

This Opinion is not a
Precedent of the TTAB

Hearing: September 21, 2023

Mailed: June 4, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

Kinetic Lighting, Inc.

v.

Christopher Bauder
—

Opposition No. 91245640
—

R. Joseph Trojan of Trojan Law Offices, for Kinetic Lighting, Inc.

Susan M. Natland, Brian C. Horne and Daniel C. Kiang of Knobbe, Martens, Olson & Bear, LLP, for Christopher Bauder.
—

Before Zervas, Dunn and English,
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

I. Introduction

Christopher Bauder (“Applicant”) seeks to register the mark



KINETIC
LIGHTS

(with KINETIC LIGHTS disclaimed) on the Principal

Register for the following goods and services:

Rope winches; machines for assembling, holding and fastening lighting devices, apparatus and installations in the fields of lighting, light installations, interactive installations, light shows, kinetic lighting, and multimedia light shows in International Class 7;

Apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electric current; electric and electronic installations consisting of apparatus for reproducing, recording, processing and transmitting sound and images, and for regulating and controlling the aforesaid installations for the fields of lighting, light installations, kinetic lighting, interactive installations, light shows and multimedia light shows; computer hardware; computer software for operation of lighting, motor control and event and house automation systems, and accessories, namely, electrical cabling, electronic cables, plug-in connectors, holders for light source control apparatus, in the fields of lighting, light installations, kinetic lighting, interactive installations; optical lanterns; spark gap tubes in the nature of electrical surge arresters; flashlights for use in photography; light regulators, namely, electric light dimmers; flashing safety lights; luminous signs; light conducting wires; optical mirrors; electric apparatus, namely, commutators; electronic circuits; electricity distribution consoles; light emitting diodes (LEDs) and laser diodes; optical cables; lamp modules for monitoring electric current and electric signals in International Class 9;

Lighting apparatus, namely, lighting installations; lighting apparatus, namely, lighting installation[s] for kinetic lighting; lighting apparatus, namely, lighting installations incorporating light emitting diodes (LEDs) fixtures; electric light bulbs; lighting installations and lighting equipment in the nature of LED lights, organic LEDs (OLEDs), tungsten lights, moving lights, pixelbars, and lasers; kinetic lighting installations and equipment in the nature of LED lights, OLEDs, tungsten lights, moving lights, pixelbars, and lasers; lighting apparatus, namely, lighting installations for events; electric lamps and lighting fixtures; lamps; ultraviolet lamps not for medical purposes; lanterns for lighting; lamp chimneys; lamp reflectors; light diffusers; all the aforesaid goods incorporating LED

lighting fixtures; lamp shades; holders specially adapted for lampshades; structural parts for all the aforesaid goods in International Class 11;

Installation of lighting devices, apparatus and installations in the fields of lighting, kinetic lighting, interactive lighting installations, light shows and multimedia light shows; upgrading of computer hardware and computer hardware accessories in the nature of electrical cabling, electronic cables, plug-in connectors and holders for light sources used in the fields of lighting, kinetic lighting, light installations, interactive installations, light shows and multimedia light shows in International Class 37;

Arranging and conducting of cultural events, live theatrical events, live performances and entertainment exhibitions in the fields of lighting design incorporating lamps and lights, lighting spectacles, light installations, kinetic lighting, interactive installations, light shows and multimedia light shows; rental of lighting installations and devices, lighting apparatus and installations in the fields of light and multimedia shows for entertainment purposes in the nature of movie sets, television and film studios and theatrical sets in International Class 41;

Design and development of computer hardware and software, and accessories in the nature of electrical cabling, electronic cables, plug-in connectors and holders for light sources and updating of computer software in the fields of lighting, light installations, kinetic lighting, interactive installations, light shows and multimedia shows; design of lighting installations, interactive lighting installations, lighting for shows and multimedia shows in International Class 42; and

Rental of lighting installations and devices, apparatus and installations in the fields of lighting, kinetic lighting, light installations for decorating private residences, public buildings, public parks, hotels, corporate buildings and public events in International Class 43.¹

¹ Application Serial No. 79217378, filed on September 28, 2017 under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f, based on a request for extension of protection of International Registration No. 1367332, registered on April 12, 2017 with a claim of priority

Kinetic Lighting, Inc. (“Opposer”) claims ownership of application Serial No. 87224128 filed on November 2, 2016 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), for the alleged mark KINETIC LIGHTING for:

Rental of lighting systems, namely, rental of stage lights, cameras, laser lights and multimedia projectors for theatrical events in International Class 41;

Special effects design for others, namely, designing lighting and camera projection systems for lights [sic] shows and exhibitions and displays featuring lighting and light movement in International Class 42; and

Rental of lighting systems, namely, rental of stage lights, cameras, laser lights and multimedia projectors for public events in International Class 43;

(collectively, “Opposer’s Application Services”); and that that it “has been continuously using the KINETIC LIGHTING mark at least as early as March 2002 and has been continuously using in commerce the KINETIC LIGHTING [mark] at least as early as November 2002”; and that Applicant’s use of its mark is likely to cause confusion with Opposer’s alleged mark for Opposer’s services.² See Trademark Act Section 2(d), 15 U.S.C. § 1052(d).³

of October 21, 2016. The mark is described in the application as consisting “of a geometric figure to the left of the words ‘KINETIC LIGHTS’ in stylized lettering.”

² Notice of Opposition at ¶¶ 3, 4, 13, 15 and 16, 1 TTABVUE 5, 9 and 10. Citations in the case docket refer to TTABVUE, the Board’s online docketing system. See *New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, *2 n.1 (TTAB 2020).

Opposer submitted a copy of the prosecution history of its application with its Notice of Opposition. With two exceptions, neither which apply here, exhibits attached to a pleading are not evidence on behalf of the party to whose pleading they are attached. See Trademark Rule 2.122(c), 35 C.F.R. § 2.122(c). They must be properly identified and introduced in evidence during the time for taking testimony. *Id.*; see also TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 317 (2023) and cases cited therein.

³ Opposer states that “[t]o the extent Opposer’s use of KINETIC LIGHTING is considered the use of a trade name, Opposer submits that it need not prove KINETIC LIGHTING acquired

Opposer submitted its application file during its testimony period. That evidence reflects that Opposer's asserts March 18, 2002 as Opposer's date of first use and November 26, 2002 as its date of first use in commerce for all three classes; disclaimed the word "LIGHTING"; and amended its application to seek registration under Section 2d of the Trademark Act, 15 U.S.C. § 1052(d).⁴

Applicant denied the salient allegations of the Notice of Opposition in its Answer, and otherwise made admissions that we discuss in our decision to the extent pertinent.⁵ Applicant raised several affirmative defenses, including that Opposer's mark is generic, fails to function as a mark, is merely descriptive and has not acquired distinctiveness because, in part, its use is not substantially exclusive.

Opposer identifies the following issues for decision:

- 1) whether Opposer has standing in this opposition;
- 2) whether Opposer owns valid prior trademark rights in the KINETIC LIGHTING mark; and
- 3) whether the application for the KINETIC LIGHTS mark must be denied because Applicant's use of that mark in

secondary meaning ... to establish priority." (Opposer's brief, 99 TTABVUE 16). Because Opposer did not plead prior trade name use and Applicant has objected to our consideration of this argument (Applicant's brief, 103 TTABVUE 44-45), we do not further consider Opposer's argument that it has prior trade name use. *See Hole In 1 Drinks, Inc. v. Lajtay*, 2020 USPQ2d 10020, *6 (TTAB 2020) (explaining that an unpleaded claim may be considered only if tried by express or implied consent).

⁴ 21 TTABVUE 64-126, 372.

The Board has updated the application record to reflect Opposer's August 16, 2017 claim of acquired distinctiveness, which the Examining Attorney accepted on August 23, 2018. 21 TTABVUE 264.

⁵ 4 TTABVUE.

connection with competing goods and services would likely cause confusion with Opposer's Mark.⁶

Applicant identifies the following issues for decision:

- 1) Whether Opposer's purported KINETIC LIGHTING mark is generic of **Applicant's** goods and services, such that Opposer cannot prevent Applicant from using the generic name of his goods and services as part of his composite mark;
- 2) Whether KINETIC LIGHTING is highly descriptive of **Opposer's** services without having acquired distinctiveness; [and]
- 3) If Opposer has trademark rights in KINETIC LIGHTING, whether there is a likelihood of confusion between Opposer's purported rights in KINETIC LIGHTING and Applicant's Mark. (emphasis added).⁷

Applicant provides the following explanation as to why it framed the first issue as it did:

[If Opposer had protectable rights], those rights cannot prevent Applicant from using or registering a term that is the generic term for Applicant's goods and services as part of a composite mark. *See, e.g., Genesee Brewing Co., Inc. v. Stroh Brewing Co.*, 124 F.3d 137, 140, 43 U.S.P.Q.2d 1734 (2d Cir. 1997).

In *Genesee Brewing*, the plaintiff claimed common-law rights in the name "Honey Brown" based on its sales of a lager beer under that name. 124 F.3d at 140-41. The plaintiff sought to stop the defendant from using the phrase "Honey Brown Ale" for the defendant's ale beer. *Id.* at 141. The Second Circuit explained that because brown lagers were not a recognized category of beer, the plaintiff may be able to establish trademark rights in "Honey Brown." *Id.* at 146-48. But the court did find that brown ales are a recognized category of beer, and that the defendant's beer fit within that category. *Id.* at 148-49. The

⁶ Opposer's brief, 99 TTABVUE 9.

⁷ Applicant's brief, 103 TTABVUE 12.

court further found that the defendant's beer fit within a new category—brown ales brewed with honey. *Id.* Thus, the court held that “Honey Brown” was generic for the defendant's goods, and the plaintiff could not prevent the defendant from using the term “Honey Brown Ale.” *Id.*

Although *Genesee Brewing* was an action for trademark infringement, the same analysis should apply here. Opposer seeks to block Applicant from registering a composite mark including the generic term KINETIC LIGHTS based on an alleged likelihood of confusion with Opposer's alleged prior rights in the unregistered term KINETIC LIGHTING. Thus, Opposer, essentially seeks to prevent Applicant from using the generic name of his own goods and services as part of a composite mark.⁸

Applicant did not raise the principle discussed in *Genesee Brewing* as an affirmative defense, and *Genesee Brewing*, a Second Circuit infringement case, is not binding on the Board. If properly pleaded, we would not reach the defense because, as discussed later in this opinion, Opposer has not established prior common law rights. Thus, we do not give further consideration to Applicant's reliance on *Genesee Brewing*.

II. The Record

In addition to the pleadings and Applicant's opposed application, which is automatically of record pursuant to Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b),⁹ the evidence of record consists of the following:

Opposer submitted:¹⁰

⁸ Applicant's brief, 103 TTABVUE 17-18.

⁹ For this reason, Applicant did not need to submit with its First Notice of Reliance (58 TTABVUE 4-197) 193 pages from its application.

¹⁰ The Board struck portions of Opposer's testimony and documentary evidence in its February 26, 2021, September 6, 2021 and December 31, 2022 orders. (38, 45 and 95

- (1) the Declaration of David Rosen, President and one of Opposer's owners, and exhibits thereto ("Rosen Decl.," public version at 21-25 TTABVUE, confidential version at 28 TTABVUE);
- (2) the Declaration of Jeff Flowers, Director of special lighting for third party Rose Brand and exhibits thereto ("Flowers Decl.," 18 TTABVUE);
- (3) the Declaration of Jeff Ravitz, lighting designer and owner of third-party Intensity Advisors, LLC, and exhibits thereto ("Ravitz Decl.," 18 TTABVUE);
- (4) Opposer's Second Amended First Notice of Reliance and exhibits thereto (public version at 91 TTABVUE, confidential version at 92 TTABVUE);
- (5) the cross-examination deposition transcript of Applicant Christopher Bauder ("Bauder Cross Depo.") (81 TTABVUE 5);
- (6) the cross-examination deposition transcript of Michael Brown, Production Designer and Creative Director for third-party Michael Brown Design ("Brown Cross Depo.") (81 TTABVUE 147); and
- (7) the Rebuttal Declaration of David Rosen ("Rosen Reb. Decl.") and exhibits thereto (83 TTABVUE).

Applicant submitted:

- (1) the Declaration of Christopher Bauder and exhibits thereto (public version at 48 TTABVUE 2, confidential version at 55 TTABVUE) ("Bauder Decl.," 48-55 TTABVUE);
- (2) the Declaration of Louise Stickland, freelance journalist and photographer based in Oxford, United Kingdom, and exhibits thereto ("Stickland Decl.," 46 TTABVUE);
- (3) the Declaration of Michael Brown, and exhibits thereto ("Brown Decl.," 47 TTABVUE);

TTABVUE) and, though listed as part of the record, we have not relied on stricken evidence as a basis for our determination.

(4) Applicant's First Notice of Reliance and exhibits thereto (58-64 TTABVUE);

(5) Applicant's Second Notice of Reliance and exhibits thereto (56-57 TTABVUE);

(6) the cross-examination deposition transcript of Jeff Flowers ("Flowers Cross Depo.") and exhibits thereto (65 TTABVUE);

(7) the cross-examination deposition transcript of Jeff Ravitz ("Ravitz Cross Depo.") and exhibits thereto (66 TTABVUE);

(8) the cross-examination deposition transcript of David Rosen and exhibits thereto (67-69 TTABVUE, entire deposition transcript designated confidential) ("Rosen Cross Depo."), including the Rosen March 10, 2020 discovery deposition (Exh. 21 to Rosen Cross Depo. (69 TTABVUE 282-623, entire deposition designated confidential); and

(9) the rebuttal cross-examination deposition transcript of David Rosen and exhibits thereto (96 TTABVUE) ("Rosen Reb. Cross").

