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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Accura Bullets, LLC

Serial No. 76616320

Michael W. Goltry of Parsons & Goltry for Accura Bullets, LLC.¹

William T. Verhosek, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

Before Grendel, Drost, and Walsh, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On October 8, 2004, applicant Accura Bullets, LLC filed an intent-to-use application to register the mark

POWER BOND

in standard character form on the Principal Register for bullets in Class 13. Serial No. 76616320. The application contains a disclaimer of the term "Bond."

¹ Subsequent to the briefing in this case, Mr. Goltry was appointed counsel for applicant. Prior to that, Ken J. Pedersen of Pedersen & Company, PLLC, was counsel for applicant.

On September 27, 2005, the application was published for opposition. When no opposition was filed, on June 16, 2008, applicant submitted the following specimen with its statement of use.

The heading on the specimen page is:



The rest of the first page from applicant's specimen is shown below. The mark appears twice in the specimen. Both occurrences are in the middle column in the third and eighth lines from the bottom on the first page:

Platinum Series

PowerBelt Platinum AeroTip Bullets utilize PowerBond™ technology, a more aggressive bullet shape and a fluted gas check design that combine to make the Platinum Series the best performing PowerBelts ever.

PowerBelt Platinums are plated using PowerBond technology, a proprietary process that creates a smoother, more uniform surface that reduces the standard deviation between shots...

muzzleloading bullets ever developed, with all of the benefits of sabot bullets but none of the problems. Like sabots, the PowerBelt bullets' patented snap-on base creates a perfect gas seal, providing consistent pressures and superior accuracy. But unlike sabots, PowerBelt Bullets are full-caliber sized, easier to load and don't require cleaning after every shot. Available in Platinum, Copper or Pure Lead grades, PowerBelt Bullets are legal in almost every state, including Colorado and Pennsylvania.

POWERBELT ADVANTAGES

HIGHER VELOCITIES The perfect gas seal of the PowerBelt® Bullet base eliminates gas blow-by, providing consistently higher velocities.

SUPERIOR ACCURACY The consistent gas pressures provided by the PowerBelt base give almost identical bullet velocity and trajectory every time. The PowerBelt base also protects the tail of the bullet from flame cutting, so the bullet's overall ballistic integrity is maintained from the time you load it until it hits your target. Combine all this with the aerodynamic superiority of PowerBelt AeroTips and you've got the ultimate long-range muzzleloader bullet.

PERFECT EXPANSION PowerBelt Bullets are available in either Hollow Point, AeroTip, Flat Point or Steel Tip designs, providing shooters the ability to choose the expansion performance that is best for their hunting situation - from a coyote to an elephant. Each bullet tip design provides varying degrees of expansion on impact - with the Hollow Point producing the most immediate expansion; the AeroTip, in addition to its aerodynamic benefits, penetrates deeper before expanding; the Flat Point provides the most controlled expansion, with increased weight retention; and the Steel Tip virtually eliminates expansion for maximum penetration. So, by matching tip design with bullet weight, you can choose the perfect bullet for whatever game you're hunting.

- Hollow Point for maximum expansion on lighter skinned game (Varmints, Deer)
- AeroTip for deeper penetration on light or medium weight game (Deer, Elk, Black Bear)
- Flat Point for heavier skinned game (Black Bear, Moose, Grizzly)
- Steel Tip for the really big stuff (Cape Buffalo, Elephant)

HARDER HITTING While sabot bullets are under-bore in size to accommodate the sabot, PowerBelt Bullets are full caliber

maximum mushroom power and creating larger diameter wound channels. Plus, they arrive on target with more weight and energy to penetrate heavy bone.

FASTER LOADING Unlike sabots, PowerBelt Bullets are easier to load because the bullet itself is one-thousandth of an inch under-bore size, while the pliable plastic base is slightly over-bore. So, the entire PowerBelt bullet/base assembly loads easily with the plastic base securing the bullet tightly over the powder charge until, upon ignition, the soft lead bullet expands to fill the rifling. This ease of loading eliminates potential accuracy-robbing damage to the bullet tip.

