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Mailed: 9/11/07

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Panasonic Corporation of North America

Serial No. 76002076

Morton Amster of Amster, Rothstein & Ebenstein for
Panasonic Corporation of North America.

Tamara G. Frazier, Trademark Examining Attorney, Law Office
116 (Michael W. Baird, Managing Attorney).¹

Before Seeherman, Quinn and Walsh, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by Panasonic Corporation of
North America to register the mark E-WEAR for "portable
audio products, namely, digital audio players that may be
worn on various parts of the user's body, such as the head,
wrist, arm, neck or hair."²

¹ Ms. Frazier did not assume responsibility of the application
until the filing of the appeal brief.

² Application Serial No. 76002076, filed March 16, 2000, alleging
a bona fide intention to use the mark in commerce. Applicant
subsequently filed an amendment to allege use setting forth a
date of first use anywhere and a date of first use in commerce of
January 29, 2001.

The trademark examining attorney refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that applicant's mark, as applied to applicant's goods, is merely descriptive thereof.

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

The examining attorney maintains that the prefix "e" is a well-known abbreviation for "electronic," and that the term "wear" is descriptive of audio products designed to be worn by the user (as reflected in the identification of goods). The examining attorney contends that the terms "e-wear" and "wearable electronics" are used interchangeably within the electronics industry, and that both terms are merely descriptive of audio products worn by the user. In support of the refusal, the examining attorney introduced dictionary definitions of "e" and "wear," articles retrieved from the NEXIS database and the Internet, and a printout listing the results of a search using the GOOGLE search engine.

Applicant argues that its mark does not forthwith convey an immediate idea about its goods and that, therefore, its mark is, at worst, just suggestive when applied to the goods. Applicant points to various meanings

of the letter "E" other than "electronic." Applicant also contends that while the term "wear" may be descriptive as applied to conventional clothing, it is only suggestive of non-clothing items, such as applicant's portable electronics. The average consumer does not think, applicant maintains, of electronic products being "worn" as opposed to be carried on the user's body. Applicant questions the probative value of the examining attorney's evidence, pointing out that the terms "wearable electronics" and "e-wear" are often used in the context of goods (e.g., clothing) completely different from applicant's audio products. Moreover, applicant contends, even if the term "wearable electronics" were viewed as merely descriptive, it is a leap therefrom to conclude that E-WEAR is merely descriptive. Also noteworthy, according to applicant, is the number of articles (over 100) in printed publications wherein E-WEAR is used as a trademark to identify applicant's products. Finally, applicant urges that any doubt be resolved in its favor. In support of its position, applicant submitted articles in printed publications, and third-party registrations of marks that include the non-disclaimed term "wear" for goods other than clothing.

A term is deemed to be merely descriptive of goods or services, within the meaning of Trademark Act Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. See, e.g., *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods or services. See *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); and *In re MBAssociates*, 180 USPQ 338 (TTAB 1973).

Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used or is intended to be used on or in connection with those goods or services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use or intended use. That a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). It is settled that:

....the question of whether a mark is merely descriptive must be determined not in the abstract, that is, not by asking whether one can guess, from the mark itself, considered in a vacuum, what the goods or services are, but rather in relation to the goods or services for which registration is sought, that is, by asking whether, when the mark is seen on the goods or services, it immediately conveys information about their nature.

In re Patent & Trademark Services Inc., 49 USPQ2d 1537, 1539 (TTAB 1998).

The examining attorney has submitted evidence that the letter "e-" is defined as "electronic; e-mail." (www.encarta.msn.com). See also *In re SPX Corp.*, 63 USPQ2d 1592 (TTAB 2002); and *In re Styleclick.com Inc.*, 57 USPQ2d 1445 (TTAB 2000), in both of which cases the Board noted dictionary definitions that the prefix "E" indicates "electronic." The examining attorney also submitted a dictionary definition showing that the term "wear" is defined, in relevant part, as "the act of wearing or the state of being worn." (www.bartleby.com) The term is further defined, in relevant part, as "to bear or have upon the person; to have attached to the body or part of it or to the clothing; to carry on or as if on the person."

Webster's Third New International Dictionary of the English Language (unabridged ed. 1993).³

Applicant's advertisement for its goods, "SV-SD75 e-wear SD Audio Player," reads in pertinent part, as follows: "Put Some Music On! Extremely compact for wearability." The advertisement, as well as many of the articles about applicant's product, attests to the small size of the digital audio player, and touts that the goods are to be worn. This is further borne out by pictures of the product and by the language of the identification of goods indicating that the digital audio player "may be worn on various parts of the user's body, such as the head, wrist, arm, neck or hair." In this connection, one of the pictures shows the user wearing applicant's audio digital player around her neck in the manner of a necklace.

