

This Opinion is Not  
A Precedent of the TTAB

Mailed:  
December 31, 2012

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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Binge Responsibly, LLC  
v.  
Power Hour LLC

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Opposition No. 91195461  
against Serial No. 77805395  
filed August 14, 2009

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William F. Lang, IV, of Lang Patent Law LLC, for Binge  
Responsibly, LLC

Power Hour LLC, pro se.

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Before Rogers, Chief Administrative Trademark Judge, and  
Grendel and Holtzman, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Power Hour LLC seeks registration on the Principal  
Register of the mark POWER HOUR (in standard character  
format) for "Digital media, namely, CDs, DVDs, software  
featuring a timed drinking game where players take a shot  
of beer every minute for an hour" in International Class 9,  
Application Serial No. 77805395. Applicant filed the use-  
based application on August 14, 2009, claiming January 1,  
2000 as its first use date. At the request of the

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trademark examining attorney, applicant submitted a disclaimer that no claim is made to the exclusive right to use the word "HOUR" apart from the mark as shown.

Binge Responsibly LLC opposes this application on the ground that the applied-for mark is generic or merely descriptive under Section 2(e)(1) of the Act, 15 U.S.C. §1052(e)(1), and has not acquired distinctiveness. Applicant, in its answer, denied the genericness and descriptiveness of its mark, and made numerous assertions characterized as "Affirmative Defenses," including priority of use by applicant, that consumers recognize the mark as a reference to its product, and that applicant's activities in "10 years of marketing and product creation" have rendered the term "well known."

THE RECORD

The record includes the pleadings,<sup>1</sup> as well as the file of the opposed application, Serial No. 77805395. See Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b). Opposer also introduced into evidence through its notice of reliance [TTABVue Entry #27] a variety of documents, including applicant's answer to the notice of opposition,

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<sup>1</sup> The exhibits attached to applicant's answer do not form part of the evidentiary record and will not be considered except to the extent that they have been properly identified and introduced into evidence. See Trademark Rule 2.122(c).

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responses to opposer's interrogatories and requests for documents, newspaper articles, website printouts, and a book excerpt. See Trademark Rule 2.120(j)(3), 37 C.F.R. § 2/120(j)(3). The printed publications and Internet website printouts provided in opposer's notice of reliance are admissible pursuant to Trademark Rule 2.122(e), 37 C.F.R. §2.122(e) and Safer Inc. v. OMS Investments Inc., 94 U.S.P.Q.2d 1031, 1039 (TTAB 2010), as the website printouts identify the date of publication or date that they were accessed and printed, and the source (e.g., the URL). Applicant's responses to opposer's interrogatories also are admissible under notice of reliance, but documents produced by applicant in response to a request for production of documents are not. Compare authorities discussed in TBMP Sections 704.10 and 704.11 (3d ed. June 2012).<sup>2</sup> Nonetheless, many of applicant's interrogatory responses refer to documents provided by applicant to opposer and we have considered the produced documents to the extent they were referenced in the interrogatory responses.

Additionally, opposer introduced into evidence the trial testimony taken on August 17, 2011, of Alicia

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<sup>2</sup>Opposer should not have submitted a copy of applicant's answer to the notice of opposition, as the answer was already of record.

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Spagnola, owner of Binge Responsibly LLC, along with Exhibit Nos. 1-5 [TTABVue Entry #28].

During the discovery period, applicant filed with the Board copies of its responses to opposer's interrogatories and requests for documents.<sup>3</sup> Discovery requests and responses are not to be filed with the Board except as needed in conjunction with the filing of a related motion or appropriate evidentiary submission filed during trial. See discussion in TBMP Section 409. Accordingly, the April 21 and 22, 2011 filings made by applicant, shown as TTABVue entries #16 through #26, have not been considered. At trial, applicant introduced no evidence during its assigned testimony period.

Only opposer filed a brief.

ANALYSIS

Opposer's Standing

The record establishes opposer's standing to bring this opposition proceeding. Section 13 of the Trademark Act provides in relevant part that "[a]ny person who believes that he would be damaged by the registration of a mark upon the principal register, ... may, upon payment of

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<sup>3</sup> Prior to serving the responses on opposer and filing the copies with the Board, applicant requested an extension of time to respond. Opposer did not contest the request, which is therefore granted as conceded. See Trademark Rule 2.127(a).