III. Applicant's Evidentiary Objections¹¹

1. Opposer submitted 20 declarations to support its claim of acquired distinctiveness.¹² These are the same declarations Opposer submitted in support its claim of acquired distinctiveness in its application. Applicant objects to most of these declarations (Rosen Decl. Exhs. 3.1, 6.1, 6.2, 6.4, and 6.6-6.19)¹³ as containing hearsay, citing Fed. R. Evid. 801, Trademark Rule 2.122(b)(2), 37 C.F.R. § 2.122(b)(2) ("Statements made in an affidavit or declaration in the file of an application for

¹¹ 105 TTABVUE.

¹² Rosen Decl. ¶¶ 9, 27, 21 TTABVUE 7, 12.

¹³ 21 TTABVUE 7, 12, 306-62.

registration, or in the file of a registration, are not testimony on behalf of the applicant or registrant. Establishing the truth of these or any other matters asserted in the files of these applications and registrations shall be governed by the Federal Rules of Evidence”) and TBMP § 704.03(a) (“Although part of the record of the proceeding, such statements constitute hearsay”).¹⁴ Applicant’s objection is sustained, and we do not consider the statements made in the declarations for the truth of any matter asserted therein. The declarations, however, have not been stricken from the evidentiary record. A party may introduce the file history of an application file, including all materials submitted in the prosecution, as an official record under a notice of reliance. *See* Trademark Rule 2.122(e), 37 C.F.R. 2.122(e); *Weider Publ’n, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1350 (TTAB 2014) (plain copies of third-party applications from USPTO’s electronic databases admissible as official records), *appeal dismissed per stipulation*, No. 14-1461 (Fed. Cir. Oct. 10, 2014). TBMP § 704.03(b)(2).

2. Applicant objects to Paragraph 12 of the Flowers testimony declaration (18 TTABVUE 12) and Paragraph 22 of the Ravitz testimony declaration (18 TTABVUE 22) as hearsay because they refer to statements made by others.¹⁵ Applicant’s objection to these paragraphs is sustained and we have not considered them for the truth of any matter asserted therein.

¹⁴ 105 TTABVUE 2-5.

¹⁵ *Id.* at 5.

3. Applicant objects to Opposer's Exhibits 167 and 168 (27 TTABVUE 267-72) on the ground that they are in a foreign language and an English language translation has not been provided.¹⁶ Because Applicant has also provided materials in a foreign language, *e.g.*, 51 TTABVUE 39, we do not strike the foreign language materials. We have not given them any weight, however, because neither party provided translations.

4. Applicant objects to an email from Opposer's employee, Laura Green, to Mr. Rosen in which Ms. Green discusses a phone call from an unknown individual. See Opposer's Exhibit 172 (24 TTABVUE 267-72).¹⁷ We need not rely on this evidence or rule on this objection in deciding this case.

IV. Entitlement to a Statutory Cause of Action

"Entitlement to a statutory cause of action is a requirement in every inter partes case." *Monster Energy Co. v. Lo*, 2023 USPQ2d 87, *11 (TTAB 2023) (citing *Australian Therapeutic Supplies PTY. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, *3 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 109 USPQ2d 2061, 2066 (2014)). "A party in the position of plaintiff may oppose registration of a mark when doing so is within the zone of interests protected by the statute and it has a reasonable belief in damage that would be proximately caused by registration of the mark." *Id.* (citing *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, *6-7 (Fed. Cir. 2020)). Opposer must

¹⁶ *Id.* at 5-6.

¹⁷ *Id.* at 6.

prove its entitlement to oppose by a preponderance of the evidence. *Shenzhen IVPS Tech. Co. v. Fancy Pants Prods., LLC*, 2022 USPQ2d 1035, *4 (TTAB 2022).

Opposer claims that it has prior common law rights in the term KINETIC LIGHTING;¹⁸ and that the USPTO “issued an advisory that Opposer’s Application would be refused registration based on a likelihood of confusion with Applicant’s KINETIC LIGHTS and design mark if Applicant’s application issues as a trademark registration” and has suspended Opposer’s application “pending the resolution of Applicant’s application.”¹⁹

Mr. Rosen stated that Opposer first used KINETIC LIGHTING at least as early as March 15, 2002 and in commerce at least as early as November 26, 2002; that KINETIC LIGHTING is distinctive at least because of the acquired distinctiveness it has gained for services and/or goods sourced from Opposer including lighting, lighting effects, lighting design, and rental of lighting equipment; and that Opposer has continuously and exclusively used the term KINETIC LIGHTING in commerce since at least 2002.²⁰ Opposer’s evidence of use of the term KINETIC LIGHTING establishes Opposer’s entitlement to a statutory cause of action for the opposition. *See, e.g., Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, *4 (TTAB 2019) (“standing” established by testimony with exhibits of use of confusingly similar mark); *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1118 (TTAB 2009) (testimony that plaintiff uses its mark “is sufficient to support opposer’s

¹⁸ Notice of Opposition, 1 TTABVUE 5.

¹⁹ *Id.* at 10.

²⁰ Rosen Decl. ¶ 5, 21 TTABVUE 6.

allegations of a reasonable belief that it would be damaged by registration of applicant's mark.”).

In addition, as noted above, Opposer filed an application to register the term KINETIC LIGHTING for Opposer's Application Services. In its Answer, Applicant admits that the USPTO cited Applicant's application as a potential bar to registration of Opposers' application.²¹ Under these circumstances, it is reasonable that Opposer would believe that any registration maturing from Applicant's involved application would damage Opposer. That is, Opposer has a reasonable belief that there is a likelihood of confusion between its alleged mark and Applicant's mark, or that the presence on the register of Applicant's alleged mark may hinder Opposer in using or registering its alleged mark. This also establishes Opposer's entitlement. *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) (“We regard the desire for a registration with its attendant statutory advantages as a legitimate commercial interest.”); *Life Zone Inc. v. Middleman Grp. Inc.*, 87 USPQ2d 1953, 1959 (TTAB 2008) (entitlement found based on opposer's ownership of pending trademark application and Office action which resulted in suspension of its application due to involved application being cited as a potential bar to registration).

V. Priority

“The question of priority is an issue in this case because opposer has asserted common law rights to [KINETIC LIGHTING] and does not own an existing

²¹ Rosen Decl. Exh. 8, 21 TTABVUE 279-80; Notice of Opposition, 1 TTABVUE 10, ¶ 14; Answer, 4 TTABVUE 5, ¶ 14.

registration upon which it can rely under Section 2(d).” *Threshold.TV, Inc. v. Metronome Enters., Inc.*, 96 USPQ2d 1031, 1037 (TTAB 2010). “To establish its priority under Section 2(d), opposer must prove that, vis-à-vis applicant, it owns ‘a mark or trade name previously used in the United States ... and not abandoned....’ Applicant, however, may rely on the filing date of its application” *Id.* (citing Trademark Act Section 7(c), 15 U.S.C. § 1057(c); and *Larami Corp. v. Talk to Me Programs, Inc.*, 36 USPQ2d 1840 (TTAB 1995)).

The Court of Appeals for the Federal Circuit has advised:

Under the rule of [*Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 43 (CCPA 1981)], a party opposing registration of a trademark due to a likelihood of confusion with his own unregistered term cannot prevail unless he shows that his term is distinctive of his goods, whether inherently or through the acquisition of secondary meaning or through “whatever other type of use may have developed a trade identity.”

RxD Media, LLC v. IP Application Dev. LLC, 125 USPQ2d 1801, 1808 (TTAB 2018), *aff’d*, 377 F. Supp. 3d 588 (E.D. Va. 2019), *aff’d*, 986 F.3d 361, 2021 USPQ2d 81 (4th Cir. 2021) (quoting *Towers v. Advent Software Inc.*, 913 F.2d 942, 16 USPQ2d 1039, 1041 (Fed. Cir. 1990)). *See also Hoover Co. v. Royal Appliance Mfg. Co.*, 238 F.3d 1357, 57 USPQ2d 1720, 1721 (Fed. Cir. 2001) (because trade identity rights arise when a term is distinctive, opposer must prove that its mark is distinctive either inherently or through acquired distinctiveness). “[I]f an opposer’s alleged means of trade designation is not distinctive — does not identify source — then there is no basis upon which to compare such a thing with the applicant’s mark to determine whether confusion as to source is likely.” *Otto Roth*, 209 USPQ at 44.

Opposer is the owner of an application filed on November 2, 2016 for the mark KINETIC LIGHTING for Opposer's Application Services.²² Applicant's application is based on a filing under Section 66(a) made on October 21, 2016. Because Opposer's application filing date is after October 21, 2016, Opposer may not rely on its application and must establish prior common law rights for services in connection with which it has used its mark. *See Life Zone. v. Middleman Grp.*, 87 USPQ2d at 1960 (while either party may rely on the filing date of its application as a "constructive use date" for purposes of priority, when the opposer's filing date is later in time it provides the opposer "no basis for . . . priority"). In this regard, Opposer states, inter alia, "Opposer's use of the mark was sufficiently extensive and exclusive such that the mark acquired distinctiveness by 2009, well before Applicant first used KINETIC LIGHTS in 2014,"²³ but discusses Opposer's Application Services. This is incorrect — Opposer must establish prior use for those services in connection with which it has actually used its alleged mark, not the services it has described in its application.

Mr. Rosen stated that "Kinetic Lighting has continuously and exclusively used the Mark and used the Mark in commerce since at least 2002 [on] ... services including lighting, lighting effects, lighting design, and rental of lighting equipment"²⁴ In its Response and First Supplemental Response to Applicant's Interrogatory Nos. 3 and 4, Opposer stated, (i) it used its mark in connection with

²² Rosen Decl. Exh. 8, 21 TTABVUE 279-80.

²³ Opposer's brief, 99 TTABVUE 15.

²⁴ Rosen Decl, ¶ 5, 21 TTABVUE 6.

lighting services, special effects design, and the sales, rental, and repair of lighting systems, equipment, and the like; (ii) lighting includes, for example, stage lighting and events lighting; and (iii) it first used its mark at least as early as March 18, 2002, and in commerce at least as early as November 26, 2002, for lighting services, special effects design, and the rental of lighting systems and equipment.²⁵

For context, we set forth Mr. Rosen's testimony about Opposer's lighting services:²⁶

- at pp. 34-37 of his cross-examination deposition (69 TTABVUE 215-18):

²⁵ 58 TTABVUE 491-92.

²⁶ The passages that follow have been designated confidential. Because the passages refer to services and equipment Opposer offers, which would be known to consumers of Opposer's Lighting Services, they cannot be confidential. Generally stated, 69 TTABVUE contains material that does not deserve a confidential designation.

We remind the parties:

It is intended that the filings in Board proceedings be publicly available and the improper designation of materials as confidential thwarts that intention. It is more difficult to make findings of fact, apply the facts to the law, and write decisions that make sense when the facts shown by the evidence may not be discussed. The Board needs to be able to discuss the evidence of record, unless there is an overriding need for confidentiality, so that the parties and a reviewing court will know the basis of the Board's decisions.

Noble House Home Furnishings, LLC v. Floorco Enters., LLC, 118 USPQ2d 1413, 1416 n.21 (TTAB 2016).

"The Board may treat as not confidential that material which cannot reasonably be considered confidential, notwithstanding a designation as such by a party." Trademark Rule 2.116(g), 37 C.F.R. § 2.116(g), *quoted in Adamson Sys. Eng'g, Inc. v. Peavey Elecs. Corp.*, 2023 USPQ2d 1293, *6 (TTAB 2023). *See also* TBMP § 412.01(c) ("The fact that the Board's standard protective order is automatically entered upon commencement in the proceeding does not give a party unbridled authority to designate its filed submissions to the Board as protected. ... The Board may disregard the designation as 'confidential' for those matters which are improperly designated...."). Due to the improper designation of this testimony as confidential, we resort to this rule and discuss evidence that cannot be reasonably termed confidential and is necessary to support our decision.

Q. What products does Kinetic Lighting currently offer?

A. We offer lighting equipment for rental. We offer lighting design services. We offer lighting equipment and accessories and supplies to purchase. And ... there's a labor component to it, too, to set it up, to operate it.

Q. What types of lighting equipment do you offer for rental?

A. Automated lighting. What we would refer to as static fixtures. Most of it is LED now. We offer the control mechanisms to operate those lights, and we offer the truss structures on which those fixtures will hang.

Q. So let's start with the automated lighting. Can you explain to me what you mean by "automated lighting."

A. Lights that move. So there's a yoke that can pan and tilt.

Q. And besides being able to pan and tilt, is there any other movement involved with those 2 lights?

A. I can't think of any other movement. I think panning and tilting covers it.

Q. And then you talked about static fixtures. Can you explain that to me a little bit what you mean by "static fixtures."