CLEANER SHOOTING With sabots, for maximum accuracy you have to clean your barrel after every shot and sometimes just to get the next sabot down the barrel. Why? Sabots leave a plastic residue in the barrel after every shot. If not thoroughly cleaned, this residue robs your barrel of accuracy and makes loading a quick follow-up shot very difficult. With PowerBelt Bullets, there is no plastic residue left behind in the barrel. That's because the PowerBelt's plastic base follows behind the bullet and drops away when the bullet leaves the muzzle having done its job of providing a perfect gas seal. This means you can shoot 6 to 8 PowerBelts before cleaning the barrel to remove excess powder fouling.

THREE PERFORMANCE GRADES TO MEET YOUR NEEDS

PowerBelt Bullets are available in three different performance grades, with all three designed to deliver the same benefits that have made PowerBelt the #1 muzzleloading bullet in America. Once you shoot PowerBelts, you'll see why they're the bullets that made sabots obsolete.

PLATINUM HIGH PERFORMANCE SERIES

DESIGNED FOR MAGNUM LOADS

PLATINUM SERIES

PowerBelt Platinum AeroTip Bullets utilize PowerBond™ technology, a more aggressive bullet shape and a fluted gas check design that combine to make the Platinum Series the best performing PowerBelts ever.

PowerBelt Platinums are plated using PowerBond technology, a proprietary process that creates a smoother, more uniform surface that reduces the standard deviation between shots. This

reduces the standard deviation between shots, and accuracy.

PowerBelt Platinums also deliver an improved ballistic coefficient by utilizing a more aggressive bullet taper design. Not only does the taper provide for a more aerodynamic flight, it also helps control the rate of expansion - regardless of powder charge or distance the bullet travels.

PowerBelt Platinums feature a fluted gas check that is sized larger than a standard PowerBelt, while still being just as easy to load. The Platinum's larger diameter gas check produces higher and more consistent pressures - further improving both velocity and accuracy.

COPPER SERIES

Our copper-plated PowerBelts have become the most popular muzzleloading projectiles since the roundball and truly are "the bullets that made sabots obsolete." They are #1 for a reason, and if you don't believe us, just ask any hunter who has shot them. The thin copper plating greatly reduces bore friction for higher velocities - while still allowing for optimal bullet expansion within the rifling grooves. Available in four tip designs - AeroTip, Hollow Point, Flat Point and Steel Tip - PowerBelt Coppers offer the widest variety of grain weights in the PowerBelt line-up, with 11 different weights from 175 grains all the way up to 530 grains. With PowerBelt Copper Series bullets you can find the right combination for whatever game you're chasing.

PURE LEAD SERIES

The original PowerBelt Bullet was the Pure Lead, and it's still a great choice for the economy-minded shooter, whether for hunting or just target shooting. Available in four different grain weights (295, 348 and 405 in the Hollow Points, and 444 in the Flat Point), PowerBelt Pure Lead bullets will get the job done with authority. And in states where copper-plated bullets are not allowed, PowerBelt Pure Leads are the highest tech, best performing bullets you can shoot - and still be legal!

THESE MUSHROOMS ARE DEADLY FOR GAME.



The examining attorney has now refused to register applicant's mark on the ground that "the mark as used on

the specimen merely identifies a process or system and does not function as a trademark under Trademark Act Sections 1, 2, and 45... Moreover, registration was refused on the ground that the specimen of use does not show the mark as it is used in connection with the goods under Sections 1 and 45." Brief at 1.

Failure to Function as a Mark

We begin by discussing whether applicant's term POWER BOND functions as a trademark. "The question whether the subject matter of an application for registration functions as a mark is determined by examining the specimens along with any other relevant material submitted by applicant during prosecution of the application." *In re The Signal Companies, Inc.*, 228 USPQ 956, 957 (TTAB 1986).

An important function of specimens in a trademark application is, manifestly, to enable the PTO to verify the statements made in the application regarding trademark use. In this regard, the manner in which an applicant has employed the asserted mark, as evidenced by the specimens of record, must be carefully considered in determining whether the asserted mark has been used as a trademark with respect to the goods named in the application.