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the prescribed fee, file an opposition in the Patent and Trademark Office, stating the grounds therefor...." To assess the requisite showing under the statute, a two-part, judicially created test requires that opposer must have: (1) a "real interest" in the proceedings and (2) a "reasonable" basis for his belief of damage. See *Ritchie v. Simpson*, 170 F.3d 1092, 1095, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999). Opposer asserts in the notice of opposition and applicant admits in its answer that opposer markets products that are similar to those of applicant. (Notice of Opp., ¶3; Ans., ¶3). Opposer alleges that "[i]f Applicant's registration is granted, Opposer will be unable to describe its products and services by using the commonly recognized name of the game for which these products and services are utilized." (Notice of Opp., ¶5).

We conclude that opposer's status as a competitor who has the right to use the term POWER HOUR to describe goods that are similar to those recited in applicant's involved application establishes its standing to oppose applicant's mark. See *Plyboo America Inc. v. Smith & Fong Co.*, 51 USPQ2d 1633 (TTAB 1999), *aff'd* 994 F.2d 1569, 26 USPQ2d 1912 (Fed. Cir. 1993); *Eastman Kodak Co. v. Bell & Howell Document Management Products Co.*, 23 USPQ2d 1878, 1879-80 (TTAB 1992). In addition, opposer introduced an e-mail

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message from applicant's owner, Steven Roose, that predated the filing date of the application, in which Mr. Roose referred to opposer's products sold as "power hour mixes of music" (Spagnola Test., p. 5, Exh. 1). This evidence further establishes opposer's requisite interest in the proceeding and potential damage from registration. See *Golomb v. Wadsworth*, 592 F.2d 1184, 201 USPQ 200, 202 (CCPA 1979) (presuming the "damage" requirement when the proposed mark is descriptive and opposer "has a sufficient interest in using the descriptive term in its business"), cert. denied, 444 U.S. 833 (1979). Moreover, opposer's receipt of a cease-and-desist letter from applicant (Spagnola Test. p. 13) further buttresses the reasonableness of opposer's belief of damage from the potential registration.

Mere Descriptiveness

Opposer bears the burden of showing, by a preponderance of the evidence, that the applied-for mark is merely descriptive. See *DuoPross Meditech Corp. v. Inviro Medical Devices Ltd.*, \_\_\_ F.3d \_\_\_, 103 USPQ2d 1753, 1755-56 (Fed. Cir. 2012); see also *Goodyear Tire & Rubber Co. v. Continental General Tire Inc.*, 70 USPQ2d 1067, 1070 (TTAB 2003). A mark that "immediately conveys knowledge of a quality, feature, function, or characteristic of the goods

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or services" must be deemed merely descriptive, and therefore unregistrable, pursuant to the provisions of Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1). In re Bayer Aktiengesellschaft, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007); see also In re MBNA America Bank N.A., 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003) "a mark is merely descriptive if the ultimate consumers immediately associate it with a quality or characteristic of the product or service"). To be "merely descriptive," a term need only describe a single significant quality or property of the goods. In re Gyulay, 820 F.2d 1216, 1218, 3 USPQ2d 1009, 1010 (Fed Cir. 1987). Descriptiveness of a mark must be considered in relation to the particular goods for which registration is sought. See In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978). The question is whether someone who knows what the goods are will understand the mark to convey information about them. In re Tower Tech, Inc., 64 USPQ2d 1314, 1316-1317 (TTAB 2002); In re Patent & Trademark Services Inc., 49 USPQ2d 1537, 1539 (TTAB 1998).

According to the identification of goods, applicant's CDs, DVDs, and software facilitate play of "a timed drinking game where players take a shot of beer every minute for an hour." The goods feature timers for the

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game, as well as entertainment content, such as music and quotations, to accompany the playing of the drinking game. (E.g., Opposer's Not. of Rel., Exh. 1). Opposer alleges that "power hour" refers to a drinking game in which "players consume one shot of beer each minute, for a period of one hour," and that "the game predates Applicant's software, and does not require Applicant's software." (Notice of Opp., ¶6).

Opposer presented a strong evidentiary case to support this common understanding of "power hour." As an initial matter, applicant's own website acknowledges that "[t]he idea of Power Hour has existed for centuries. It is quite simple. Take a shot of beer every minute for an hour... We have spiced up this age old drinking game ...." (Opposer's Not. of Rel., Exh. 1). Although applicant states in its answer that "there was no existing Power Hour game" prior to applicant's, this contention is belied by evidence of record that pre-dates not only the filing date of this application, but also applicant's claimed first use date of January 1, 2000.

