

As previously discussed, the relevant public’s perception is the primary consideration in determining whether a term is generic. *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 1569 [4 USPQ2d 1141] (Fed. Cir. 1987) (“It is basic to the inquiry to determine whether members of the relevant public primarily use or understand the term to refer to the genus of goods or services.”). And, as noted, evidence of the public’s perception may be obtained from “any competent source, such as consumer surveys, dictionaries, newspapers and other publications.” *Northland Aluminum*, 777 F.2d at 1559.

One of our sister circuits has indicated that “direct consumer evidence, e.g., consumer surveys and testimony is preferable to indirect forms of evidence.” *Berner Int’l Corp. v. Mars Sales, Co.*, 987 F.2d 975, 982-83 [26 USPQ2d 1044] (3d Cir. 1993) (“Consumer surveys have become almost *de rigueur* in litigation over genericness.”) (internal citation and quotation marks omitted). We likewise have recognized that “consumer surveys may be a preferred method of proving genericness.” *BellSouth Corp. v. DataNational Corp.*, 60 F.3d 1565, 1570 [35 USPQ2d 1554] (Fed. Cir. 1995) (“While consumer surveys may be a preferred method of proving genericness under the proper test of purchaser understanding, we are satisfied that on the facts of this case genericness has been established under that test.”).

See also Glover v. Ampak Inc., 74 F.3d 57, 37 USPQ2d 1602, 1603 (4th Cir. 1996) (stating that evidence of genericness may come from purchaser testimony, consumer

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surveys, listings and dictionaries, trade journals, newspapers, and other publications, and: “Only by showing that the public understands by the mark the class of goods or services of which the trademarked product or service is a part can the party who seeks to cancel a registration carry its burden.”).

RC has provided no direct consumer evidence in the form of surveys or testimony. Nor is there any dictionary evidence associating ZERO with soft drinks. RC has provided indirect evidence to support its contention that the relevant purchasing public primarily uses or understands ZERO to refer to the genus of soft drinks, energy drinks, or sports drinks, in particular such drinks with zero calories. After carefully reviewing the record as a whole, we find that its evidence does not establish that the relevant purchasing public primarily uses or understands ZERO to refer to the genus of such goods.

We will briefly address the record evidence relevant to our findings as categorized by RC, which grouped its discussion of public understanding of the term ZERO in the argument section of its trial brief under the headings “Competitors Use ‘Zero’ Generically,” “Competitors Use ‘Zero’ Generically in Trademark Applications and Registrations,” “Consumers Use ‘Zero’ to Refer to a Category of Beverages,” and “TCCC Itself Uses ‘Zero’ Generically.”

1. Competitor Use of ZERO

We note at the outset that, because TCCC seeks registration under Section 2(f), it is an established fact that ZERO is not inherently distinctive in association with soft drinks, energy drinks, and sports drinks. *Cold War Museum Inc. v. Cold War Air Museum Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1629 (Fed. Cir. 2009); *Yamaha*, 6

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USPQ2d at 1005. Some of the uses by competitors on which RC relies is merely additional evidence that the word ZERO and numeral 0 are descriptive and, as TCCC argues, may be used to provide information about zero-calorie beverages. This includes use of the numeral 0 on “Nutritional Facts” panels and use of both the word ZERO and numeral 0 in “call-outs” on labeling or packaging to indicate that a product has zero calories. Evidence that the term conveys information about the goods to consumers does not render it generic. While such uses provide information about the products, they do not demonstrate use of ZERO to name a category of goods.

More persuasive is the use of ZERO in product names by competitors, including RC, which has sold its DIET RITE PURE ZERO since 2005.¹⁵ RC also submitted evidence of the existence of some 27 third-party zero-calorie soft drinks, sports drinks, and energy drinks with names that incorporate ZERO, as follows:

All Sport Zero, Diet Crisp Zero, Monster Energy Zero Ultra, Rox Zero, Pre Zero, Runa Zero, Beast Zero, Holistics Zero, Pomberry Zero, Sodastream Zero Cola, Big Red Zero, Propel Zero, Sqwincher Zero, Blue Sky Zero, Impulse Zero, Red Bull Total Zero, Victory Zero, Bubba Zero, Jones Whoopass Zero, Roaring Lion Zero, Virgil’s Zero, Caballa Negro Zero, Rob’s Really Good Zero, Vita Rain Zero, Clearly Zero, Monster Energy Absolutely Zero, Rockstar Pure Zero.¹⁶

Nonetheless, we do not find that the record evidence rises to a level sufficient to support a finding that ZERO is a generic name for types of beverages. *Cf. Sheetz*, 108

¹⁵ Springate Decl. ¶ 11, 139 TTABVUE 8.

¹⁶ See RC Brief at 26, 145 TTABVUE 28. We omit the following because they are not used for soft drinks, sports drinks, or energy drinks, including the “zero-calorie soft drinks” that RC asserts as the relevant genus: Arnold Palmer Zero, Icee Zero, and two margarita mixes, Margarita Zero and Zero Margarita Mix.

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USPQ2d at 1357 (stating that extensive use of the term FOOTLONG by competitors offering identical goods to denote a type of sandwich is evidence of genericness).