A. Lighting fixtures that do not pan and do not tilt.

Q. And then you mentioned truss structures. What are truss structures?

A. Aluminum structures that are set up for lights to hang on.

Q. Are there any other truss structures that you offer at Kinetic Lighting?

A. There's different sizes, and we offer it in two different colors.

Q. And then you also mentioned control mechanisms. What type of control mechanisms do you offer?

A. The most common are what we refer to as consoles, and they're essentially computers running software to control the lights.

Q. And what aspects of the lights do those consoles control?

A. For most lights these days they will control color. If the lights can project images, they'll control the images. And if the lights pan and/or tilt, they'll control the panning and/or tilting. And they can control other effects, too, a strobe effect, things of that nature. And focus.

Q. And so we talked about the automated lighting being the lights that move, panning or tilting. Do you both sell and rent those types of lights?

A. Yes.

Q. And do you manufacture those lights, or are those manufactured by someone else?

A. Manufactured by someone else.

- at pp. 43-44 of his cross-examination deposition (69 TTABVUE 324-25):

Q. What types of projects does Kinetic Lighting typically work on?

A. So for our production group it's a lot of corporate work. So it's everything from exhibits. It can be shareholder meetings. It can be internal sales meetings for companies. Product launches. But historically it's even extended beyond that to film premiere parties and all sorts of other projects.

Q. Then how about the lighting design services? Who are those typically provided to?

A. The same. And then there's also concerts I should point out too.

Q. And the previz services, who are those typically provided to?²⁷

²⁷ "Previz" services are previsualization services "typically provided to other lighting designers that includes recording cues and scenes for a performance in a virtual environment

A. That's typically provided to other lighting designers outside of our company, oftentimes in the concert touring segment. And it's offered to what we would refer to as a programmer, someone who operates the lighting control consoles.

Q. So we've talked about corporate events for film premiere parties and concerts. Are there any other types of events that Kinetic Lighting provides lighting services or equipment for?

A. Yeah. We also provide services and equipment for studios and production companies involved with film and TV. On the rental side quite often we don't know where our equipment goes when we're not involved with actually operating it.

Q. And does -- do you ever provide operation services for studios, movie, TTABVUE production companies?

A. It's more common that we would provide equipment on a rental basis for them that doesn't have our staff operating the equipment.

- At pp. 45-46 of his discovery deposition, Mr. Rosen stated (69 TTABVUE 326-27):

A. ... On the rental side of the business it would be -- the rental and production side of the business it's -- fixtures and control would be the most that we're renting.

Q. And when you say "fixtures," are you referring to both the automated and static fixtures?

A. Yes.

- At p. 48 of his discovery deposition, Mr. Rosen states (69 TTABVUE 329):

Q. And has Kinetic Lighting ever at any point offered any lighting that moves up and down a cable or moves in any other way besides panning and tilting?

without having a physical lighting setup. Previz can be up to \$1,000 per day." (Rosen Decl., ¶ 56, 21 TTABVUE 20).

A. I don't recall anything we've provided that moves up and down a cable. My recollection right now is that it's panning and tilting.

Based on the foregoing, we find that Opposer has used the term KINETIC LIGHTING in connection with (i) the rental of lighting equipment, namely rental of automated lighting (lights that move), static fixtures (lighting fixtures that do not pan and do not tilt), control mechanisms (computers running software which inter alia control the panning and tilting, strobe effects and focus) to operate lights, and truss structures; (ii) lighting design; (iii) sales of lighting equipment and accessories and supplies; and (iv) the operation of lighting equipment (collectively, "Opposer's Lighting Services").

We next consider whether Opposer's mark is distinctive, either inherently or through acquired distinctiveness. Opposer pleaded that if its mark is merely descriptive, it has acquired distinctiveness.²⁸

A. Mere descriptiveness

A term is merely descriptive "if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) (citing *In re Gyulay*, 820 F.2d 1216, 1217 (Fed. Cir. 1987)). On the other hand, a mark is suggestive if imagination, thought or perception is required to reach a conclusion on the nature of the goods or services. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1252 (Fed. Cir. 2012). Descriptiveness must be

²⁸ Notice of Opposition ¶¶ 6-8, 1 TTABVUE 5-6.

evaluated “in relation to the particular goods [or services] for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use.” *Id.* “A mark need not immediately convey an idea of each and every specific feature of the goods [or services] in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of the goods [or services].” *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016) (citing *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987)).

“Evidence of the public’s understanding of [a] term . . . may be obtained from any competent source, such as purchaser testimony, consumer surveys, listing in dictionaries, trade journals, newspapers[,] and other publications.” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018) (quoting *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1046 (Fed. Cir. 2018)). “These sources may include [w]ebsites, publications and use ‘in labels, packages, or in advertising material directed to the goods [or services].” *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017) (quoting *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)).

Also, a determination of the degree of descriptiveness is an integral part of a claim of acquired distinctiveness. *See Royal Crown v. Coca-Cola*, 127 USPQ2d 1047 (“[T]he ... burden of showing acquired distinctiveness increases with the level of descriptiveness; a more descriptive term requires more evidence of secondary meaning” (citing *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1422 (Fed.

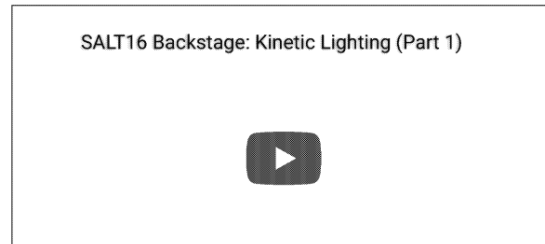
Cir. 2005)); *id.* at 1048 (“[T]he Board must make an express finding regarding the degree of the mark’s descriptiveness on the scale ranging from generic to merely descriptive, and it must explain how its assessment of the evidentiary record reflects that finding.”); *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1265-66 (Fed. Cir. 2015) (Board was within its discretion not to accept applicant’s allegation of five years’ use given the highly descriptive nature of the mark); *In re Boston Beer Co.*, 198 F.3d 1370, 1373 (Fed. Cir. 1999) (“[T]he greater the degree of descriptiveness the term has, the heavier the burden to prove it has attained secondary meaning.” (quoting *In re Bongrain Int’l (Am.) Corp.*, 894 F.2d 1316, 13 USPQ2d 1727, 1727 n.4 (Fed. Cir. 1990))); *Spiritline Cruises LLC v. Tour Mgmt. Servs., Inc.*, 2020 USPQ2d 48324, *5 (TTAB 2020) (the degree of descriptiveness “is helpful in laying a foundation for our discussion of acquired distinctiveness.”).

Some of the evidence involves the term “light” (instead of “lighting”) in association with the term “kinetic.” “Light” is defined as “a source of light: such as ... an electric light,”²⁹ and “lighting” is the gerund form of “light.” Opposer states that “[l]ighting can be defined as ‘illumination.’”³⁰ Several articles and webpages interchangeably use the terms “lights” and “lighting.” *See*, for example, the image from SALT (saltcommunity.com):

²⁹ Merriam-Webster Dictionary, Opposer’s First Notice of Reliance, Exh. 201, 19 TTABVUE 86.

³⁰ First Supp. Resp. to Applicant’s Interrog. No. 17, 58 TTABVUE 506.

SALT16 Backstage: Kinetic Lights (Part 1)



(53 TTABVUE 130-31). We therefore find that evidence referring to “lights” such as “kinetic lights” is probative of the descriptiveness of “kinetic lighting.” We arrive at this finding despite Mr. Rosen’s testimony that “[n]obody in our industry that I have any dealings with refers to that [*i.e.*, the term “kinetic lights”] to describe lights.”³¹

The evidence in the record includes the following:

Definition of “kinetic”

Oxford Living Dictionaries (North American English) defines “Kinetic” as “relating to or resulting from motion.” (21 TTABVUE 87).

Lighting providers

- TAIT (taittowers.com): “Before a sold out audience the Red Hot Chili Peppers revealed the largest, automated, **kinetic light** installation in concert touring history”; “Even more so, the fans were impressed with the ‘dynamic glow’ from the **kinetic light** installation that created a nonstop, contagious spirit throughout the night.” (51 TTABVUE 5).
- Outform, Inc. (outform.com): “**Kinetic Light Show** [–] An enchanting play of light and motion.”; “Demanding attention with a unique play of light, color, and motion, the **Kinetic Light** Show creates mesmerizing choreographed

³¹ Rosen Cross Depo., 69 TTABVUE 34-35.

visuals that transform ordinary surroundings into works of art.” (51 TTABVUE 12-16).

- Wahlberg Motion Design (wahlberg.dk):³² “660 of Wahlberg’s DMX Winches were used in the opening of one of the’ world[’]s most respected digital transformation and technology conferences: LiveWorx 2018 in Boston. ... The **Kinetic installation** received great feedback from the audience.” (51 TTABVUE 22-27).

- Kinetic Light Systems (kinetic-systems.com): “We provide unique LED Lighting **kinetic systems** that enables a perfect combination of lighting and movement. **Lighting kinetic systems** is a simple and bright idea to move up and down an illuminated object [-] a merge of the art of lighting with mechanical technology.” (51 TTABVUE 43-46).

- WHYIXD (whyixd.com): “‘Magpie bridge’ is a **kinetic light** installation. It’s assembled with mechanical devices and computer programs to perform the rolling shape.” (51 TTABVUE 54-56).

- LUCENT Interactive Technology Lab (impetors.com): “Elevate Your Event With Our **Kinetic Lights** And Give Your Guests A Spectacular Aerial Lighting Display. ... Our new LED **Kinetic Lighting** system delivers a dynamic combination of lighting and movement, highlighting focal points of your event with a moving sculptural light installation.” “The lights are installed into the ceiling to turn what was once a black cavity into a brilliant lighting display that moves to the beat of your event.” (51 TTABVUE 67-68).

- Guangzhou Hosen Lighting Technology Ltd. (hosen.en.alibaba.com): “Led Kinetic lighting,” “Stage Light DMX led **Kinetic lighting** DMX winch,” “kinetic lighting system dmx winch led tube kinetic light.” (51 TTABVUE 135-38).

- Alibaba.com Eastsun Orbisfly: “ORBISFLY™ LED **Kinetic light** family”; “led lift ball, led kinetic lighting

³² The wahlberg.dk webpage appears to be a Danish webpage but refers to use of winches by a customer in Boston. We therefore have considered this foreign website.

system, color led disco ball”; “Colorful LED effects light led kinetic lighting.” (58 TTABVUE 236-39).

Industry publications

- PLSN (plsn.com, “Lighting and Video for Drake’s Boy Meets World Tour ...,” March 10, 2017): “The design incorporates multiple elements of lighting and video technology including a **kinetic LED lighting** system....” “The kinetic spheres are a collaborative project.” (52 TTABVUE 106-115).
- PLSN (“Jennifer Lopez,” August 9, 2019): “It took a lot of automation to keep all the gags in the show working. ... Glow Motion looked after the **Kinetic lighting** as sticks of LED lowered down in various configurations that looked spectacular.” (53 TTABVUE 2-36).
- PLSN (“Red Hot Chili Peppers Launch North American leg of ‘The Getaway Tour’ with Elaborate **Kinetic Light** Installation,” January 6, 2017): “With what has been called one of the largest **kinetic light** installations in touring history, the Red Hot Chili Peppers have literally lit the path for a new concert-goer experience.” (52 TTABVUE 128-32).
- TPI Magazine (tipmagazine.com, “Red Hot Chili Peppers,” March 23, 2017): “The west coast four piece rolled out the world’s largest, tourable **kinetic lighting** installation in support of their latest album, The Getaway.” (53 TTABVUE 76).
- Designboom (designbloom.com, July 9, 2017): “**kinetic lighting** installation designed by WHYIXD hovers through space and time.” (53 TTABVUE 87-90).
- AV Interactive (avinteractive.com, “Setting the state for success,” October 25, 2017): “The addition of **kinetic lighting** brought the audience together and closer to the action, introducing a 3D focal point to the stage design”; and “A Madrix console handled the **kinetic lights** while all other lighting fixtures were controlled from an Avolites Tiger Touch 2” (53 TTABVUE 109, 110).
- SALT (saltcommunity.com, dated “05.03.20”): “This past year, we used a fairly new application of LED lighting

specifically called **Kinetic Lighting**. And we thought it would be fun to go a bit behind the scenes in this first part of the SALE Backstage series, learning a bit more about **kinetic lights**"; and "With that in mind, one of the biggest benefits of a **kinetic lighting** system, is the dynamic environments you can create." (53 TTABVUE 131-32).

- Trendhunter (trendhunter.com, "A Hotel Chandelier is Designed to React to Environmental Data" May 1, 2014): "A mesmerizing **kinetic lighting** installation turns environmental data into a visual light show. Designed and engineered by IDEO's creative technology study The Digital Shop, the Edison project at a Palo Alto Hotel allows for new 'generative arts' through custom circuits, light bulbs, software...." (47 TTABVUE 44).

YouTube Screenshots

- "How to control **kinetic light** via Madirx." (54 TTABVUE 21).

- "Design the motion of LED **kinetic light** by 3D MAX." (54 TTABVUE 25).

- Comment (attributed to Kevin Wang) stating, "From the video you will know it is easy designing the motion for the LED **kinetic light**" (54 TTABVUE 25).

- "**Kinetic Light** System." (54 TTABVUE 31).

- "**Kinetic Lighting** System KINETIC FLY." (54 TTABVUE 33).

- "**Kinetic lights** from FYL lighting company." (54 TTABVUE 37).

- "**Kinetic lights** project from Ukraine." (54 TTABVUE 39).