In re Bose Corp., 546 F.2d 893, 192 USPQ 213, 216 (CCPA 1976) (footnote omitted).

The examining attorney argues (Brief at 3-4, reference to record omitted):

The specimen shows the applied-for mark used solely to identify a process or system because the goods "utilize" and are "plated using POWERBOND² technology, a proprietary process that creates a smoother, more uniform surface that reduces the standard deviation between shots." There are no other showings of the mark in the specimen pages submitted. Thus, the name of a system or process does not function as a trademark unless it is also used to indicate the source of the goods in the application.

On the other hand, applicant argues that the "name of a process may be a trademark for the goods." Brief at 3. Furthermore, "[n]otably therein, one technological feature is identified as POWERBOND™ with the trademark symbol, clearly indicating to the public that Applicant considers POWERBOND to be a trademark for these bullets." Reply Brief at 2.

"The Trademark Act is not an act to register mere words, but rather to register trademarks. Before there can be registration, there must be a trademark, and unless words have been so used they cannot qualify." *Bose Corp.*, 192 USPQ at 215, citing *In re Standard Oil Co.*, 275 F.2d

² It is unclear whether applicant's mark is spelled with or without a space between the words "Power" and "Bond." The drawing and most of the papers in the file, including applicant's brief, most often appear to depict the mark with a space and the examining attorney required a disclaimer of the term "Bond." See Examiner's Amendment dated May 16, 2005. However, applicant's reply brief and the examining attorney's brief (except for the captions) refer to the mark as POWERBOND and the specimen shows the term without a space. Inasmuch as the "drawing depicts the mark sought to be registered" (37 CFR § 2.52), we will refer to the mark as POWER BOND in this opinion.

945, 125 USPQ 227 (CCPA 1960). Furthermore, "[w]ishing does not make a trademark or service mark be." *In re Morganroth*, 208 USPQ 284, 287 (TTAB 1980). "A critical element in determining whether a term or phrase is a trademark is the impression the term or phrase makes on the relevant public." *In re Volvo Cars of North America, Inc.*, 46 USPQ2d 1455, 1458 (TTAB 1998).

We point out that there is apparently no disagreement with applicant's initial argument that the "name of a process may be a trademark for goods." Brief at 3. We do not understand that the examining attorney is arguing, as applicant maintains, that "the name of a process may not be used as a trademark for goods." *Id.* For example, the examining attorney has argued that a mark may be refused registration if it "merely identifies a process or system" and "The specimen shows the applied-for mark used *solely* to identify a process or system." Brief at 3 (emphasis added).³ *Accord In re Produits Chimiques Ugine Kuhlmann SA*, 190 USPQ 305, 306 (TTAB 1976 ("There is no question but that if a designation is used to identify services or to identify both a process and services rendered under the

³ See also Final Office Action at 2 ("Thus the name of a system or process does not function as a trademark unless it is also used to indicate the source of the goods in the application... The specimen shows the applied-for mark used solely to identify a process or system").

process by the proprietor thereof, it constitutes a service mark within the meaning of the statute"). Therefore, the question here is whether applicant's term, which identifies a process, also functions as a trademark.⁴

The *Bose* case is particularly relevant to the issue on appeal here. In that case, Bose sought to register the term SYNCOM for loudspeaker systems. The specimens consisted of "instruction sheets and warranty registration cards attached to the goods." 192 USPQ at 214. These instruction sheets, much like applicant's "informational brochures," were included with the products and they similarly contained several paragraphs of information including a few sentences that mentioned the term SYNCOM. In the text of the specimen, there appears this language:

INTERAUDIO speakers, by taking advantage of the advanced technology inherent in the ACOUSTICOUPLER™ design and the SYNCOM™ speaker testing computer*, provide new levels of performance in direct radiating speakers. Designed and manufactured with the objective of providing the best overall performance at their price, INTERAUDIO speakers reproduce music with a high degree of realism to dramatically increase your listening enjoyment.

* The SYNCOM computer is used under license from Bose Corporation.