Although we will not specifically discuss the data because it was filed under seal, RC introduced sales data for the 52 weeks ending March 23, 2013, for products with ZERO in the name, including some of those listed *supra*.¹⁷ Other than RC's product, there appear to be no soft drinks with ZERO in the name except TCCC's that are listed as having sales. With the significant exceptions of MONSTER ABSOLUTELY ZERO energy drinks and PROPEL ZERO enhanced waters,¹⁸ for most third-party sports drinks and energy drinks with ZERO in the name listed in this data, both the total sales and percentage of stores selling the goods were very low.

Although record evidence shows that third parties do use the term ZERO in association with goods relevant to our inquiry, the overall use appears to be relatively minor in comparison to TCCC's, representing a small fraction of TCCC's use of the term for its goods. Crucially, moreover, there is nothing to link the third-party uses to evidence that the public "primarily uses or understands the term [ZERO] to refer to the genus of goods or services," that is, as the *name of a category* of sports,

¹⁷ Springate Decl. ¶ 35 & Exhibit RC 17, 134 TTABVUE 15, 30.

¹⁸ RC also submitted (under seal) evidence indicating a large volume of sales and advertising for PROPEL ZERO, zero-calorie "nutrient enhanced water beverages" and powder packets offered by PepsiCo. However, TCCC suggests, and evidence the parties designated confidential supports, that "enhanced water" is a different category from "sports drinks." See TCCC Brief at 43, 153 TTABVUE 45. RC argues that "TCCC itself offers a ZERO-named enhanced water product that competes directly with PROPEL ZERO, namely, VITAMINWATER ZERO," but registration of that mark is not before us. RC Reply Brief at 39 n.20, 157 TTABVUE 40.

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energy, or soft drinks. *Princeton Vanguard*, 114 USPQ2d at 1833. Therefore, we find that the third-party uses of record do not demonstrate that ZERO is generic.





2. Competitor Trademark Applications and Registrations

Third-party registrations may be used to show the sense in which a word is used in ordinary parlance and whether a particular term has descriptive significance as applied to certain goods or services. *Institute Nat'l Des Appellations D'Origine v. Vintners Int'l Co.*, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992) (“Such third party registrations show the sense in which the word is used in ordinary parlance and may show that a particular term has descriptive significance as applied to certain goods or services.”); *General Mills Inc. v. Health Valley Foods*, 24 USPQ2d 1270, 1277 (TTAB 1992).

RC submitted four live registrations for the goods at issue from which the term ZERO was disclaimed, alone or in combination with other disclaimed words. TCCC, in turn, submitted one live registration from which the term ZERO was disclaimed along with other words, and two with no disclaimers. Both parties submitted three additional live registrations incorporating ZERO.¹⁹ Relevant information from these 10 third-party registrations is summarized in the following chart:

¹⁹ Both parties also submitted evidence concerning trademark applications, as well as cancelled and expired registrations. None are probative evidence of the public's understanding of the significance of ZERO today, when we must determine the question of genericness. *See In re Thunderbird Prods. Corp.*, 406 F.2d 1389, 160 USPQ 730, 732 (C.C.P.A. 1969). As we have often said, applications are not evidence of anything except that they were filed. *See, e.g., Weider Publ'ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1360 (TTAB 2014); *Glamorene Prods. Corp. v. Earl Grissmer Co.*, 203 USPQ 1090, 1092 n.5 (TTAB 1979); TBMP § 704.03(b)(2) & n.3. Cancelled and expired registrations are not evidence of any presently existing rights in the mark shown, or that it was ever used. TBMP § 704.03(b)(1)(A) & n.24.

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Party	Mark	Goods (Partial)	Disclaimer	Cite
RC		Soft drinks carbonated, non-carbonated and cola	"Zero cal"	102 TTABVUE 144 (Exh. RC 221)
RC		Energy drinks	"Zero"	102 TTABVUE 237 (Exh. RC 243)
RC	WHOOPASS ZERO	Energy drinks	"Zero"	102 TTABVUE 264 (Exh. RC 249)
RC	IMPULSE ZERO	Beverages, namely energy drinks and sports drinks	"Zero"	102 TTABVUE 308 (Exh. RC 259)
TCCC	JCORE ZERO-LITE	Sports drinks; powders for use in the preparation of isotonic sports drinks and sports beverages	None	110 TTABVUE 496 (Exh. TCCC 290)
TCCC	FOUR POINT ZERO	Non-alcoholic beverages, namely, carbonated beverages; seltzer water	None	110 TTABVUE 498 (Exh. TCCC 291)
TCCC		Non-alcoholic beverages, namely, carbonated beverages; seltzer water	"seltzer lemon wedge unsweetened + zero calories clean + crisp + refreshing glass bottled 12 oz/355 ml"	110 TTABVUE 524 (Exh. TCCC 304)
Both	0 CALORIES 0 SUGAR 0 SODIUM 0 GUILT	Isotonic beverages; isotonic drinks; all the aforementioned goods contain no calories, sugar or sodium	"0 calories 0 sugar 0 sodium"	102 TTABVUE 204 (Exh. RC 236) 110 TTABVUE 494 (Ext. TCCC 289)
Both		Non-alcoholic beverages, namely carbonated beverages	"No-cal zero calorie soda-pop genuine brand"	102 TTABVUE 105 (Exh. RC 211) 110 TTABVUE 522 (Exh. TCCC 303)