- Comment (attributed to Ann Xiao) stating "15 cm ball with 5m drop dmx winch **kinetic lights** use[d] for hotel." (54 TTABVUE 39).

- "MADRIX @ Dragonfly Jakarta mind-blowing night club **kinetic lighting** system." (54 TTABVUE 41).

- “X LIGHTING How to installed [sic] **Kinetic lights.**” (54 TTABVUE 43).
- “Orbisfly® **kinetic light** & Audi new A8L.” (54 TTABVUE 45).
- Pangolin Laser Systems comment to video stating, “Pangolin’s Kinetic Lights Plugin is designed for our BEYOND software, allowing you to quickly sequence a laser beams position together with the movement of a **kinetic lighting** fixture.” (54 TTABVUE 47).³³
- “The **kinetic light** for client watching.” (54 TTABVUE 59).
- “Love Lights: Interactive Kinetic Light Sculpture” and “This is an interactive **kinetic light** sculpture called ‘Love Lights’ that we built for one of our clients.” (54 TTABVUE 63).
- “Wonderful Kinetic Light Sculpture.” (54 TTABVUE 65).

In addition, Applicant submitted:

³³ This screenshot may include a reference to Applicant, even though it states, “Pangolin’s Kinetic Lights Plugin.”



The video shows a series of white, spherical LED light fixtures suspended from a ceiling by thin cables. The lights are arranged in a horizontal line and are illuminated from within, casting a soft glow. The ceiling is a grid-like structure, and the overall scene is dimly lit, emphasizing the light from the fixtures.

Led Lift Ball , Led Kinetic Lighting System , Color Led Disco Ball

5 views • Jan 7, 2019

X lighting
46 subscribers

Led Lift Ball , Led Kinetic Lighting System , Color Led Disco Ball

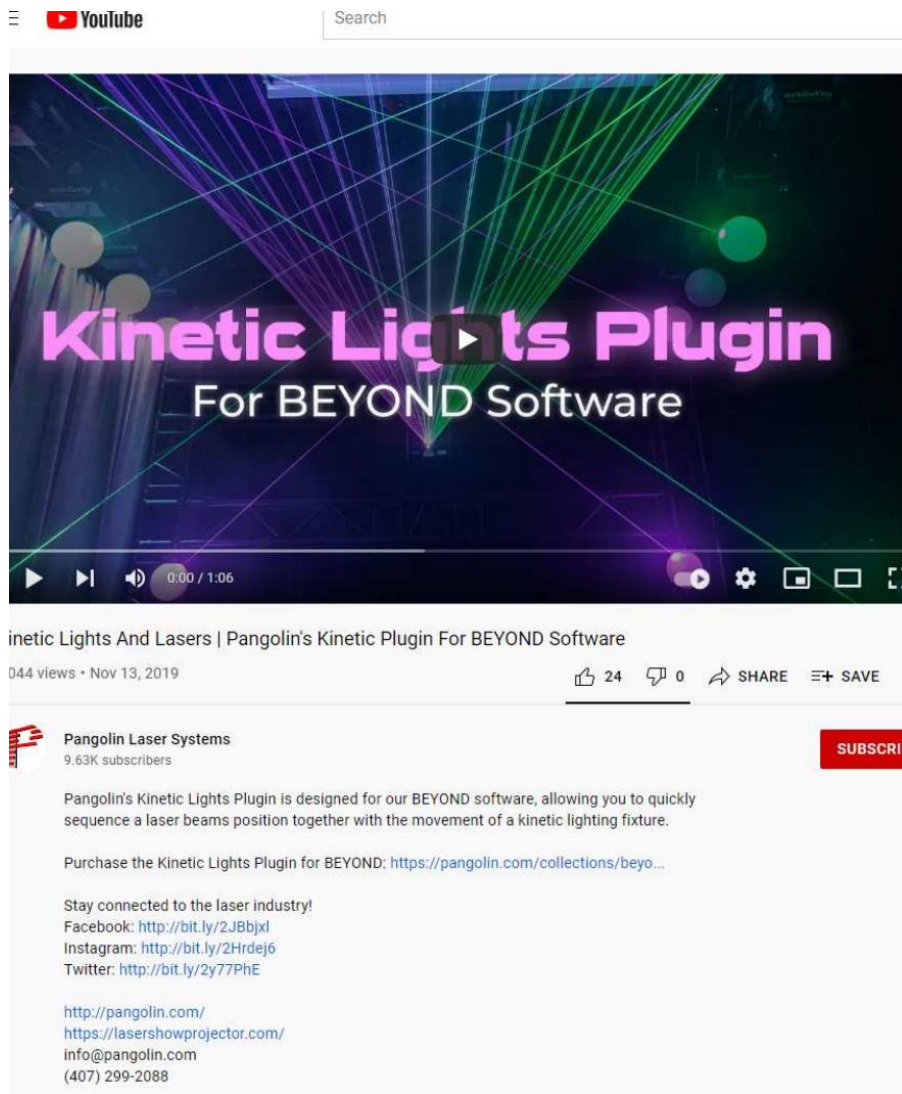
Product testing before leaving the factory:

1. Product specifications: ball ruler 25cm, winch height 0-3m, 2.6s / m
2. Color: RGB 3IN1

We've been engineering and building professional lighting equipment for many years, Our kinetic lights are critical components in the lighting setup at all kinds of events: art galleries, interior displays, stage shows, and much more. Our high-precision hoists are used mainly for synchronized spatial animation of large arrays of tethered LED light fixtures.

34

and



35

Wikipedia entries

- Wikipedia entry for “James Patten,” stating, “Patten is a TED fellow and speaker whose studio-initiated research has led to the creation of new technology platforms, like Thumblers, tiny-computer controlled robots; interactive, **kinetic lighting** features; and immersive environments that engage the body.” (53 TTABVUE 146).
- Wikipedia entry for “Dante Leonelli,” stating, “Their group exhibition toured to Sheffield, Hull, Manchester and Oxford, culminating in the first exhibition of **kinetic light**

³⁵ 62 TTABVUE 58.

art to be shown at the Hayward Gallery.” (53 TTABVUE 150).

- Wikipedia entry for “Liquid light show,” stating, “Light Sound Dimension (LSD) was possibly the first psychedelic lightshow and was operated by Bill Ham. Ham pioneered **kinetic lighting** and actually used this technique at the Red Dog Saloon back in 1965.” (53 TTABVUE 170).

Third-party emails sent to Opposer³⁶

- April 26, 2019 email from Nicholas Grant, Echelon Design, Inc., stating, “We have [to] design a large **kinetic lighting** structure and are looking for someone to help us fabricate and develop the concept.” (24 TTABVUE 246).
- November 22, 2017 email from An Vo, stating “Is your **kinetic lighting** for sale for people who want to put it in their home?” (24 TTABVUE 276).

Witness Testimony

Submitted by Applicant:

- Michael Brown – production designer and creative designer who provides production design services for stage, film, TV, concert, fashion, retail, virtual and live event productions
 - “Based on my own personal education and experience in the industry, the phrases ‘**kinetic lights**’ and ‘**kinetic lighting**’ are used by people in the industry, including myself, to refer to the artform of a genre of lighting combined with physical movement.” (¶ 9 Brown Decl., 47 TTABVUE 9); and
 - “**Kinetic lighting** to me would refer to specifically a lighting element or a scenic element that can be illuminated via light that actually moves in X, Y, Z space. It actually has tangible physical movement.” (Brown Cross, 81 TTABVUE 161).

³⁶ One email is from an individual in Kazakhstan with a .ru email address. (24 TTABVUE 278). This email has limited probative value because it does not appear to be from a consumer in the United States.

- Louise Stickland – journalist specializing in the entertainment technology industry, including professional lighting, testified that she:

- “understand[s] the phrases ‘**kinetic lights**’ or ‘**kinetic lighting**’ to refer to lights or lighting that move.” (¶ 8 Strickland Decl., 46 TTABVUE 3-4);

- “personally used the phrases ‘**kinetic light**’ and ‘**kinetic lighting**’ to refer to lights that move and the term ‘**kinetic**’ to describe a category of lighting.” (*Id.* at ¶ 9, 46 TTABVUE 4);³⁷ and

- “understand[s] the phrases ‘kinetic lights’ and ‘**kinetic lighting**’ as descriptive phrases for a style or approach to lighting that involves motion.” (*Id.* at ¶ 8, 46 TTABVUE 3).

Submitted by Opposer:

- Jeff Ravitz – lighting designer, testified that he has “not seen the use of the term ‘**KINETIC LIGHTING INSTALLATION**’ to identify any particular type of lighting installation” (¶ 28 Ravitz Decl., 18 TTABVUE 23).

- Jeff Flowers – Director of Special Projects for Rose Brand, a company that specializes in equipment used in the entertainment and production industry such as stage drapery, testified that he has not heard the term “**kinetic lighting**” used to identify any particular type of lighting, including lights that are in motion or “moving lights.” (¶¶ 2, 4, 17 and 20 Flowers Decl., 18 TTABVUE 10, 12).

³⁷ Ms. Stickland stated she wrote articles describing (i) a creation of an inventor of lighting effects and equipment as “Wynne Willson’s Caterpillar **kinetic light** creatures”; (ii) the products of lighting manufacturer, Robe Show Lighting, as “**kinetic lighting**”; and (iii) Applicant’s **kinetic light** installation called SKALAR as “an amazing and compelling piece of immersive **kinetic light** art.” (*Id.* at ¶¶ 6, 9 and 10, 46 TTABVUE 3, 4).

Statements by Opposer's competitors

Applicant located the following from Opposer's competitors' webpages:³⁸

- Robe Lighting: "Interesting recent projects include ... the spectacular **kinetic light** show that opened the Taipei Music Center." (96 TTABVUE 77).
- 4Wall: "Facebook's design teams have also been eager to use a myriad of the latest lighting and visual design technologies, including ... the use of **Kinetic lighting** technology." (96 TTABVUE 81). and
- PRG: "Lighting and Video for Drake's Boy Meets World Tour ... with Support from PRG Worldwide" and "The design incorporates multiple elements of lighting and video technology include a **kinetic LED lighting** system; a curved video wall; an array of lighting fixtures" (96 TTABVUE 85).

Registration Evidence

- Registration No. 3464552 (issued on August 18, 2006) for



the mark _____ for "apparatus for lighting, lighting fixtures, components of lighting fixtures, namely, electric lighting fixtures; electric devices used to control the color and intensity of artificial light sold as components of lighting fixtures; and controllers sold as components of lighting fixtures" registered under a claim of acquired distinctiveness of "COLOR KINETICS" (57 TTABVUE 132-33).

- Registration No. 3474087 (issued on July 22, 2008) for




the mark _____ for "apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity, namely, microprocessors, circuit boards, power modules, data


³⁸ Mr. Rosen confirmed that these sources are from its competitors. See Rosen Reb. Cross, confirming that the third parties identified in the Rosen Rebuttal Declaration are Opposer's competitors. (96 TTABVUE 45-47).

networks; and computer hardware, computer programs and software used to control lighting fixtures and to create, edit, store, manipulate, simulate and display artificial light, images, sound or combinations thereof” registered under a claim of acquired distinctiveness of the entire mark (57 TTABVUE 142-43).

- Registration No. 3008812 (issued on October 25, 2005) for the mark X-EFFECTS for “Light projectors providing dimensional and **kinetic lighting** effects” (57 TTABVUE 158-59).

- Registration No. 4304846 for the mark BOPPERS for inter alia “rental of games and party equipment, namely, **kinetic lighting**” (57 TTABVUE 163-64).

- Registration No. 5524654 for the mark  for inter alia “light projectors providing dimensional and **kinetic lighting** effects” (57 TTABVUE 169-70).

- Registration No. 5524658 for the mark  for inter alia “Light projectors providing dimensional and **kinetic lighting** effects” (57 TTABVUE 175-76).