This evidence shows prior use of "power hour" to refer to essentially the same drinking game that applicant claims to have created in 2000. For example, a 1991 newspaper article addressing youth drinking noted, "Frequently, party



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entertainment includes games such as 'power hour,' in which players drink a shot of beer every minute for an hour."

(Id., Exh. 2, "Alcohol's Escape, Thrills Ensnaring Younger Teens: Heavy Drinking Starts as Early as 9 or 10" by Ellen Uzelac & Joel McCord, *The Sun*, August 18, 1991 at 1A).

Similarly, a 1998 book entitled *The Ultimate Drinking Games Book* (1998) contains an entry for "Power Hour" describing it as a challenge where players "swig a gulp of beer, every minute, for an entire hour." (Id., Exh.3, at p. 128).

Also, according to a 1998 newspaper article, drinking games played on campuses include "'power hour,' which requires ingesting a shot of beer each minute for 60 minutes." (Id., Exh. 4, "Binge Drinking: On Campus, Why Does One Drink Lead to Another ... and Another?" by Alan Scher Zagier, *News and Observer*, December 13, 1998 at 1A).

More recent third-party uses of "power hour" in connection with goods similar to applicant's also support the descriptiveness of the term. For example, such uses include a promotional webpage for a smart-phone application that indicates that it will "start you on the way to an endless power hour," and that one of its features can provide "a burnable power hour." (Id., Exh. 7, [ipowerhour.com](http://ipowerhour.com)). Similarly, a software webpage ([sofotex.com](http://sofotex.com)) offers an iPod "Power Hour" application that

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"plays the middle 60 seconds of 60 songs," which is "[u]seful for drinking games," and where the "[u]ser can now set how long to make the power hour." (Id., Exh. 8). The hourofmusic.com website provides music to accompany the "Power Hour Drinking Game," stating that "Power hour is a simple game that can have any number of players (hopefully more than one)" wherein "each player drinks a one [sic] shot of beer every minute signaled by a song change." (Id., Exh. 23). The powerhourcd.com website offers a music CD created by someone "frustrated with performing power hour at college watching the clock," and recommends keeping an eye on "people that [sic] are less familiar with the power hour." (Id., Exh. 24). None of these uses appear to refer to applicant or its goods. Indeed, applicant makes no argument to the contrary. Thus, others in applicant's industry use "power hour" to name the drinking game in describing their goods.

Furthermore, a significant volume of dictionary and other evidence shows use of "power hour" to describe a type of drinking game, without reference to applicant or its software. For example, a Wikipedia entry defines "Power hour" as "a drinking event where every player drinks one shot of beer every minute." (Id., Exh. 10, wikipedia.org). The website for Barmeister, an Online Guide to Drinking,

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reflects an entry for "Drinking Game: Power Hour," indicating, "The object is to take a shot of beer every minute for an entire hour." (Id., Exh.13). The first four definitions of "power hour" in the Urban Dictionary indicate that it involves drinking a shot of beer every minute for an hour. (Id., Exh. 11). Other examples of similar descriptive uses include the idrink.com website, featuring "drinking games & contests," which contains an entry for "Power hour," describing it as a drinking game where a shot of alcohol is consumed each hour. (Id., Exh.14). Also, a website for "Power Hour HQ: Video Power Hour Directory" includes a music video with 60 songs for use by those "doing power hours." (Id., Exh. 19). The Angelfire.com website shows an entry for "Power Hour" under the heading "Drinking Games," and states that "[t]he object is to take a shot worth of beer every minute for an entire hour." (Id., Exh. 22). None of these uses appear to refer to applicant or its goods. This evidence shows widespread use of "power hour" as the name of the same drinking game also described in the other evidence that pre-dates applicant's claimed first use date. Clearly, both before and after January 2000, consumers have known the term not as a source indicator, but rather as a long-established type of drinking game, independent of any use by applicant.