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Party	Mark	Goods (Partial)	Disclaimer	Cite
Both	ZERO IS GOOD	Non-alcoholic flavored beverages, namely, flavored waters ²⁰	None	102 TTABVUE 273 (Exh. RC 251) 110 TTABVUE 508 (Exh. TCCC 296)

RC argues that the registrations “are relevant to show that many companies and individuals have sought to register and use the term or numeral zero in connection with beverage products, thus tending to show that zero (the term or numeral) is diluted, and/or generic, and/or highly descriptive or descriptive for such goods,”²¹ and that they show “common acceptance of ‘zero’ as an industry term.”²² TCCC argues that five of the six registrations listed above that it submitted show that the registration was issued without a disclaimer of ZERO²³ (although the word or numeral was disclaimed in two of the registrations as part of a phrase). With respect



to its Exhibit 303, for the mark , TCCC argues that the registration “was issued by the USPTO for beverages in International Class 32 with a disclaimer of the word ZERO because ZERO modifies a generic term in the mark,” that is, zero calorie.²⁴ TCCC also points out that RC initially applied to register its marks

²⁰ We include this registration because it was submitted by both parties, but we view its probative value to be very limited because it does not identify goods of the relevant genus, that is, soft drinks, energy drinks, or sports drinks.

²¹ Opposer’s Notice of Reliance on Official Records, ¶ 1, 102 TTABVUE 1-2; *see also id.* at ¶¶ 2-3, 102 TTABVUE 10-11, 14-15.

²² RC Brief at 27, 145 TTABVUE 29.

²³ TCCC’s Notice of Reliance on Printed Publications, Official Records and Discovery Request Responses at ¶ D, 110 TTABVUE 28-32.

²⁴ *Id.* at ¶ D(22), 110 TTABVUE 31-32.

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DIET RITE PURE ZERO and PURE ZERO without disclaiming ZERO, agreeing to disclaim the term on request by the Examining Attorney.²⁵

Disclaimers are not limited to generic matter, but also are required for terms that are descriptive. *See* Trademark Act Section 6(a) (“The Director may require the applicant to disclaim an unregistrable component of a mark otherwise registrable.”); *In re Louisiana Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1264 (Fed. Cir. 2015) (distinguishing generic terms from descriptive marks, which can acquire distinctiveness and become registrable on that basis); *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1796 & n.1 (Fed. Cir. 1987) (noting that third-party registrations with the term “sweats” disclaimed “are evidence, albeit not conclusive, of descriptiveness of the term”).

We find that the third-party registrations of record are as consistent with a conclusion that ZERO is descriptive, rather than generic, as applied to soft drinks, energy drinks, and sports drinks. Once again, TCCC has admitted that ZERO has descriptive significance by asserting its claims of acquired distinctiveness.

3. Consumer Use of ZERO

The public’s perception is the primary consideration in a determination of genericness. *Loglan Inst. Inc. v. Logical Language Group Inc.*, 962 F.2d 1038, 22 USPQ2d 1531, 1533 (Fed. Cir. 1992). As stated *supra*, the relevant consuming public in this case is ordinary consumers who purchase and consume soft drinks, energy drinks, or sports drinks, including such drinks with no or essentially no calories.

²⁵ TCCC Brief at 29, 153 TTABVue 31.

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As noted, RC submitted no direct evidence of public perception in the form of contemporary consumer surveys or testimony.²⁶ Rather, Opposer submitted the following 17 Internet printouts, spanning the years 2008 to 2013, “to demonstrate media and consumer use of the term zero to identify a category of beverage products, thus showing that zero is generic and/or highly descriptive or descriptive of such products.”²⁷

1. A tweet stating “is it just me or do diet/‘zero’ sodas taste a little better when they’re just a wee bit warm?” (RC 170, Nov. 30, 2009, <http://twitter.com/chrisocallahan>);
2. A printout identifying “Diet/Zero Sodas” as a type of “lower calorie beverages” (RC 171, Dec. 7, 2009, www.physiciansregional.net);
3. A message board excerpt stating “Thankfully, artificial sweeteners [sic] make me sick so I avoid them anyway! And don’t let those so called ‘zero’ sodas fool you either!” (RC 172, December 2008, www.bitstrips.com);
4. The question: “What kind of zero beverages are there to choose from besides coffee and diet sodas?” and a response on “Active Low-Carber Forums” (RC 173, March 16, 2008, <http://forum.lowcarber.org>);
5. A video “vlog” posted under the title “Reviewing ‘Zero’ sodas,” stating: “I’m reviewing ‘Zero’ (as in no carb, no sugar, no calories) sodas, Diet Rite Zero, Sprite Zero, and Coca Cola Cherry Zero.” (RC 174, Jan. 11, 2010, <http://tinfoilchef.com>);
6. A question on a carbonated drink message board regarding “diet sodas, or zero sodas” and a response referencing “diet/zero sodas” and “diet/zero carb soda” (RC 175, Aug. 4-5, 2008, www.bullshido.net);

²⁶ Consumer research TCCC conducted before launching its ZERO products in 2004 (submitted under seal) emphasizes the descriptive nature of the term, as discussed *infra*, but is not probative as to whether ZERO was generic at the time of trial. See Opposer’s Notice of Reliance on Stipulated Documents, Exhibits RC 95-96, 94 TTABVUE 121-55; Opposer’s Notice of Reliance on Deposition Testimony, Exhibit RC 127, Baker Discovery Tr. at 80:18-81:13, 99 TTABVUE 60-61; TCCC Brief at 23 n.8, 153 TTABVUE 25.