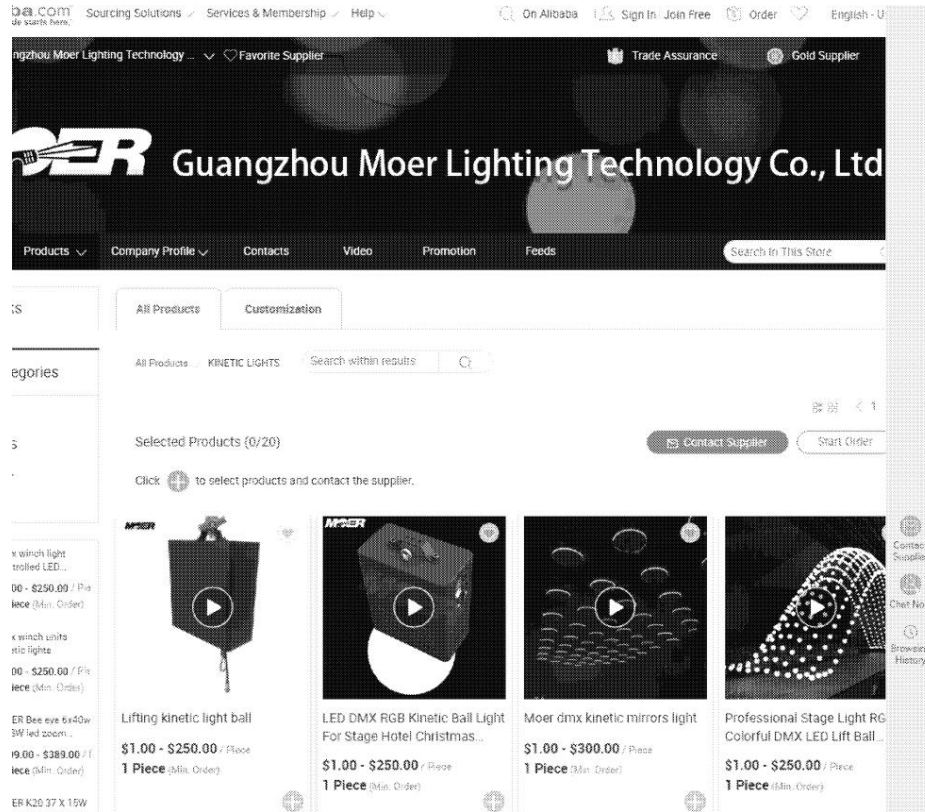
Stage lighting components

- “SY led lift ball, led kinetic lighting system, color led ...” (52 TTABVUE 40):

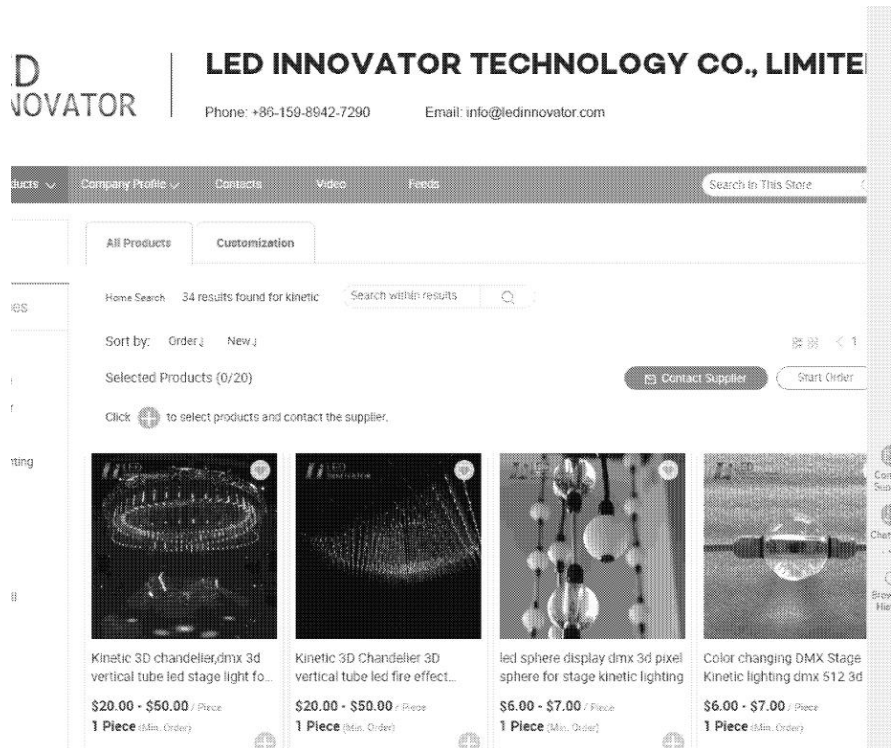
The screenshot shows the Alibaba.com storefront for Guangzhou SY Stage Equipment Co., Ltd. The page is titled "SY led lift ball, led kinetic lighting system, color led ..." and displays a search for "kinetic" products. The search results are sorted by "Order" and show 41 results. The products listed include:

- SY 2019 new arrivals Led Winches DMX 512 Kinetic Lig... (Ready to Ship, \$172.00 / Piece, 5 Pieces (Min. Order))
- SY Wholesale DMX winches LED dj kinetic ball for Concert (Ready to Ship, \$172.00 / Piece, 5 Pieces (Min. Order))
- SY 2019 new arrivals Led Winches DMX 512 Kinetic Lig... (Ready to Ship, \$172.00 / Piece, 5 Pieces (Min. Order))
- SY Manufacturer dmx winch kinetic lifting ball disco light (Ready to Ship, \$188.00 / Piece, 1 Piece (Min. Order))
- 2020 2020 2020 China produc... (2020 China produc... \$320.00 - 6330.00 / 1 Piece (Min. Order))
- 900w fog machine air disinfection stage... (855.00 - 660.00 / Piece (Min. Order))
- Professional 220w 15R Factory price... (6480.00 - 5490.00 / 1 Piece (Min. Order))
- SY led lift ball , led kinetic lighting system , color led dis... (Ready to Ship, \$188.00 / Piece, 5 Pieces (Min. Order))
- SY DMX winches led ball kinetic lifting lighting stage... (\$188.00 / Piece, 20 Pieces (Min. Order))
- SY Wedding stage decoration mini led light Colorful DMX LE... (Ready to Ship, \$172.00 / Piece, 5 Pieces (Min. Order))
- SY Dmx Control winch LED kinetic lifting ball for Stage... (\$188.00 / Piece, 1 Piece (Min. Order))

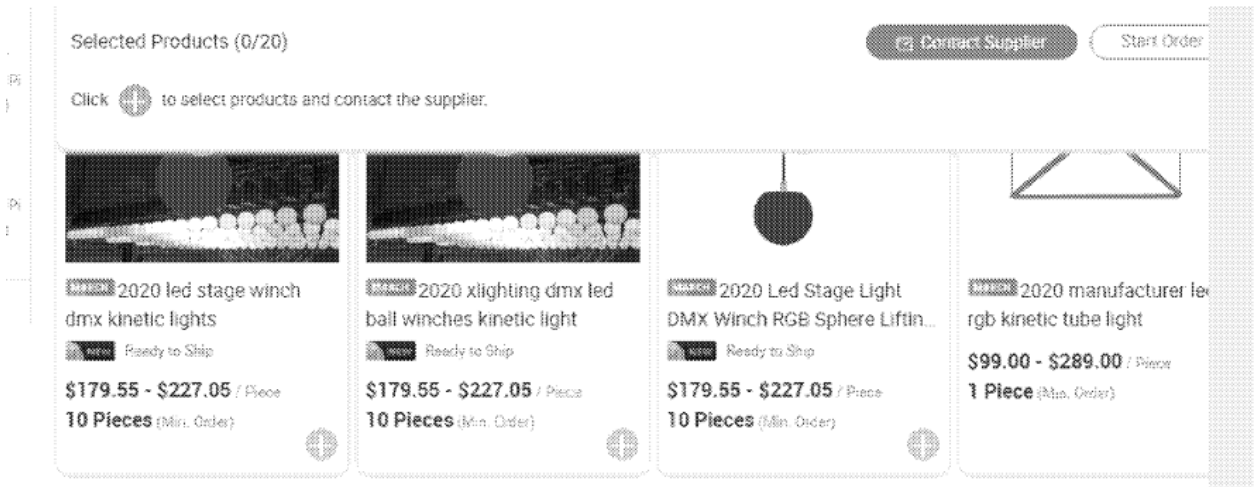
● “Kinetic Ball Light For Stage Hotel Christmas” (51 TTABVUE 149):



● “Color changing DMX Stage Kinetic lighting DMX” (51 TTABVUE 157):



● “2020 led stage winch dmx kinetic lights” (51 TTABVUE 162):



Other evidence:

● home lighting (51 TTABVUE 86):

D'LIGHT : Kinetic Lighting - Transformable Lampshade by I2M USA INC. — Kickstarter 05.03.20, 12:19

D'LIGHT
kinetic lighting

INTERNATIONAL DESIGN EXCELLENCE AWARDS '18
2015 DESIGN AWARD BEST 100
50%

D'LIGHT(Automatic) x 1
Get your own 1 automatic D'light.

INCLUDES:

- 7.5W LED Smart Bulb
- Universal joint

ESTIMATED DELIVERY: Dec 2017
SHIPS TO: Only certain countries

Limited
31 backers

Pledge US\$ 98 or more

[No hurry package]
D'LIGHT(Auto) x 1

- Get your own 1 automatic D'light.
- By Korean post's international mail service - no hurries in delivery (could take 2-3 weeks or more) but all the shipments will be tracked as well.

INCLUDES:

+ D'LIGHT : Your very first personal kinetic lighting

- lighting for children’s parties (52 TTABVUE 32):



Applicant argues that Opposer’s proposed mark is merely descriptive of a feature of Opposer’s services because “Opposer offers design and rental services for lighting systems and light shows that feature light movement.”³⁹ According to Applicant, Opposer is a lighting design and lighting equipment rental company; Opposer’s lighting-design services include light shows and displays “featuring lighting and light movement”; Opposer rents “moving lights”; and “KINETIC” means “relating to or

³⁹ Applicant’s brief, 103 TTABVUE 33.

resulting from motion,” “depending on movement for its effect,” and “pertaining to motion.”⁴⁰

Opposer argues that KINETIC LIGHTING is suggestive of Opposer’s lighting equipment rental services,⁴¹ stating that it provides all kinds of theatrical and studio lighting equipment, including movable lights, stage lights with automated mechanical abilities such as panning, tilting, and rotating. With respect to movable lights, Opposer states, “people would not know whether ‘kinetic lighting’ is lighting equipment that moves, or a service for staging light shows”;⁴² and that “‘kinetic’ conveys nothing specific about such features.”⁴³ Opposer concludes, “[p]eople would certainly not immediately know that ‘kinetic lighting’ refers to lighting rentals (more specifically, the rental of lighting systems for theatrical events or public events; special effects lighting for lights shows and exhibitions and displays featuring lighting and light movement.”⁴⁴ Opposer also relies on the testimony of Messrs. Flowers and Ravitz, who generally state that they have not heard of KINETIC LIGHTING to identify any particular type of lighting,⁴⁵ or the rental of stage lighting.⁴⁶ In addition, Mr. Rosen testified in his rebuttal deposition that Exhibits 5-13 of Applicant’s Notice of Reliance from Alibaba.com webpages, for example,

⁴⁰ *Id.*

⁴¹ Opposer’s brief, 99 TTABVUE 16-17.

⁴² Reply brief, 106 TTABVUE 18.












⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Flowers Decl. ¶¶ 17 -18, 18 TTABVUE 12-13.

⁴⁶ Ravitz Decl. ¶ 30, 18 TTABVUE 23.

Manufacturers, Suppliers and Exponers on Alibaba.com LED Stage Lights

 <p>Compare Similar Products</p>	<p>Guangdong, C</p>	<p>Contact Supplier Leave Messages</p>	<p>40w led commercial wall pack lights</p>
 <p>Compare Similar Products</p>	<p>2015 led matrix panel,color kinetic lighting,led cheap good blinder US \$1-338 1 Piece IP33 30W RGB RGB 3 in 1 90-245</p>	<p>Guangzhou E-Lites Equipment Co. Ltd China (Mainland) Trade Assurance Transaction Level 800+ 84.0%</p>	 <p>NOM-GMO 3-MCPD Fresh Organic Light & Sushi Soy Sauce EU</p>
 <p>Compare Similar Products</p>	<p>Chinese Manufacturer! Winches Led Ball Light/Kinetic Lighting DMX Winch Ball/LED US \$300.0 10 Sets IP54 Projection Lights Changeable AC100-240V 1700</p>	<p>Shenzhen Ledworks Technology Co., ... China (Mainland) Trade Assurance Transaction Level 90.9%</p>	 <p>Top sale cheapest sign board led light for USA</p>
 <p>Compare</p>	<p>2017 LED kinetic lights sculpture DMX winches stage lifting ball light US \$175.0-190.0 10 Pieces CE,RoHS Projection Lights DESON 13000</p>	<p>Guangzhou Deson Stage Lighting Equi... China (Mainland) Trade Assurance Transaction Level 83.3%</p>	 <p>Best Price waterproof Aluminum decorative commercial LED light</p>
 <p>Compare Similar Products</p>	<p>High Quality 3d Ball Led,Led Stage Light,Led Light Color changing DMX Stage US \$10-50 10 Pieces LED Beam Lights RGB 15 12.6</p>	<p>Shenzhen Ledcolourlight Technology ... China (Mainland) Trade Assurance Transaction Level 600+ 87.8%</p>	 <p>Zhongshan lighting factory CE and UL funky artistic indoor</p>
 <p>Compare Similar Products</p>	<p>Uirobot kinetic lights US \$100-100000 1 Set IP54 CREE BV,CCC,CE,RoHS LED RGB Uirobot</p>	<p>Shanghai United Intelligence Robotics ... China (Mainland) Trade Assurance Transaction Level 6,000+ 70.0%</p>	
<p>2016 China Christmas Kinetic lighting/stage Led Lift Ball/ orbisfly RGB led light</p>	<p>Guangdong, C</p>	<p>Contact Supplier Leave Messages</p>	<p>Guangzhou Yuexiu District Gresty Ligh... China (Mainland)</p>

http://www.alibaba.com/area/product_en?CatId=&SearchText=kinetic+lighting[1/10/2017 10:45:06 AM]

BAU001313

47

are consumer-grade and not professional-grade equipment that is used for the professional lighting industry.⁴⁸ In his cross-examination deposition, Mr. Rosen further testified, “Alibaba is – it’s an e-commerce platform, I believe out of China, that -- most of the professional companies in the United States in my industry, we don’t typically source our products from Alibaba.”⁴⁹ He also testified:⁵⁰

Q. Now, at the bottom of this page, there's a product listing called “Professional Stage Light RGB Colorful DMX LED Lift Ball Orbisfly Kinetic lighting.” Do you see that?