Articles in printed publications and on the Internet show the following relevant uses of "e-wear" in connection with electronic devices:

"At the Massachusetts Institute of Technology, they've been researching 'e-wear' - wearable electronics and computers - for years," says Bjarin. (www.abcnews.com, December 24, 2004)

³ Judicial notice may be taken of dictionary definitions, and we have done so with respect to this additional definition. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594, *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

Welcome to wearable computers, e-wear if you will, and digital jewelry. (*Ventura County Star*, December 10, 2001)

And jewelry that doubles as a camera, electronic organizer or music player. It's not some future vision - some of these products are available now, and more are on the way. It's being called wearable electronics, or "e-wear." (www.sptimes.com, June 11, 2001)

More fashionable and less expensive is the e-wear from VIA of Northfield, Minn. A Pentium PC, a voice-recognition hardware and four PC-card slots reside in a waistband that looks like Bruce Wayne's bat-belt. (*USA Today*, November 22, 1996)

At NAB, Panasonic showcased new digital media products such as "personal e-ware" (wearable electronics) and public-venue display systems. (*Electronic Media*, April 30, 2001)

Although many wearable fashions sound futuristic, some are available today, and more are on the way. The crossroads between CE (consumer electronics) and high fashion couture is being called wearable electronics or "e-wear." (www.realtytimes.com, March 17, 2006)

The record also includes articles showing uses of "wearable electronics" or "wearable" for various electronic devices:⁴

⁴ The examining attorney also submitted copies of search results for the key words "wearable electronics" and "e-wear wearable electronics" generated by the GOOGLE search engine. In some cases, a webpage shown in the summaries has been submitted, and we have cited to the webpage; however, in most cases, the examining attorney did not submit the corresponding webpage. Although we have considered the GOOGLE summaries, they are

Some technology-minded fashionphiles say the future is not in accessories, but rather "wearable electronics" where the gadget actually becomes part of the clothing. IBM is developing digital jewelry, such as a necklace that doubles as a microphone; earrings with speakers, so wearers can answer calls; and watches and bracelets with video screens."

(The San Diego Union-Tribune, January 28, 2002)

Sony, meanwhile, is developing a version of the Memory Stick that's half the size of current models. "The purpose of an ultras-small type of flash media is to open the door for wearable electronics, like a wristwatch camera or a portable audio device that you could wear like a piece of jewelry," Neiman explains.

(Computer Shopper, November 1, 2001)

So even though the valuable components of today's wearable electronics, such as the mobile phone, will be unplugged...

(USA Today, June 1, 2001)

Oakley's line of "wearable electronics" includes sunglasses with a built-in MP3 player...

(Contra Costa Times (California), December 22, 2005)

And you thought iPods were the pinnacle of wearable electronics.

(St. Louis Post-Dispatch, December 21, 2005)

Oakley, the supplier and retailer of outdoor apparel and accessories,

entitled to limited probative value in the absence of the corresponding webpages. *In re Fitch IBCA, Inc.*, 64 USPQ2d 1058 (TTAB 2002).

shipped its second-generation MP3 sunglasses with embedded memory, and it promises to expand its selection of wearable electronics.

(*Twice*, December 5, 2005)

Thanksgiving retailers stand to snag strong sales in televisions, digital cameras, cell phones and wearable electronic devices, Goldenberg says.

(*San Bernardino Sun*, November 24, 2005)

Wearable technology is now hitting the fashion runway. From sexy thigh holsters for cell phones to geeky hats with built-in cellular microphones, wearable electronics are now available in the marketplace.

(*Rochester Democrat and Chronicle*, November 13, 2005)

This Sunglass Icon will have a definitive Southern California flavor as well as a dedicated "store-within-a-store" concept which will highlight and feature select Oakley-branded apparel, accessories and wearable electronic products.

(*PrimeZone Media Network*, November 10, 2005)

The decision for Motorola and Oakley to collaborate is natural; Razrwire is not the first time either company has tried creating wearable electronic technology.

(*Sacramento Bee*, July 28, 2005)

Samsung intros wearable digital audio player.

(www.macworld.com, May 9, 2001)

Keep the beat strong and your workout long with this wearable digital audio player/exercise sensor.

(www.ebay.com)

The world's first MP3 Watch is a cool
combo wristwatch and wearable audio
player by Casio that stores up to 33
minutes of MP3 files.

(*The Boston Herald*, November 23, 2000)

Wearable Digital Audio Player
(www.design.philips.com)

The record establishes that the term "wearable electronics" refers to small electronic devices, such as applicant's, that may be literally worn by the user. The evidence also shows that the term "e-wear" essentially has been used as an interchangeable abbreviated version of the term "wearable electronics." In view of this evidence, we find that consumers would equate "e-wear" with "wearable electronics." Accordingly, we conclude that the term E-WEAR sought to be registered is merely descriptive when applied to digital audio players that may be worn on the user's body. The term immediately describes, without conjecture or speculation, a significant characteristic or feature of the goods, namely, that applicant's digital audio players are wearable electronic devices.

Applicant has submitted numerous articles that make reference to "e-wear" as a trademark for its goods. Although these articles may have a bearing on acquired distinctiveness (if any) of the term sought to be

registered, the evidence is not persuasive in showing that the term is inherently distinctive.

We also note that some of the articles not specifically cited in this decision refer to a type of clothing that actually incorporates electronics into the clothing fibers, and that such clothing has been referred to as "e-wear." We also readily appreciate that the letter "e" has various meanings, and that the term "wear" often refers to clothing (although, as shown above, "wear" has been used in connection with goods other than clothing). Such uses, however, do not compel a different result in this case. As noted earlier, that a term may have other meanings in different contexts is not controlling.

Applicant's contention that the term "wear" is not descriptive, but rather is "playfully suggestive," is not persuasive. In this connection, applicant submitted third-party registrations of marks that include the non-disclaimed term "wear" for goods other than clothing. The fact that the term "wear" has not been disclaimed in the context of various non-clothing items is of no significance herein. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ["Even if some prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such

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prior registrations does not bind the board or this court."].

We conclude that the term E-WEAR is merely descriptive of wearable electronics, that is, the specific type of product identified in the involved application: "portable audio products, namely, digital audio players that may be worn on various parts of the user's body, such as the head, wrist, arm, neck or hair."

Decision: The refusal to register is affirmed.