²⁷ Opposer’s Notice of Reliance on Printed Publications at ¶ 2 & Exhibits RC 170-86, 101 TTABVUE 8-11, 220-311. Where available, the date listed reflects when the material was posted online rather than the date it was printed.

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7. The question: “What is the difference between zero drinks and diet drinks?” with the answer: “Zero means Zero calories Diet means less calories” (RC 176, April 27, 2010, <http://wiki.answer.com>);
8. A post titled “Great Diet Drinks with Little to No Carbs” stating in part: “If you are a soda lover like myself, then you do have alternatives to regular calorie and carb filled soda. Pepsi and Coke products have come [sic] out with their Zero soda. It has zero carbs, zero sugar, and zero calories. Most of the Zero sodas, especially Sprite, taste just like the regular version.” (RC 177, June 16, 2009, www.associatedcontent.com);
9. A comment on Yahoo! Answers about sugar free drinks contrasting “Diet (‘zero’) sodas” with “‘Sugar’ sodas” (RC 178, Sept. 25, 2009, <http://answers.yahoo.com>);
10. An article about the beverage product PROPEL ZERO, which begins: “Propel is remaking itself as a Zero.” (RC 179, March 17, 2011, <http://adage.com>);
11. A message board with the topic “Zero Sodas?,” including three posts mentioning Coke Zero (RC 180, May 17-19, 2011, www.sparkpeople.com);
12. A story from the Dayton Daily News titled “Experts: Drinks have health consequences,” which states that “Soda comes in different forms, with titles including: ‘regular,’ ‘diet’ and ‘zero,’” but capitalizes “Zero” throughout the remainder of the article (RC 181, June 20, 2012, www.daytondailynews.com);
13. Five answers to the question “How come those ZERO sodas don’t have any calories?” with two referencing “zero sodas” (RC 182, 2010, <http://answers.yahoo.com>);
14. A body building forum with a message thread titled “How many diet/zero sodas in a day?” (RC 183, Sept. 1, 2011, <http://forum.bodybuilding.com>);
15. A “Trying To Conceive” message board with the topic “‘Zero’ Sodas,” in which the original post asks in part: “Are Zero sodas (Coke Zero, Sprite Zero, Big Red Zero, etc) still okay to drink?” (RC 184, May 12-14, 2013, www.whattoexpect.com);
16. A blog post on the side effects of soda that refers to “diet or ‘zero’ sodas,” which also mentions Coke, Diet Coke, and Coke Zero (RC 185, Jan. 23, 2012, livewholebefree.com/wordpress); and
17. A blog post on weight loss referencing the impact of “zero sodas” on nutrition (RC 186, Sept. 1, 2012, <http://zeudy.com>).

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RC's indirect evidence is competent, for the most part,²⁸ but insufficient. This handful of public references spread over five years does not establish that ordinary consumers primarily use or understand the term ZERO to refer to the genus of soft drinks, sports drinks, or energy drinks. This is particularly true in the context of the ubiquity of TCCC's ZERO products, which have had billions of dollars in sales since they first entered the market in 2004, as discussed *infra*.

4. TCCC's Use of ZERO

Finally, RC argues that TCCC itself uses the term ZERO and numeral "0" generically in nutrition labels, packaging call-outs, and product names. "Moreover, virtually every advertisement for TCCC's ZERO-named products reinforces that 'zero' in the product name refers not to the source of the product but to the zero-calorie nature of the product."²⁹

We find TCCC has presented ZERO as part of a mark in product names. *E.g.*:³⁰



²⁸ The contents suggest that consumers in at least references 5, 8, 11, and 15-16 are using "Zero" either in whole or in part to refer to the parties' products.

²⁹ RC Brief at 41, 145 TTABVue 43.

³⁰ Exhibit B to Feb. 28, 2007 Response to Office Action, Application Serial No. 78664176, resubmitted by notice of reliance as TCCC Exhibit 207, 110 TTABVue 152.

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The remainder of RC's argument pertains more to the descriptive nature of the term ZERO. Although such uses of ZERO and 0 by TCCC certainly convey information about the nature of its products – including primarily that they contain zero (or at least fewer than five) calories – they do not name the genus of those goods.