A. Yes.

Q. And is it also your opinion that this is a consumer-grade product?

A. I would say that it’s my opinion that this is not really kind of the -- the professional equipment that we'd be using typically in our industry. And, again, there’s brands that are known to have -- that fall within a group of – there’s a group of brands that offer professional equipment. This does not appear to be one of them, to me.

Q. And what are those brands that you were just referring to?

A. There’s – there’s a bunch of them. Examples would include Robe, Elation Professional, Clay Paky. Those are a few.

Q. Okay. So is it your -- so your opinion that these products are consumer grade, or at least not professional grade, is that based on your understanding that these aren’t -- the products shown in Exhibit 5-13 are not manufactured by particular manufacturers in the United States?

A. That’s what I'm seeing based on -- what you’re showing me right now on the left side of my screen appears to be a -

⁴⁸ Rosen Rebuttal Decl. ¶ 3, 83 TTABVUE 3.

⁴⁹ Rosen Cross Depo., 96 TTABVUE 16.

⁵⁰ *Id.* at 17-19.

- a Chinese manufacturing company is what appears to be listed here. Or seller. And what I'm saying is in my experience, my decades of experience here in the industry in the United States, this is not where we would be typically sourcing our equipment, and this doesn't appear to be a brand that we would be -- that many of us in this industry in the United States would be considered to be in kind of that professional tier.

Q. ... Is it your understanding that the products and services at issue in this case are for the professional lighting industry?

A. Yes.

Further, Mr. Rosen states “[t]he entertainment, lighting, and events industry refers to certain lighting equipment as ‘automated lighting’ and ‘moving lights’.”⁵¹ In his cross-examination deposition, he testified:

Q. And what -- we talked about moving lights. As you mentioned, it's referenced in the next sentence. What does the industry use “moving lights” to describe?

A. It describes a category of lights that -- typically, they can pan and tilt.

Q. And is the term “kinetic” synonymous with “moving”?

A. So I recall from physics class years ago “kinetic energy” referring to energy -- moving energy that's not static. Again, I don't have people who are -- people don't refer -- place orders with me or my team talking about -- they don't refer to moving lights with the word “kinetic.” They'll refer to “automated lighting,” they'll refer to “moving lights,” or they'll specify actual products names.⁵²

⁵¹ Rosen Decl. ¶ 191, 21 TTABVUE 60.

⁵² Rosen Cross Depo., 69 TTABVUE 216.

Consistent with Mr. Rosen's testimony, Opposer's webpage contains a link to "Moving Lights" under the heading "Equipment."⁵³

Opposer has not offered a definition of "kinetic lighting" or "kinetic lights" in its brief.

Discussion

We are not persuaded by Opposer's argument and evidence that its pleaded mark is suggestive of Opposer's Lighting Services. First, Opposer amended its pleaded application for the standard character mark KINETIC LIGHTING for Opposer's Application Services (which are similar to the pleaded Opposer's Lighting Services) to seek registration under the provisions of Section 2(f) and to disclaim LIGHTING. Upon initial examination, the assigned examining attorney rejected the mark as merely descriptive.⁵⁴ In response, Opposer claimed acquired distinctiveness under Section 2(f).⁵⁵ Its claim was not made in the alternative. Opposer therefore has conceded mere descriptiveness of its claimed mark for its identified services. *See Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1629 (Fed. Cir. 2009) ("Where an applicant seeks registration on the basis of Section 2(f), the mark's descriptiveness is a nonissue; an applicant's reliance on Section 2(f) during prosecution presumes that the mark is descriptive."); *In re Am. Furniture Warehouse CO*, 126 USPQ2d 1400, 1403 (TTAB 2018) (noting that a claim of acquired distinctiveness by applicant to overcome a refusal in a prior registration for the same

⁵³ Rosen Decl. Exh. 192, 68 TTABVUE 455.

⁵⁴ Applicant's Notice of Reliance, 58 TTABVUE 387.

⁵⁵ *Id.* at 58 TTABVUE 379-93.

wording in connection with the same services “can be viewed as a concession by [a]pplicant that the wording itself is not inherently distinctive for those services”). In response to the examining attorney’s requirement, Opposer also disclaimed LIGHTING, which is an admission that the term is generic. *See Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc.*, 107 USPQ2d 1750, 1762 (TTAB 2013) (“respondent’s disclaimer of the individual word TOURS in its Section 2(f) registration constitutes a tacit admission that this individual term is generic for the identified services”).

Second, “kinetic lighting” in the context of Opposer’s Lighting Services has meaning. “Kinetic” is defined as “relating to or resulting from motion.” Opposer alleged in the Notice of Opposition that “kinetic” means “relating to or resulting from

motion.”⁵⁶ The Oxford Living Dictionaries provides the same definition⁵⁷ and Mr. Rosen admitted that he understands the term “kinetic” can mean “relating to or resulting from motion.”⁵⁸ Opposer states on its webpage, “[w]e sell lighting equipment and supplies from most major manufacturers. From gobos, tape, color filters/gel. Cable, lamps and fog fluid, to moving lights and truss.”⁵⁹ “Kinetic lighting” – in the context of Opposer’s Lighting Services – means that the lights which are the subject of the services, move.

Third, much of the evidence set forth above uses “kinetic lighting” or “kinetic lights” to refer to lights that move. In addition, that evidence demonstrates that the term “kinetic lighting” is used in connection with a wide variety of lighting that

⁵⁶ Notice of Opposition ¶ 5, 1 TTABVUE 5.

Opposer’s brief cites to an alternate and more technical definition of “kinetic” as “of or relating to the motion of material bodies and the forces and energy associated therewith” from Merriam-Webster Dictionary, and provides the internet address for the definition. It did not cite to a location in the record where a definition appears, and did not request that we take judicial notice of the definition. 99 TTABVUE 17. Providing only the link without the material attached is not sufficient to introduce it into the record. *See In re ADCO Indus. – Techs., L.P.*, 2020 USPQ2d 53786, *2 (TTAB 2020) (web addresses or hyperlinks are insufficient to make the underlying webpages of record); *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1195 n.21 (TTAB 2018) (Board does not consider websites for which only links are provided); *In re Olin Corp.*, 124 USPQ2d 1327, 1332 n.15 (TTAB 2017) (“Because the information displayed at a link’s Internet address can be changed or deleted, merely providing a link to a website is insufficient to make information from that site of record.”); *In re Change Wind Corp.*, 123 USPQ2d 1453, 1462 n.8 (TTAB 2017) (providing only a web address or hyperlink is insufficient to make such materials of record); *In re Powermat Inc.*, 105 USPQ2d 1789, 1791 (TTAB 2013) (same); *In re White*, 73 USPQ2d 1713, 1716 n.5 (TTAB 2004). We do not rely on the Merriam-Webster Dictionary definition. But even if we had, “[i]t is well settled that so long as any one of the meanings of a term is descriptive, the term may be considered to be merely descriptive.” *In re Chopper Indus.*, 222 USPQ 258, 259 (TTAB 1984); *see also, In re IP Carrier Consulting Grp.*, 84 USPQ2d 1028, 1034 (TTAB 2007).

⁵⁷ 21 TTABVUE 87.

⁵⁸ 69 TTABVUE 44.

⁵⁹ Rosen Decl. Exh. 190, 24 TTABVUE 413.

involves motion, including lighting for children, stage lighting, Applicant's large-scale lighting installations, and even home lighting. "Kinetic lighting" is also within the identifications of several trademark registrations.

In view of the foregoing, including Opposer's concessions through its Section 2(f) claim and disclaimer, we find that the term "kinetic lighting" immediately describes a feature of Opposer's Lighting Services in that the lighting it provides includes moveable lights. In addition, due to the meaning of the term (which consumers would readily understand), the quantity of the evidence and the variety of evidence, we conclude that the term is highly descriptive of a feature of Opposer's Lighting Services, *i.e.*, the type of goods featured in Opposer's Lighting Services.

B. Acquired distinctiveness

To establish secondary meaning or "acquired distinctiveness," Opposer must show that "in the minds of the public, the primary significance of a product [or service] feature or term is to identify the source of the product [or service] rather than the product [or service] itself." *Inwood Labs., Inc. v. Ives Labs.*, 456 U.S. 844, 214 USPQ 1, 4 n.11 (1982); *Qualitex Co. v. Jacobson Prods. Inc.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995). Mere intent that a term function as a trademark is not enough in and of itself. *In re Morganroth*, 208 USPQ 284, 287 (TTAB 1980) ("Wishing does not make a trademark or service mark be.").

The burden of proving secondary meaning is on the party asserting it. *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1006 (Fed. Cir. 1988). Opposer's burden of proving acquired distinctiveness is commensurate with its mark's degree of descriptiveness. *Real Foods v. Frito-Lay*, 128 USPQ2d at 1378. The

amount and character of evidence required to establish acquired distinctiveness depends on the facts of each case. *Roux Labs., Inc. v. Clairol Inc.*, 427 F.2d 823, 166 USPQ 34, 39 (CCPA 1970). Because we have found that the wording KINETIC LIGHTING is highly descriptive of Opposer's Lighting Services, Applicant's burden of establishing acquired distinctiveness under Section 2(f) is commensurately high. See *In re Steelbuilding.com*, 75 USPQ2d at 1424; *In re Bongrain Int'l.*, 13 USPQ2d at 1729; *In re Greenliant Sys. Ltd.*, 97 USPQ2d 1078, 1085 (TTAB 2010).

Acquired distinctiveness may be proven through "both direct and circumstantial evidence." *Schlafly v. Saint Louis Brewery, LLC*, 909 F.3d 420, 128 USPQ2d 1739, 1743 (Fed. Cir. 2018). "Direct evidence includes actual testimony, declarations or surveys of consumers as to their state of mind. Circumstantial evidence is evidence from which consumer association may be inferred, such as years of use, extensive amounts of sales and advertising, and any similar evidence showing wide exposure of the mark to consumers." *Kohler Co. v. Honda Giken Kogyo K.K.*, 125 USPQ2d 1468, 1506 (TTAB 2017).

The evidence may show (1) association of the mark with a particular source by actual purchasers (typically measured by customer surveys); (2) length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and/or (6) unsolicited media coverage of the product embodying the mark. *Converse, Inc. v. ITC*, 909 F.3d 1110, 128 USPQ2d 1538, 1546 (Fed. Cir. 2018); *In re SnowWizard, Inc.*, 129 USPQ2d 1001, 1005 & n.8 (TTAB 2018) (holding *Converse* applicable to Board proceedings). On this

list, no single factor is determinative. *Performance Open Wheel Racing, Inc. v. U. S. Auto Club Inc.*, 2019 USPQ2d 208901, *22 (TTAB 2019).

In discussing these six factors, we have considered the evidence that pertains to Opposer's activities prior to October 21, 2016, Applicant's constructive use date.⁶⁰

a. Association of the mark with a particular source by actual purchasers

Opposer relies on declarations it submitted in connection with its trademark application in connection with this factor.⁶¹ As discussed earlier in this opinion, we do not consider the declarations for the truth of any assertions made therein. They therefore they have no probative value on the question of acquired distinctiveness.⁶²

Opposer also relies on the testimony of Mr. Flowers, who stated he understands KINETIC LIGHTING to be a source indicator for Opposer's services including lighting, lighting effects, lighting design, and rental of lighting equipment. Mr. Flowers, however, works for Rose Brand, a source of lighting equipment and supplies sold by Opposer.⁶³ He acknowledged that he made his statement aware that the term

⁶⁰ As discussed *supra*, Opposer's acquisition of proprietary rights must precede Applicant's actual or constructive use of its mark. *RxD Media v. IP Application Dev.*, 125 USPQ2d at 1808; *Exec. Coach Builders, Inc. v. SPV Coach Co.*, 123 USPQ2d 1175, 1180 (TTAB 2017) (citing *Otto Roth*, 209 USPQ at 43; *Larami Corp. v. Talk to Me Programs.*, 36 USPQ2d at 1845). We look to October 21, 2016 as the date by which Opposer's alleged mark must have acquired distinctiveness to establish priority.

⁶¹ There are no surveys in the record to assist us.

⁶² These are the Szots, Flowers, Smit, Ravitz, Anlauf, Fonseca, Schweitzer, Cooley, Wilson, Mays, Dunn, Cabada, Puentes, Lu and Tankerson, Knight, Glenn and Gusick Declarations. (21 TTABVUE 309-53).

⁶³ 18 TTABVUE 10; 24 TTABVUE 416-424; *see also* Rosen Depo., 64 TTABVUE 73-75.

KINETIC LIGHTING is used with a design component, and not just as a word mark.⁶⁴ Opposer has not pleaded ownership of a mark with a design element.