The *Bose* specimens follow:

⁴ Applicant has submitted copies of two registrations for marks for bullets to show that the "name of a process may be used as a trademark for goods." Response dated June 21, 2008 at 1. As indicated above, this point is not in dispute.

Interaudio™ Speakers MODEL 3000

INTERAUDIO speakers, by taking advantage of the advanced technology inherent in the ACQUASTIMPLE™ design and the SYNCHRON speaker testing technique, provide new levels of performance in great sounding speakers. Designed and manufactured with the objective of producing the best overall performance at these prices, INTERAUDIO speakers re-define music with a high degree of realism to dramatically increase your listening enjoyment.

The SYNCHRON capacitor is used under license from Sanyo Corporation.

INSTALLATION INSTRUCTIONS

SPEAKER CONNECTION

Standard 18 gauge "lamp cord" or "pig cord" is recommended as cable for connecting the speakers to a power amplifier, when the cable length is less than 50 feet. For longer runs, heavier duty wire (16- or 14-gauge) is recommended. The following procedure for speaker connection should be followed:

1. Examine the rear of your speakers. You will notice two terminals on the back of each speaker marked "6 ohm" and "common". The "6 ohm" marking corresponds to the positive (+) or red terminal on your amplifier; the "common" marking corresponds to the ground, negative (-) or black terminal. Examine the rear of your receiver or amplifier. There will be terminals for a 2 $\frac{1}{2}$ speaker and a 4 $\frac{1}{2}$ speaker. Look for the terminals for either speaker. Notice that there are both a positive (+) or red terminal and a negative (-) or black or ground terminal for each. The objective in wiring a speaker is to connect the 6 ohm terminal on the speaker to its corresponding positive terminal on the amplifier, and the common terminal on the speaker to its corresponding common or negative terminal on the amplifier.
2. Speaker cords in double-conductor wire. Determine the "polarity" marking on your wire so that you can tell which conductor is which. Standard lamp cord normally has a ridge or groove along one side which can be seen or felt with the fingers. Speaker cable of clear plastic generally has wires of two different colors (e.g. copper and silver). Choose one conductor and decide whether you will use it for positive or negative connections; for example, "Silver" is positive or "frayed" is negative.
3. As described in Step 2, connect the left speaker to the amplifier, 6 ohm to positive, and common to negative. Connect the right speaker in the same manner.

When you have completed this procedure, the speakers should be "in phase". As a check on speaker phasing, place the two speakers side by side, and play music with high bass content through your amplifier, observing in the MORNING and AFTERNOON listening briefly, reverse the two wire connections at one of the two speakers and listen again. The connection with proper phasing is the one that gives the most realistic sound reproduction.

SPEAKER PLACEMENT

To obtain the best speaker placement depends on many factors, including room size and shape, location of furniture, tape and record, and position of cabinets. The best room is all of which pay a major role in sound quality. With INTERAUDIO speakers, they can be placed either on a bookshelf or on the floor. The closer you are to the floor and to corners, the greater the bass response.

80-123840

Made in the USA - Patent rights pending

This structure is 1:125 INTERAUDIO

Since high frequencies are more directional than bass, low higher frequencies are more directional than bass. The speakers are to be oriented horizontally and placed in relation to each other. The tweeters should be placed in the center. The bass and midrange drivers should be placed as close to the listener as possible. The speaker is designed to be used with different speaker cabinets. In determining the one you like best.

AMPLIFIER POWER

INTERAUDIO loudspeakers are designed to be powered by the majority of the amplifiers and receivers that are on the market today. Power requirements will vary substantially with room size, speaker placement, and type of material listened to. The Model 3000 may be used with amplifiers rated up to 75 watts rms per channel. However, it should be noted that high quality sound at normal listening levels requires less than 15 watts per channel.

When using the Model 3000 with amplifiers rated at more than 75 watts rms per channel, or with surround or other "222 signals" (see "Speaker" for equivalent) speaker be protected by a BLISS HDL-24 or equivalent "Speaker" (see equivalent) using an in-line HIGH PASS FILTER. Be sure to use the correct filter for the size of the speaker or other low pass filter. Be sure to use the correct filter for the size of the speaker or other low pass filter. Be sure to use the correct filter for the size of the speaker or other low pass filter.