C. Conclusion as to Genericness

We have examined the record as a whole, including evidence that we have not specifically discussed, taking into account both the evidence that supports and detracts from a finding of genericness. *See Princeton Vanguard*, 114 USPQ2d at 1834; *see also West Fla. Seafood, Inc. v. Jet Rests., Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1663 (Fed. Cir. 1994) (encouraging Board to “look at the evidence as a whole, as if each piece of evidence were part of a puzzle” in assessing prior use). For all of the reasons discussed, we find that RC has not met its burden to establish by a preponderance of the evidence that ZERO is generic for soft drinks, sports drinks, or energy drinks, even such drinks that contain no, or fewer than five, calories.

VI. Secondary Meaning

We next consider TCCC's claim of acquired distinctiveness in the ZERO marks, which has been challenged before. In *Companhia de Bebidas das Américas – Ambev v. Coca Cola Co.*, Opposition No. 91178953 (parent), 2012 WL 1881492 (May 2, 2012) (non-precedential) (“*Ambev*”),³¹ the Board found the record evidence sufficient to

³¹ Citations are to the slip opinion. A decision of the Board not designated as a precedent is not binding on the Board, but may be cited for whatever persuasive weight to which it may be entitled. TBMP § 101.03. TCCC cites *Ambev* for its persuasive value, noting that the decision “addressed many of the same issues that the Board will need to resolve in these proceedings.” TCCC Reply Brief at 10 n.6, 161 TTABVUE 12. We agree with the parties that the decision in *Ambev*, which involved a different opposer, is not binding or preclusive here.

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support registration on the Principal Register under Section 2(f) of the same 17 applications RC now opposes. Genericness was not an issue in that consolidated proceeding, filed by another competitor of TCCC's in the soft drink field and dismissed with prejudice after trial.

Ambev was decided in May 2012, nearly four years before this case came before us for decision. TCCC's subject applications were filed from 2003 to 2008 and, following submission of evidence in support of TCCC's Section 2(f) claims, approved for publication between 2007 and 2009. The question of whether the ZERO marks have acquired distinctiveness, however, is determined on the basis of the facts existing as of the time registrability is being considered by the Board. Accordingly, we will take into account facts arising up to the closing of the testimony periods. So as to be clear, the Board can and must consider all evidence of use, promotion, consumer reaction and the like properly presented up to the close of the opposition's trial phase. *General Foods Corp. v. MGD Partners*, 224 USPQ 479, 486 (TTAB 1984); *see also McCormick & Co. v. Summers*, 354 F.2d 668, 148 USPQ 272, 276 (CCPA 1966) (stating that "registrability of a mark must be determined on the basis of facts as they exist at the time when the issue of registrability is under consideration"); *Harsco Corp. v. Elec. Scis., Inc.*, 9 USPQ2d 1570, 1571 (TTAB 1988).

"To show that a mark has acquired distinctiveness, an applicant must demonstrate that the relevant public understands the primary significance of the mark as identifying the source of a product or service rather than the product or service itself." *In re Steelbuilding.com*, 75 USPQ2d at 1422. Passage of time alone may be insufficient to establish secondary meaning. *See, e.g., In re Packaging*

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Specialists, Inc., 221 USPQ 917, 920 (TTAB 1984) (deeming use of mark for sixteen years “a substantial period but not necessarily conclusive or persuasive on the Section 2(f) showing”). Trademark Rule 2.41(a)(3), 37 C.F.R. § 2.41(a)(3), states that an applicant may submit, in support of registration under Section 2(f), “appropriate evidence showing duration, extent, and nature of the use in commerce and advertising expenditures in connection therewith . . . and verified statements, letters or statements from the trade or public, or both, or other appropriate evidence of distinctiveness.”

A variety of record evidence is directed toward the question of secondary meaning. First, in the application file for the mark COKE ZERO, TCCC identified sales in the two years preceding its 2007 claim of acquired distinctiveness as exceeding \$1 billion for its ZERO products, or the equivalent of more than 50 million 288-fluid ounce cases, with more than one-third of total sales attributable to COKE ZERO alone.³²

With respect to advertising, by 2007,

Applicant states that it has spent in excess of one hundred fifty million dollars (\$150,000,000.00) advertising and promoting its ZERO family of beverage products, which includes COKE ZERO, SPRITE ZERO, FANTA ZERO, VAULT ZERO and PIBB ZERO, through a myriad of advertising and promotional channels. Applicant has spent over one hundred million dollars (\$100,000,000.00) advertising and promoting COKE ZERO alone.³³

³² Feb. 28, 2007 Response to Office Action, Application Serial No. 78664176, resubmitted by notice of reliance as TCCC Exhibit 207, 110 TTABVUE 58-59.

³³ *Id.*, 110 TTABVUE 58.

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Although filed under seal in this case, TCCC submitted evidence that its sales and advertising totals through the end of 2011 were multiples of the preceding figures.³⁴ These very high dollar amounts, in conjunction with TCCC's other evidence, strongly support a showing of secondary meaning.