In addition, Opposer relies on Mr. Ravitz's testimony – Mr. Ravitz is employed by a company which rents lighting equipment from Opposer and which refers business to Opposer. Mr. Ravitz stated, inter alia, he associates “KINETIC LIGHTING’ with a lighting equipment house in Glendale, California [i.e., Opposer], providing at least the following services: the rental of stage lighting, providing special effects designs, designing lighting and camera projection systems for light shows and exhibits, the rental of multimedia projectors for theatrical events, and the rental of multimedia projectors for public events.”⁶⁵ On cross-examination, however, he admitted that in referring to KINETIC LIGHTING, he was referring not to a word mark but to a combined word and design mark.⁶⁶

Because of Messrs. Flowers and Ravitz's business connections to Opposer, and because of their acknowledgement that they had Opposer's composite mark in mind when they were testifying, the Flowers and Ravitz declarations have reduced probative value. *Cf. Mag Instrument, Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701,

⁶⁴ Flowers Cross Depo., 65 TTABVUE 40 (“Q. And when you were thinking the KINETIC LIGHTING mark, did you understand that to include the -- any design elements or the logo for the company Kinetic Lighting? A. Sure. The word ‘mark’ would reasonably include that.”).

⁶⁵ Ravitz Decl. ¶¶ 1, 17-18, 18 TTABVUE 19, 21-22; Ravitz Cross Depo., 66 TTABVUE 16-17.

⁶⁶ Ravitz Cross Depo., 66 TTABVUE 38-39. Opposer's materials exhibit the following mark:



See, e.g., Rosen Decl. Exh. 3.7, 21 TTABVUE 177.

1723 (TTAB 2010) (“There is no evidence to suggest that this was a random selection of possible declarants. More importantly, none of the declarants, except possibly one, is described as an end consumer. They are almost exclusively either [plaintiff’s] sales representatives or otherwise associated with a company in the flashlight retail business.”).

Opposer also relies on **Applicant’s** witness, Mr. Brown, who acknowledged that he rented lighting equipment from Opposer and that he has an understanding of what services Opposer offers.⁶⁷ We balance Mr. Brown’s acknowledgment with his testimony that “kinetic lighting” is a “generic term for a genre of art,”⁶⁸ and do not place much stock in it.

b. Length, degree and exclusivity of use

Mr. Rosen stated that the mark was first used at least as early as March 15, 2002 and first used in commerce at least as early as November 26, 2002, approximately 22 years ago. (Rosen Decl. ¶ 5, 21 TTABVUE 6). While this reflects relatively long use, long use of a term does not necessarily establish that the term has acquired distinctiveness as a mark. *See Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.*, 123 USPQ2d 1844, 1855 (TTAB 2017) (25-plus years not sufficient to prove acquired distinctiveness); *Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1766 (TTAB 2013), *aff’d mem.*, 565 F. App’x 900 (Fed. Cir. 2014) (19 years use insufficient to prove acquired distinctiveness); *In re Interstate*

⁶⁷ 81 TTABVUE 167-69.

⁶⁸ Brown Cross Depo., 81 TTABVUE 174.

Folding Box Co., 167 USPQ 241, 245 (TTAB 1970) (30 years of use insufficient to prove acquired distinctiveness). We consider the length of Opposer’s use in connection with the other evidence of record.

Opposer states that it provided services to clients throughout the United States;⁶⁹ and that its clients include individuals and entities with operations in the entertainment, exhibit, publicity, social events, and retail markets.⁷⁰ In his declaration, however, Mr. Rosen stated that “Kinetic Lighting has performed services including lighting, lighting effects, lighting design, and rental of lighting equipment in U.S. states such as California, New York, Texas, and Florida.”⁷¹ Mr. Rosen also discussed events in Tennessee.⁷² Most of the evidence – testimony and documentary – reflects use in the Los Angeles, California area.⁷³ We thus find that Opposer’s use of its proposed mark has been primarily on a local level, although in a major metropolitan area. To the extent Opposer has rented lighting equipment that has been sent outside of California, it is not clear from the record whether such rentals were made to entities outside of California or to California entities which transported the rented equipment outside of California.

⁶⁹ Resp. to Applicant’s Interrog. No. 5, 58 TTABVUE 493.

⁷⁰ First Supp. Resp. to Applicant’s Interrog. No. 8, 58 TTABVUE 497.

⁷¹ Rosen Decl. ¶ 5, 21 TTABVUE 6.

⁷² Rosen Cross Depo., 69 TTABVUE 76 (“we’ve been involved with an event in Tennessee, also an annual event. I believe it surrounded one of the country music award shows.”); and 69 TTABVUE 79-80.

⁷³ When questioned in his cross-examination deposition about the number of projects Opposer was involved in outside of California, Mr. Rosen identified two projects in New York and could not identify any in Texas or Florida. Rosen Cross Depo., 69 TTABVUE 74-75. He added, however, that “there would be a lot of rental equipment going to Florida” and that the projects, at least in Texas, are “not really my department.” *Id.*, 69 TTABVUE 71-72.

With regard to third-party use of any similar marks, there is evidence in the record of use of the term COLOR KINETICS for lighting fixtures.⁷⁴ Mr. Rosen testified that he was aware of Color Kinetics, an entity which offers architectural LED lighting products and controls.⁷⁵ In addition, Mr. Rosen testified that on or about 2003, a company named Kinetic Sculptures offered lighting services, and that after communicating with Opposer, Kinetic Sculptures changed its name in exchange for rental equipment.⁷⁶ Further, the record contains numerous uses by third-parties of the term “kinetic lighting” and “kinetic lights” in a merely descriptive or generic manner. *See* discussion *supra*.

The nature and number of third-party uses in the record indicate that use by Opposer has not been substantially exclusive as is typically required for a showing of acquired distinctiveness. Non-exclusive use presents a problem for Opposer in obtaining trademark rights in a designation that is not inherently distinctive, because it interferes with the relevant public’s perception of the designation as an indicator of a single source. *See, e.g., Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 222 USPQ 939, 940-41 (Fed. Cir. 1984) (“When the record shows that

⁷⁴ Flowers Cross Depo., 65 TTABVUE 48; Ravitz Cross Depo., 66 TTABVUE 62, and Exh. 3 to Ravitz Cross Depo. (Ravitz March 11, 2020 Depo.) 66 TTABVUE 141.

⁷⁵ Rosen Cross Depo., 69 TTABVUE 34.

Opposer also relies on the USPTO’s TESS record for the registration for the mark COLOR KINETICS. A registration is only evidence that a mark registered, not evidence of trademark use. *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009) (“[T]hird-party registrations are not evidence of third-party use of the registered marks in the marketplace ...”) (citing *Olde Tyme Foods Inc. v. Roundy’s Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992)).

⁷⁶ Rosen Decl. ¶ 190, 21 TTABVUE 60.

purchasers are confronted with more than one (let alone numerous) independent users of a term or device, an application for registration under Section 2(f) cannot be successful, for distinctiveness on which purchasers may rely is lacking under such circumstances.”); *Target Brands, Inc. v. Hughes*, 85 USPQ2d 1676, 1682-83 (TTAB 2007) (finding substantial use of proposed mark by opposer’s parent company and additional use of it by numerous third parties “seriously undercuts if not nullifies applicant’s claim of acquired distinctiveness”); *Flowers Indus. Inc. v. Interstate Brands Corp.*, 5 USPQ2d 1580, 1588-89 (TTAB 1987) (“[L]ong and continuous use alone is insufficient to show [acquired distinctiveness] where the use is not substantially exclusive.”). The number of third-party uses suggests that consumers are likely to perceive the term “kinetic lighting” when used for lighting services, not as a trademark for one company, but rather as common terminology used by different entities in the industry to describe a feature or characteristic of lighting goods and related services.

c. Amount and manner of advertising

Mr. Rosen stated:

Kinetic Lighting’s advertisement campaigns using the Mark date back at least to 2004. Advertisement of Kinetic Lighting’s services includes Kinetic Lighting’s website at <https://kineticlighting.com>, trade magazines, direct mailing, Google Ads, industry listings, event promotions, and social media presence including Facebook, Twitter, Instagram, and Pinterest. Advertisements in trade magazines have included *BizBash*, *PLSN*, *Inside Weddings*, and *Lighting & Sound America*. *BizBash* is a trade media news source for event and meeting professionals claiming nearly 125,000 unique users. *BizBash* also hosts in-person events in major cities in the United States and Canada. *PLSN* is a trade media for the

visual presentation industry including lighting, staging, production services, facilities management, special effects and others. *Inside Weddings* is a wedding media providing readers for helping and inspiring readers planning their own weddings including all vendor information. *Lighting & Sound America* is an American entertainment technology magazine. *BizBash*, *PLSN*, *Inside Weddings*, and *Lighting & Sound America* are leading trade magazines in the entertainment, lighting, and events industry.⁷⁷

Opposer submitted samples of Opposer's *BizBash* (2006), *Inside Weddings* (2004), and *Lighting & Sound America* (2009) advertising.⁷⁸ Mr. Rosen admitted, however, that he does not know the circulation or number of users for *PLSN*, *Inside Weddings* and *Lighting & Sound America*. And, with regard to *BizBash*, he acknowledged he did not know whether the figure he quoted for the number of users was a monthly or an annual figure.⁷⁹

Mr. Rosen also stated that in 2005, advertising expenses were over \$47,000; and that in 2011, sales and marketing expenses they were over \$29,000; in 2015, they were over \$30,000; in 2016, they were over \$35,000; and in 2017, they were over \$51,000.⁸⁰

Applicant's marketing expenses are not impressive, falling far below levels deemed persuasive in other cases involving the acquired distinctiveness of marks that may be highly descriptive. *Cf. Burke-Parsons-Bowlby Corp. v. Appalachian Log*

⁷⁷ Rosen Decl. ¶¶ 30-32, 45, 21 TTABVUE 14-15, 17-18; Exhs. 16-21, 23 and 24. *See also* Resp. and Supp. Resp. to Applicant's Interrog. No. 6, 58 TTABVUE 494-95.

⁷⁸ *See, e.g.*, Rosen Decl. Exhs. 3.9-3.11, 21 TTABVUE 193-98.

⁷⁹ Rosen Cross Depo., 69 TTABVUE 157-59.

⁸⁰ Rosen Decl. ¶ 55, 21 TTABVUE 20 and 28 TTABVUE 18.

Homes, Inc., 871 F.2d 590, 10 USPQ2d 1443, 1447 (6th Cir. 1989) (finding that \$100,000 for one year’s advertising expenditures did not evidence acquired distinctiveness in “Appalachian Log Structures” for log houses without additional evidence “to establish the amount as extensive or to distinguish it as beyond that necessary to survive in the market”); *In re Country Music Ass’n Inc.*, 100 USPQ2d 1824, 1834 (TTAB 2011) (acquired distinctiveness found where, inter alia, “from 2000-2007, applicant engaged in targeted advertising campaigns, spending approximately \$1-3 million annually on print and television ads, trade shows, promotional events, and email campaigns”). It is not clear as well whether these figures include overseas advertising expenses, and Opposer does not cite to any evidence regarding the number of visitors to Applicant’s website.

Opposer also promotes its services through promotional items, an annual Kinetic Lighting Open House, classes, product demonstrations and trade shows, such as the Live Design International industry trade show in Las Vegas since at least 2004.⁸¹ Mr.

Rosen explained:

58. Since 2009, Kinetic Lighting has hosted an annual trade show event called “Kinetic Lighting Open House.” The event is for entertainment, lighting, and event industry professionals and students to network, attend educational courses, and participate in product demonstrations, comparisons, and showcases from various manufacturers. Hundreds of attendees attend Kinetic Lighting Open House from across the United States.⁸²

⁸¹ Opposer’s Resp. and Supp. Resp. to Applicant’s Interrog. No. 6, 58 TTABVUE 494-95; 21 TTABVUE 27.

⁸² Rosen Decl. ¶¶ 57-58, 21 TTABVUE 21.

65. Since 2013, Kinetic Lighting has been the namesake of The Kinetic Lighting Award for Outstanding Achievement in Theatrical Design for the Los Angeles Drama Critics Circle Awards. The Los Angeles Drama Critics Circle was founded in 1969 and is dedicated to excellence in theatrical criticism and promoting the improvement of theatre in Los Angeles. The Kinetic Lighting Award for Outstanding Achievement in Theatrical Design has been covered by media such as the Los Angeles Times and educational institutions such as the California Institute of the Arts. ...

77. Kinetic Lighting was a festival affiliate sponsor of the 2013 and 2014 Los Angeles Film Festival, presented by Film Independent (21 TTABVUE 25).

78. Kinetic Lighting is a sponsor of the theatrical arts. Kinetic Lighting has provided services including lighting equipment to the Geffen Playhouse in Los Angeles. ...

80. Kinetic Lighting has been a sponsor of the Los Angeles Stage Alliance Ovation Awards since at least 2014.

We cannot gauge the exposure of Opposer's mark from its outreach activities because the record is missing information regarding each of the events, such as the number of participants, how Opposer's sponsorship was featured and how many potential purchasers knew of Opposer's sponsorship. *C.f. In re Soccer Sport Supply Co.*, 507 F.2d 1400, 184 USPQ2d 345, 347 (CCPA 1975) ("The advertisements of record do not support an inference of distinctiveness inasmuch as the evidence fails to disclose information from which the number of people exposed to the [mark] could be estimated--such as circulation of the publications in which the advertisements appear, advertising expenditures, number of advertisements published, volume of sales of the soccer balls, and the like.").

Turning to social media, Opposer has a presence on Facebook, Instagram, Twitter and Pinterest.⁸³ Mr. Rosen stated that Opposer's Facebook account was created at least as early as June 12, 2009, and its Twitter account at least as early as March 2009.⁸⁴ He does not indicate when Opposer created the Instagram and Pinterest accounts.