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In assessing the descriptiveness issue, we also take note of the fact that applicant initially approached opposer's owner, Ms. Spagnola, about her power-hour-related products and even entered into a business relationship with opposer, without asserting exclusive rights in the term POWER HOUR or objecting to opposer's use of the term. The testimony and accompanying exhibits of Ms. Spagnola, indicate that when applicant's owner, Mr. Roose, initially contacted her in December 2008, he raised no objection to her use of the term "power hour" in connection with her goods, and in fact, expressed admiration for her products. (Spagnola Test., p. 7; Exh.1). Furthermore, when applicant subsequently proposed that it and opposer enter into a business relationship under a written contract, applicant's owner forwarded a proposed agreement already executed by applicant that made no explicit claim to trademark rights in POWER HOUR, despite a section of the contract entitled "Copyright, Trademark, Patent Use/Rights." (Id., Exh. 3, p. 3). Given the nature of the communications between applicant and opposer, and the nature of their business relationship, we consider applicant's failure to initially object to opposer's use of POWER HOUR, or to explicitly address rights in and use of the term in the written contract between them telling. These actions give rise to

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an inference that, at least at that point in time, applicant likely viewed POWER HOUR as a descriptive term available for use by others.

Ultimately, the evidence of record points unmistakably to the conclusion that the proposed mark is highly descriptive. The third-party use of the term in conjunction with a drinking game is widespread and voluminous. Well before applicant's claimed first use date, the term appears to have been established as the name of a drinking game. Because POWER HOUR refers to the game that applicant's goods are designed to facilitate or accompany, we conclude that the proposed mark is merely descriptive of a significant feature or function of applicant's goods.

Acquired Distinctiveness

Although applicant's answer does not explicitly refer to "acquired distinctiveness" or "Section 2(f)" as affirmative defenses, applicant alleges in its answer that POWER HOUR is understood as a reference to its products, and describes sales and promotion under the mark. Although applicant submitted no evidence during its testimony period, thereby waiving the opportunity to provide its own evidence of acquired distinctiveness, opposer introduced into evidence documents provided with applicant's

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interrogatory responses which contain relevant information. In its brief, opposer also listed acquired distinctiveness as one of the issues in the case, and argued the insufficiency of the evidence regarding this issue.

(Opposer's Brief at pp.7, 19-23; TTABVue Entry #30). Thus, we will consider whether POWER HOUR has acquired distinctiveness as a source indicator for applicant, such that it would no longer be considered *merely* descriptive.

The burden of proving that a mark has acquired distinctiveness rests on applicant, as the party asserting distinctiveness. See *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1006 (Fed. Cir. 1988). "To establish secondary meaning, a manufacturer must show that, in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself." *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 214 USPQ 1, 4 n.11 (1982) (citation omitted). The amount and character of evidence required to establish acquired distinctiveness depends on the facts of each case and particularly on the nature of the mark sought to be registered. See *Roux Labs., Inc. v. Clairol Inc.*, 427 F.2d 823, 166 USPQ 34, 39 (CCPA 1970); *In re Gammon Reel, Inc.*, 227 USPQ 729, 730 (TTAB 1985). Typically, more evidence is required when a

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mark is so highly descriptive that purchasers seeing the matter in relation to the named goods or services would be less likely to believe that it indicates source in any one party. See, e.g., *In re Bongrain Int'l Corp.*, 894 F.2d 1316, 13 USPQ2d 1727, 1729 n.4 (Fed. Cir. 1990); *In re Seaman & Assocs., Inc.*, 1 USPQ2d 1657, 1659 (TTAB 1986). As set forth above, the evidence in this case indicates that POWER HOUR is highly descriptive.

Applicant's affirmative defenses in its answer, contain uncorroborated assertions about the use of social media accounts, online stores, and ownership of a variety of domain names,<sup>4</sup> some of which include the term POWER HOUR (¶¶15, 16, 17). Applicant further provides a timeline asserting use of POWER HOUR since January 2000, and points to its use of the "TM" symbol to buttress its claim that the mark is source-indicating (¶¶19, 20). Although applicant also lays claim to millions of downloads of its software and tens of thousands of dollars in sales in both its answer and interrogatory responses, no supporting documentation or other corroboration of these self-serving

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<sup>4</sup>We note that the mere registration of a term as a domain name does not establish trademark rights in the term. See *Brookfield Communications Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 50 USPQ2d 1545, 1555 (9th Cir. 1999); see also TMEP § 1215.02(a) (8<sup>th</sup> ed. 2011) (noting that a domain name may be registered as a trademark only if it functions as a source identifier).