Next, TCCC introduced evidence of unsolicited media coverage, both in its application files and in the trial record. This includes, for example, an April 17, 2007 story in THE WALL STREET JOURNAL titled *Zero Is Coke's New Hero*, stating in part that "the company is scoring a surprise hit with Coca-Cola Zero."³⁵

Finally, TCCC submitted the testimony deposition of Dr. Alex Simonson, who conducted a survey of secondary meaning in the term ZERO for soft drinks in 2008, with exhibits pertaining to the study. In the survey, Dr. Simonson found that 61% of respondents associated the term ZERO with one company, as opposed to 6% for the term DIET, yielding a net secondary meaning level of 55%; a second type of analysis of the data yielded net secondary meaning of 57%.³⁶ Moreover, a majority of all 251 respondents – 131, or 52% – mentioned either COKE (or variants thereof) or SPRITE when asked with what company's products they associated the term ZERO.³⁷

³⁴ In the *Ambev* decision, we cited non-confidential testimony that "sales of the ZERO line of beverages, including COCA-COLA ZERO, SPRITE ZERO, PIBB ZERO, FANTA ZERO, and other ZERO beverages have increased in the ensuing years to over four billion dollars, with over eight hundred and sixty million cases of COCA-COLA ZERO being sold," *id.* at 17, and that "TCCC's advertising expenditures for its entire line of ZERO [] beverages had risen to five hundred and thirty seven million dollars by mid-2010." *Id.* at 18.

³⁵ TCCC Notice of Reliance, Exhibit 271, 110 TTABVUE 405-09.

³⁶ Simonson Tr. at 27:7-28:6, 167 TTABVUE 31-32.

³⁷ TCCC Exhibit 131 ("A Test of Relevant Consumers to Determine the Level of Secondary Meaning of the Term 'Zero' as Part of a Name with Respect to Soft Drinks") at 10, 167 TTABVUE 215.

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Although RC criticizes the survey, we remain of the view we held when the same survey was submitted in the *Ambev* case: that it “validates the significant sales and advertising numbers” discussed *supra. Id.* at 20. See *In re Hehr Mfg. Co.*, 279 F.2d 526, 126 USPQ 381, 382 (CCPA 1960) (finding survey “adequate to show that a majority of those interviewed” associated mark with applicant’s products); 6 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 32.190 (4th ed. 2016) (“MCCARTHY”) (“Generally, figures over 50% are regarded as clearly sufficient.”) (footnote omitted). We note, however, that the survey was conducted approximately five years before the close of testimony in early 2014, somewhat diminishing its weight in assessing contemporary public perception. That is not to say it is without probative value in the present proceeding.

RC argues that TCCC cannot establish secondary meaning because its use of ZERO has not been substantially exclusive. The substantially exclusive standard, however, 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, 52 USPQ2d 1307, 1309 (Fed. Cir. 1999).

Other than RC’s own name DIET RITE PURE ZERO, the record evidence concerning third-party use of ZERO in a mark for soft drinks is inconsequential, particularly when compared with the magnitude of TCCC’s use. Sales and advertising for RC’s DIET RITE PURE ZERO have been substantial since the product was renamed in the summer of 2005, totaling over \$327 million in net revenue from 2007 through 2012, equal to an estimated 1.8 billion cans sold in nearly 25,000 retail

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outlets throughout the United States.³⁸ RC spent more than \$5 million advertising its product over the same five-year period.³⁹ Except for one newspaper story, however, there is no record evidence of the public's understanding of the significance of the mark DIET RITE PURE ZERO, or that ZERO in that mark primarily identifies the source of a product.⁴⁰ None of the respondents in the 2008 Simonson survey who associated ZERO with only one company also identified DIET RITE PURE ZERO.⁴¹ See 2 MCCARTHY § 15:27 (“The quantity and quality of third party use is not alone determinative and must be weighed along with other evidence.”). We find that the cumulative effect of TCCC's use of ZERO in connection with its line of soft drinks is so extensive that it qualifies as “substantially exclusive” as required under Section 2(f), and that the use of ZERO by others is not so extensive as to rise to a level that invalidates TCCC's claim of substantially exclusive use.

Considering the record evidence as a whole, we find that TCCC has established by a preponderance of the evidence that it has acquired distinctiveness in the descriptive term ZERO when used as part of a mark for soft drinks and, thereby, for syrups, concentrates, and powders for making soft drinks.

In their secondary meaning arguments, the parties seem to agree that we should decide whether ZERO has acquired distinctiveness for beverages or zero-calorie

³⁸ RC Brief at 14-15, 145 TTABVUE 16-17.

³⁹ *Id.* at 15, 145 TTABVUE 17.

⁴⁰ JEAN SHANLEY, *Organizers do their best to cater to stars' whims*, THE MEADVILLE (PA) TRIBUNE, Aug. 16, 2008, Opposer's Notice of Reliance on Printed Publications, Exhibit RC 190, 101 TTABVUE 362-66 (referencing a rock band's request for “Diet Rite Zero Cola”).

⁴¹ Simonson Tr. at 140:13-141:7, 167 TTABVUE 144-45.

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beverages. Yet virtually all the record evidence of secondary meaning, including the Simonson survey, addresses only soft drinks. This includes the Section 2(f) evidence submitted with TCCC's five subject applications that cover other types of beverages, namely, sports drinks and energy drinks. In the context of the record as a whole, evidence filed under seal shows sales and marketing expenditures for POWERADE ZERO sufficient to satisfy TCCC's burden with respect to sports drinks. We find, however, that TCCC has not met its burden to establish by a preponderance of the evidence that it has acquired distinctiveness in the term ZERO for energy drinks.