The social media exhibits on which Opposer relies bear "3/3/20" as a print date – there is no information pertaining to social media activity in 2016 when Applicant filed his application. Also, Mr. Rosen provided no testimony relating to the extent of consumer exposure to the social media platforms (such as the number of followers, likes, or other analytics or metrics). Without context, the limited information we have has little probative value. *In re GJ & AM, LLC*, 2021 USPQ2d 617, *52 (TTAB 2021) ("because Applicant has not provided any testimony or evidence estimating the size of the relevant consumer base, there is no context by which we can assess the extent or effectiveness of Applicant's social media reach."). *See also s. Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1690 (Fed. Cir. 2018) (noting that opposer's witness specified that opposer had more than 300,000 Facebook followers); *New Era Cap v. Pro Era*, 2020 USPQ2d 10596, at *4-5 (Opposer's witness testified to 3.5 million likes on its Facebook page, 204,000 Twitter followers, 710,000 Instagram followers, 37,000 You Tube Channel subscribers, and 500 million social media impressions from SuperBowl XLIX activities). To the extent that these

⁸³ Rosen Decl. ¶¶ 31-34., 21 TTABVUE 14-15.

⁸⁴ *Id.*

social media page printouts bear figures that would purport to show the exposure of these pages to the public, these figures are hearsay and do not establish the truth of the matter.⁸⁵ See *WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1041 (TTAB 2018).



We note as well that Opposer frequently uses the mark  in its marketing materials, on its website, in print advertising and on business cards rather than the pleaded KINETIC LIGHTING mark.⁸⁶ This raises a question as to whether relevant purchasers associate the designation KINETIC LIGHTING, without the accompanying letter “K,” solely with Opposer. See *In re Mogen David Wine Corp.*, 372 F.2d 539, 152 USPQ 593, 595 (CCPA 1967) (where advertising depicting the bottle design sought to be registered always featured the word mark MOGEN DAVID, such evidence failed to prove acquired distinctiveness in the design itself); *In re Franklin County Historical Soc’y*, 104 USPQ2d 1085, 1093 (TTAB 2012) (the applicant is not known by the proposed mark “CENTER OF SCIENCE AND INDUSTRY,” but rather by the shortened acronym COSI, and that if any term has gained a degree of renown, it is the acronym; none of the examples shows use of the proposed mark, “CENTER OF SCIENCE AND INDUSTRY,” without the acronym COSI, and there is no

⁸⁵ In any event, these numbers do not show significant exposure to the public from the social media platforms. The social media exhibits show on their face the following: Instagram (6,013 followers), Twitter (5,716 followers), Facebook (3,775 likes and 3,838 followers) and Pinterest (142 followers). Rosen Decl. Exhs. 23-25, 21 TTABVUE 410-20.

⁸⁶ See Rosen Decl. Exhs. 3.7-3.11, 3.13 – 3.18, 9, 11, 12, 14-22, 21 TTABVUE 162-98, 201-17, 383, 386-89, 393-409.

indication that any goodwill associated with COSI has somehow been transferred to “CENTER OF SCIENCE AND INDUSTRY”).

In sum, Opposer’s showing regarding its marketing activities fails to help Opposer establish that its proposed mark has acquired distinctiveness.

d. Amount and manner of sales, and number of customers

With regard to Opposer’s sales, Mr. Rosen testified that Opposer’s gross sales from 2005 through 2018 have been in the millions of dollars for each year. He stated in the non-confidential portion of his testimony:

[G]ross income for the years 2003 to 2009 total[ed] over \$20,000,000. ... In 2009, Kinetic Lighting earned a gross revenue of about \$5,000,000 for its services of providing lighting, lighting design, and lighting equipment rentals for about 150 to 200 events. Kinetic Lighting had a gross revenue of about \$10,000,000 in 2016 and had an estimated gross revenue, at the time of the declaration, of \$12,000,000 for 2017.⁸⁷

Regarding its customers, Opposer did not provide a specific number of customers or the identity of its customers – it identified the events it serviced. We gather from Mr. Rosen’s testimony that Opposer provides design and lighting equipment rentals for hundreds of events a year, and that in 2009, Opposer provided design and lighting equipment rental for about 150 to 200 events.⁸⁸ In its brief, Opposer lists 30 events prior to 2017 for which it provided lighting equipment, installation and rentals.⁸⁹ It

⁸⁷ Rosen Decl. ¶ 9, 21 TTABVUE 7.

⁸⁸ *Id.*

⁸⁹ Opposer’s brief, 99 TTABVUE 11-13. Opposer lists – with citations to the evidentiary record – University of Southern California homecoming rally and concert (2001), Television Arts & Sciences Primetime Emmy Awards parties (2003), Arnold Schwarzenegger Governor campaign (2003), Autry Museum of Western Heritage 2003 gala, Landry’s Restaurants’ 2003 sales meeting, daKAH hip hop orchestra (2003), Pebble Beach Auctions (2004), the premiere

is not clear, however, whether the 30 events involved some or all of the same customers. Also, the *Converse* factor concerns the number of customers, not the number of events.

As with Opposer's advertising figures, we cannot accurately gauge Opposer's level of success without additional evidence as to Opposer's market share, or, alternatively put, how Opposer's Lighting Services under its alleged mark rank in terms of sales in its industry. "Our precedents have long alerted practitioners to the fact that the absence of evidence of competitive contextual information may limit the probative value that we might otherwise accord advertising and sales numbers in the acquired distinctiveness inquiry." *In re GJ & AM*, 2021 USPQ2d at *14-15 (citing *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1480 (TTAB 2016); *AS Holdings, Inc. v. H & C Milcor, Inc.*, 107 USPQ2d 1829, 1838 (TTAB 2013); *Target Brands v. Hughes*, 85 USPQ2d at 1681; *In re Gibson Guitar Corp.*, 61 USPQ2d 1948, 1952 (TTAB 2001)). *See also*, Thomas J. McCarthy, 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 15:5 (5th ed., March 2024 Update) ("Raw sales figures need to be put into context to have any meaning. That is, if a company says that its sales of goods or services under the mark are \$x, that number cannot be said to be 'impressive' or 'persuasive' evidence of secondary meaning without knowing how \$x compares with the norms of that industry.").

of the television show *Prision Break* (2005), and the premier party of the film *Mr. & Mrs. Smith* (2005).

In addition, as pointed out above, Mr. Rosen testified that Opposer offered its services overseas. It is not clear from the sales figures whether they include income from overseas sales.

Applicant's evidence regarding its sales, and the number of its customers, without any context and without further supplementation or explanation, fails to help Opposer establish that its proposed mark has acquired distinctiveness.

e. Intentional copying

Opposer does not reference any instances of intentional copying other than Applicant's adoption and use of his mark. Mr. Bauder testified, however, that he "was not aware of Opposer, Opposer's Mark, or Opposer's goods and services at the time [he] selected the Kinetic Lights Mark in 2013."⁹⁰ Mr. Bauder maintains he learned of Opposer's use of KINETIC LIGHTING in 2015.⁹¹ We thus find that Opposer has not identified any instances of intentional copying.

In addition, Opposer is silent on whether Mr. Bauder's alleged copying was to confuse consumers and pass off his product as Opposer's. "Copying is only evidence of secondary meaning if the [copier's] intent in copying is to confuse consumers and pass off his product as the plaintiff's." *Stuart Spector Designs, Ltd. v. Fender Musical Instruments Corp.*, 94 USPQ2d 1549, 1575 (TTAB 2009) (quoting *Thomas & Betts Corp. v. Panduit Corp.*, 65 F.3d 654, 36 USPQ2d 1065, 1072 (7th Cir. 1995)).

⁹⁰ Bauder Decl. ¶ 59, 48 TTABVUE 52.

⁹¹ Bauder Cross Depo., 81 TTABVUE 121.

f. Unsolicited media coverage

Opposer points to the following as unsolicited media coverage:

- April 28, 2004 bizbash.com article entitled “LIGHTING: Cool Seamless Projections” stating, “Los Angeles-based Kinetic Lighting transforms venues with scrolling images using the Finelite Image Projector,” noting “Kinetic Lighting sends Finelite Projectors and technicians to events across the country.” (21 TTABVUE 447-48.)
- February 23, 2006 bizbash.com article on Opposer’s participation in a Hollywood Bowl season premier. (21 TTABVUE 461.)
- March 2006 bizbash.com article titled “Thinking Outside the Hall” regarding lighting work that Opposer helped with for Disney Concert Hall. (21 TTABVUE 425.)
- June 29, 2006 bizbash.com article covering T-Mobile’s “Sidekick Party” noted “Kinetic Lighting’s colorful swirls contributed to the fun playhouse theme.” (21 TTABVUE 473-480.)
- August 1, 2007 exhibitiononline.com article titled “Kinetic Lighting Goes Green for Simpson Movie Premier Party,” noting “[w]hen the producers of The Simpsons Movie premier party wanted to incorporate eco-friendly technology into the event, they turned to Kinetic Lighting, Inc.” and quoting a producer of the event saying, “We are thankful for the professionalism of the entire Kinetic Lighting staff.” (21 TTABVUE 133.) The article also notes that “Kinetic Lighting is an award-winning lighting company...” (*Id.*)
- September 29, 2008 bizbash.com article covering Macy’s “Passport fashion show” noted “Kinetic Lighting’s psychedelic lighting pattern decorated the party tent.” (21 TTABVUE 567.)
- January 26, 2009 bizbash.com article covering various special events, noted “[f]or the gala opening of the Chado Ralph Rucci exhibit at the Phoenix Museum of Art [in Arizona] in March, Kinetic Lighting incorporated elements of the tabletops into decorative wall illuminations.” (21 TTABVUE 626.)

- February 9, 2010 bizbash.com article covering the premier of the film Valentine’s Day (21 TTABVUE 141-145) noted “Gobos from Kinetic Lighting cast heart-shaped patterns on the carpet and tent walls” (25 TTABVUE 69.)
- November 15, 2011 bizbash.com article covering the Twilight movie premier noted “A beach vignette complete with projected ocean from Kinetic Lighting.” (25 TTABVUE 169.)
- September 14, 2011 bizbash.com article covering Emmy Awards noted “FOX has also partnered with Kinetic Lighting to provide Prism Projection RevEAL Studio LED lighting fixtures throughout the red carpet area.” (25 TTABVUE 498.)
- November 6, 2012 bizbash.com article covering the “Breeders’ Cup Kickoff at the Mayor’s Mansion” noted “Purple uplighting from Kinetic Lighting provided an eerie glow for the flowers from Sticks & Stones.” (25 TTABVUE 206.)
- February 7, 2014 bizbash.com article covering that year’s Super Bowl events noted that “Los Angeles-based Kinetic Lighting handled the [Fox] event’s lighting.” (25 TTABVUE 341.)
- March 25, 2014 bizbash.com article covering a TED Conference, a “flagship event drew about 1,200 attendees from 42 countries,” noted “Passersby could use their cell phones to control the piece’s lighting, which was provided by Graphics eMotion and Kinetic Lighting.” (25 TTABVUE 311.)

Many of the articles are from one publication, BizBash. As noted earlier in this decision, Mr. Rosen stated, “*BizBash* is a trade media news source for event and meeting professionals claiming nearly 125,000 unique users. *BizBash* also hosts in-person events in major cities in the United States and Canada. *BizBash* [is a] leading trade magazines in the entertainment, lighting, and events industry.”⁹² A review of

⁹² Rosen Decl. ¶¶ 30-32, 45, 21 TTABVUE 14-15, 17-18; Exhs. 16-21, 23 and 24.

the articles reflects that many of them concern events where various contributors such as caterers and lighting professionals participated. Opposer is not the subject of, or featured in, the articles – the articles mention Opposer in passing. Thus, while there is evidence of unsolicited media coverage, the persuasiveness of this evidence is limited.

g. Discussion/Conclusion

We have discussed the *Converse* factors as they apply to this case and have noted the shortcomings of Opposer’s evidence regarding each factor. We have also found that the designation KINETIC LIGHTING is highly descriptive as applied to Opposer’s Lighting Services, and determined that Opposer’s burden of proving acquired distinctiveness is very high. *See In re Steelbuilding.com*, 75 USPQ2d at 1424 (“The proposed mark is highly descriptive. Therefore, applicant had the burden to show a concomitantly high level of secondary meaning.”). The length of Opposer’s use is outweighed by the other evidence showing that the phrase “kinetic lighting” is highly descriptive, as well as the absence of direct evidence showing consumer recognition of the wording as a source indicator for Opposer’s Lighting Services. We therefore conclude that Opposer has failed to carry its burden of showing that its alleged mark KINETIC LIGHTING has acquired distinctiveness prior to the filing date of Applicant’s application, and that it has priority based on its common law use of its claimed mark KINETIC LIGHTING for Opposer’s Lighting Services.⁹³

⁹³ Opposer points out that the examining attorney who examined Opposer’s application found that KINETIC LIGHTING had acquired distinctiveness and that the same evidence which persuaded the examining attorney to withdraw a Section 2(e)(1) refusal is now before us. (99 TTABVUE 14, citing 21 TTABVUE 365-73.) The Board, however, is not bound by an

Because Opposer has not established its priority, we need not reach the issue of likelihood of confusion.

Decision: The opposition is dismissed.

examining attorney's decision. See *In re La. Fish Fry Prods.*, 116 USPQ2d at 1265; *Alcatraz Media v. Chesapeake Marine Tours*, 107 USPQ2d at 1765.