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claims was introduced into the evidentiary record. "A party's response to an interrogatory is not without evidentiary value, but generally is viewed as 'self-serving.'" *ShutEmDown Sports, Inc. v. Lacy*, 102 USPQ2d 1036, 1043 (TTAB 2012), citing *General Electric Co. v. Graham Magnetics Inc.*, 197 USPQ 690, 692 n.5 (TTAB 1977); *Grace & Co. v. City of Los Angeles*, 278 F.2d 771, 776 (9th Cir. 1960), and *Beecham Inc. v. Helene Curtis Industries, Inc.*, 189 USPQ 647 (TTAB 1976). Thus, we accord little weight to applicant's claims regarding downloads and sales. Applicant acknowledges in the affirmative defenses in its answer that a search on the Facebook social-media site reveals that applicant's "Power Hour page has 942 fans where the association to the game outside my company has only 750 likes.... " Thus, even applicant's own characterization of the situation reflects substantial consumer understanding of the term as non-source-indicating.

Accordingly, we find that applicant failed to meet its burden to show that POWER HOUR has acquired distinctiveness as a source indicator for its goods. In making this finding, we keep in mind that, as discussed in the prior section, the term is highly descriptive for the goods for which applicant seeks registration and the record shows



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that applicant's use has not been substantially exclusive. See Quaker State Oil Refining Corp. v. Quaker Oil Corp., 453 F.2d 1296, 172 USPQ 361, 363 (CCPA 1972); Nextel Communications Inc. v. Motorola Inc., 91 USPQ2d 1393, 1408 (TTAB 2009). We have not hesitated to deny Section 2(f) claims on much more extensive evidentiary records than applicant's. See, e.g., In re Crystal Geysler Water Co., 85 USPQ2d 1374 (TTAB 2007) (holding applicant's evidence of acquired distinctiveness, including a claim of use since 1990, sales of more than 7,650,000,000 units of its goods, and extensive display of its mark CRYSTAL GEYSER ALPINE SPRING WATER on advertising and delivery trucks and promotional paraphernalia, insufficient to establish that the highly descriptive phrase ALPINE SPRING WATER had acquired distinctiveness for applicant's bottled spring water).

Genericness

Turning to the genericness claim, opposer argues that POWER HOUR should be considered generic because others who make products for playing the drinking game 'power hour' must be able "to describe their goods as what they are." (Opposer's Brief at 14).

Generic terms are terms that the relevant purchasing public understands primarily as the common or class name

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for the goods or services. In re Dial-A-Mattress Operating Corp., 240 F.3d 1341, 57 USPQ2d 1807, 1811 (Fed. Cir. 2001); In re Am. Fertility Soc'y, 188 F.3d 1341, 51 USPQ2d 1832, 1836 (Fed. Cir. 1999). A two-part test is used to determine whether a designation is generic: (1) What is the genus of goods or services at issue? and (2) Does the relevant public understand the designation primarily to refer to that genus of goods or services? H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc., 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986).

The identification of goods in this case indicates the appropriate genus -- CDs, DVDs, software featuring a drinking game. See Magic Wand, Inc. v. RDB, Inc., 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991) (genericness analysis focuses on identified services). We do not find that the evidence of record rises to the level of showing that the term POWER HOUR refers to a category of CDs, DVDs, and software. As indicated above, most of the evidence in this case relates to "power hour" as the name of a drinking game involving the consumption of shots of beer, apparently played without any use of CDs, DVDs, or software. The few examples of descriptive or arguably generic use with CDs, DVDs, or software do not meet the requisite standard for

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genericness here. See Magic Wand, 19 USPQ2d at 1553 (limited generic use fails to establish genericness).

Although opposer draws an analogy to the hypothetical proposed mark CHESS, for a computer chess game, an important distinction differentiates the mark and goods at issue here. The game of chess may be fully played via computer using a virtual chessboard and pieces, such that the computer game *is* the game of chess. However, the central focus of the game described by the proposed mark POWER HOUR rests on drinking shots of beer that obviously are not provided by the digital media. Thus, applicant's CDs, DVDs, or software are an accompaniment to the traditional POWER HOUR game, but do not provide everything needed to play the game. Thus, unlike with CHESS as the name of a genus of computer game that may be played entirely via chess software, the user cannot play POWER HOUR on the software. Rather, the player may use the software, CDs, and DVDs to enhance or accompany the game. So while POWER HOUR may describe a significant feature of the CDs, DVDs, and software, the evidence does not show that the term refers to a category of such goods. Thus, the term does not rise to the level of genericness in the context of these goods.

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**Decision:** The opposition to the registration of POWER HOUR is hereby sustained under Section 2(e)(1) of the Trademark Act because the mark is descriptive and lacks acquired distinctiveness under Section 2(f), but dismissed on the ground of genericness.