For these reasons, RC's opposition is SUSTAINED as to registration of application Serial No. 77413618 (FULL THROTTLE ZERO for "non-alcoholic beverages, namely, energy drinks") without disclaimer of the term ZERO. For applications Serial Nos. 76674382 (COKE ZERO ENERGY), 76674383 (COKE ZERO BOLD), and 78698990 (VAULT ZERO), the Section 2(f) claim is restricted to "non-alcoholic beverages, namely, soft drinks; syrups and concentrates for making soft drinks." RC's oppositions are SUSTAINED as to registration of these three applications without disclaimer of the term ZERO as to the remaining goods: "non-alcoholic beverages, namely, energy drinks" and "syrups and concentrates for making energy drinks." TCCC is allowed two months from the date of this decision in which to file a motion to amend these four applications to conform to the findings of the Board by stating that no claim is made to the exclusive right to use ZERO apart from the marks as shown for the applications and goods "non-alcoholic beverages, namely, energy drinks" and "syrups and concentrates for making energy drinks." See Trademark Manual of Examining Procedure (TMEP) § 1212.02(j) (April 2016). Failing that, the

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opposition will be sustained as to applications Serial Nos. 77413618, 76674382, 76674383, and 78698990. *See* Trademark Rule 2.133(b), 37 C.F.R. § 2.133(b).

RC's oppositions are DISMISSED WITH PREJUDICE as to applications Serial Nos. 78316078, 78580598, 78620677, 78664176, 77097644, 77175066, 77175127, 77176099, 77176108, 77176127, 77176279, 77257653, and 77309752.

VII. Priority

We turn now to TCCC's opposition to RC's applications to register DIET RITE PURE ZERO and PURE ZERO⁴² on the grounds of priority and likelihood of confusion pursuant to Trademark Act Section 2(d).⁴³

The parties disagree as to the relevant priority dates. RC argues that it can rely for priority on the dates it filed its applications pursuant to Section 1(b) of the Trademark Act. TCCC contends that: "In a proceeding such as this, involving use by both parties of descriptive terms, priority is not determined based on constructive use as of the filing date of a party's intent to use application. Priority in such a case is determined instead by the priority as to secondary meaning."⁴⁴

⁴² Applications Serial Nos. 78576257 and 78581917 were filed by Royal Crown Company, Inc. Their assignment to Dr Pepper/Seven Up, Inc. ("Dr Pepper") was recorded with the USPTO Assignment Recordation Branch on April 30, 2010, at Reel/Frame 4196/0881. Dr Pepper was joined as a party in each of these consolidated proceedings by Board order of March 15, 2013, 84 TTABVUE.

⁴³ TCCC also pled a false suggestion of a connection claim under Section 2(a) of the Trademark Act, but noted that it is relying at trial only on its Section 2(d) claim. TCCC Brief at 45 n.18, 153 TTABVUE 47. TCCC therefore waived the Section 2(a) claim. *United Global Media Group, Inc. v. Tseng*, 112 USPQ2d 1039, 1040 n.2 (TTAB 2014).

⁴⁴ TCCC Reply Brief at 8, 161 TTABVUE 10.

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The flaw in TCCC's position is that it must prove a likelihood of confusion between its ZERO family of marks and RC's marks considered in their entirety. Although RC has disclaimed ZERO from each of its applied-for marks, we find that RC's marks DIET RITE PURE ZERO and PURE ZERO are not descriptive in their entirety. Rather, as a whole, the marks are inherently distinctive. *Cf. Larami Corp. v. Talk To Me Programs Inc.*, 36 USPQ2d 1840, 1846 n.9 (TTAB 1995) ("The Board has held that, where ***neither party's mark*** in an Opposition proceeding is inherently distinctive, priority lies with the party whose mark is the first to become distinctive through use in commerce.") (emphasis added) (citing *Perma Ceram Enters. Inc. v. Preco Indus. Ltd.*, 23 USPQ2d 1134 (TTAB 1992)); *Bass Pro Trademarks LLC v. Sportsman's Warehouse Inc.*, 89 USPQ2d 1844, 1851-52 (TTAB 2008) (finding mark SPORTSMAN'S WAREHOUSE, used by both parties in plain or design form, to be merely descriptive, and stating: "Accordingly, with respect to petitioner's pleaded common law use of the mark SPORTSMAN'S WAREHOUSE, the issue of priority is based on the priority of the acquisition of acquired distinctiveness."). RC therefore need not prove priority of secondary meaning in its marks to defeat TCCC's claims, but is entitled to the benefit of its application filing dates: February 28, 2005 for DIET RITE PURE ZERO, and March 7, 2005 for PURE ZERO.

TCCC neither pled nor argued that RC's marks are likely to cause confusion with any of its individual marks, instead focusing on the "Zero Marks" collectively identified in its 17 applications, i.e., its asserted ZERO family. *See, e.g.*, TCCC's Brief at 48: "In view of TCCC's established family of ZERO marks, consumers are likely to believe that RC's ZERO Marks, since they also contain the common ZERO

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characteristic, are part of TCCC's family of ZERO marks."⁴⁵ To establish ownership and priority in a family of ZERO marks in this opposition proceeding, TCCC must show by competent evidence:

“first, that prior to the entry into the field of the opponent's mark, the marks containing the claimed 'family' feature or at least a substantial number of them, were used and promoted together by the proponent in such a manner as to create public recognition coupled with an association of common origin predicated on the 'family' feature”

Marion Labs. Inc. v. Biochemical/Diagnostics Inc., 6 USPQ2d 1215, 1218 (TTAB 1988) (quoting *Land-O-Nod Co. v. Paulison*, 220 USPQ 61, 65-66 (TTAB 1983)).

A family of marks “only arises if the purchasing public recognizes that the common characteristic is indicative of a common origin of the goods.” *Han Beauty Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 USPQ2d 1557, 1559 (Fed. Cir. 2001) (quotation omitted). Consistent with our discussion *supra*, establishing a family of marks – a doctrine available only to a plaintiff, *Baroid Drilling Fluids Inc. v. Sun Drilling Prods.*, 24 USPQ2d 1048 (TTAB 1992) – has been compared to acquiring secondary meaning. *See, e.g.*, 3A LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES § 21:47 (4th ed. 2015) (“In effect, to establish the existence of a family relationship the trademark proprietor must meet something like a secondary meaning standard.”). As we stated in *Aloe Creme Labs., Inc. v. Aloe 99, Inc.*, 188 USPQ 316, 325 (TTAB 1975):

It is established that in order to achieve or establish a “family of marks”, it must be demonstrated through competent evidence that the various marks asserted to comprise said “family” or, at least, at [sic] goodly number of them, have become familiar or known to a particular segment of the purchasing public as a result of sales or constant exposure through

⁴⁵ 153 TTABVUE 50.

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advertising and promotion in a manner which creates an association of common ownership and recognition by the inclusion in each mark of the asserted “family” characteristic. See: *Witco Chemical Company, Inc. v. Smith*, 153 USPQ 412 (TT&A Bd., 1967), *affirmed*, 164 USPQ 43 (CCPA, 1969). The doctrine of a “family of trademarks”, as recognized by the court in *American Aloe Corporation v. Aloe Creme Laboratories, Inc.*, *supra*, is bottomed on a theory basically similar to the concept of “secondary meaning” to the extent that the proponent thereof must show that it has achieved recognition or secondary meaning in the “family” characteristic sufficient to preclude others from using or registering the term as a portion of a trademark for like or similar goods.

See also 4 MCCARTHY § 23:61 (“Even if the family ‘surname’ is descriptive, it may become the basis of a family of marks if secondary meaning is proven.”) (footnote omitted).

The only mark in its asserted ZERO family that TCCC used before RC’s filing dates was SPRITE ZERO, beginning in September 2004, six months before RC’s priority dates.⁴⁶ By using only a single ZERO mark before RC’s priority dates, TCCC has not established a family of marks indicating a single source of ZERO-formative soft drinks in the minds of the consuming public.

TCCC has failed to establish priority in its asserted family of ZERO marks, an indispensable element of a likelihood of confusion claim. *E.g., Life Zone Inc. v. Middleman Group Inc.*, 87 USPQ2d 1953, 1960 (TTAB 2008). We need not reach the merits of the likelihood of confusion issue because without proof of priority, TCCC cannot prevail.

The claims under Trademark Act Section 2(d) are dismissed.

⁴⁶ The product introduced in September 2004 actually was called DIET SPRITE ZERO. TCCC did not change to name to SPRITE ZERO until 2006. *See Baker Tr.* at 61:17-62:4, 168 TTABVUE 65-66.

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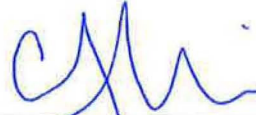
Decision: RC's opposition is SUSTAINED as to registration of application Serial No. 77413618 (FULL THROTTLE ZERO for "non-alcoholic beverages, namely, energy drinks") without disclaimer of the term ZERO. For applications Serial Nos. 76674382 (COKE ZERO ENERGY), 76674383 (COKE ZERO BOLD), and 78698990 (VAULT ZERO), the 2(f) claim is restricted to "non-alcoholic beverages, namely, soft drinks; syrups and concentrates for making soft drinks." RC's oppositions are SUSTAINED as to registration of these three applications without disclaimer of the term ZERO as to the remaining goods: "non-alcoholic beverages, namely, energy drinks" and "syrups and concentrates for making energy drinks."

TCCC is allowed two months from the date of this decision in which to file a motion to amend these four applications to conform to the findings of the Board, failing which judgment will be entered against it as to applications Serial Nos. 77413618, 76674382, 76674383, and 78698990. *See* Trademark Rule 2.133(b), 37 C.F.R. § 2.133(b).

All other claims asserted by the parties are DISMISSED WITH PREJUDICE.

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2016, a copy of the foregoing **OPPOSERS' NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT** was sent by first-class mail postage pre-paid to Applicant's Attorney: Bruce W. Baber, Esq., King & Spalding LLP, 1185 Avenue of the Americas, New York, New York 10036-4003.



Emily Weiss