CARE AND MAINTENANCE

INTERAUDIO speaker cabinets are of rugged construction with a walnut grained vinyl veneer finish. This surface may be cleaned with a damp cloth using covered with a high quality synthetic and cotton fabric. It should be maintained free but can be cleaned occasionally by light dusting.

WARRANTY

INTERAUDIO speakers are warranted to be free of defects in workmanship and material for five years from the date of delivery to the original purchaser. During that period any defect that occurs in normal use will be repaired at no charge for parts or labor. The cost of shipping and handling will be repaired with no charge for parts or labor.

To take advantage of this warranty you must:

1. Complete and mail the attached Warranty Registration Card within three days of purchasing the speaker system.
2. Use the speaker system in accordance with the written instructions provided.
3. Have repairs performed only through an authorized INTERAUDIO Dealer or Service Center.

Should a defect occur, it is to be present do NOT return the speaker to the factory. Bring it to the INTERAUDIO dealer from whom it was purchased; he will diagnose the problem and arrange for any necessary repairs. If this is not convenient, write to INTERAUDIO SYSTEMS, Customer Service Department, 50-2351 Kinnear Street, Framingham, Massachusetts 01701, describing the problem and we will advise you as to the procedure to follow.

MODEL 3000 WARRANTY REGISTRATION

NOTE: FOR A PAIR OF SPEAKERS, FILL OUT AND MAIL ONLY ONE CARD WITH BOTH SPEAKER SERIAL NUMBERS.

YOUR NAME _____ AGE _____
 ADDRESS _____
 CITY _____ STATE _____ ZIP _____
 SERIAL NUMBER _____
 PURCHASE DATE _____ MODEL _____

WE WOULD APPRECIATE YOUR ANSWERING THE FOLLOWING:

I desired your product through Advertising in _____
 Friend Dealer Other _____

INTERAUDIO 3000 is my first set of speakers

Is in addition to _____ Speakers
 replaces _____ Speakers

My amplifier has approximately _____ rms, watts/channel.

COMMENTS _____

80-102840

In that case, the CCPA held that:

[I]t is quite apparent that, in the specimens of record, only INTERAUDIO identifies the loudspeaker systems for high-fidelity music reproduction as originating with appellant and distinguishes such goods from those manufactured and sold by others. The mark SYNCOM merely relates to a speaker-testing computer. Only INTERAUDIO would be used by purchasers in asking for the loudspeaker systems set forth in appellant's application, and the mark SYNCOM neither serves as an indication of origin of such goods, nor serves any other valid trademark function with respect to such goods. SYNCOM is not used as a trademark with respect to such goods.

Bose, 192 USPQ at 216.

Similarly, applicant's mark is embedded in the text of applicant's specimen and it simply reports that applicant's bullets are made with "PowerBond™ technology"⁵ much like the *Bose* speakers were tested using the SYNCOM speaker-testing computer. The term POWER BOND refers to the "proprietary process" used to improve the performance of the POWERBELT bullets.

We note that in relation to services, the Court of Customs and Patent Appeals has held that:

The requirement that a mark must be "used in the sale or advertising of services" to be registered as a service mark is clear and specific. We think it is not met by evidence which only shows use of the mark as the name of a process and that the company is in the business of rendering services generally, even though the advertising of the services appears in the same brochure in which the name of the process is used. The minimum requirement is some direct

⁵ The examining attorney's request that we take judicial notice of his submitted definition of the term "technology" is granted.

association between the offer of services and the mark sought to be registered therefore.

In re Universal Oil Prods. Co., 476 F.2d 653, 177 USPQ 456, 457 (CCPA 1973) (emphasis omitted).

Regarding trademarks, the Trademark Act requires that a mark is used in commerce when "it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto." 15 U.S.C. § 1127. As in *Universal Oil*, trademark use for the goods "is not met by evidence which only shows use of the mark as the name of a process." Even if we assume that applicant's specimen is a proper specimen, the term POWER BOND does not function as a trademark to identify applicant's bullets. It simply identifies the process used to enhance the performance of the bullets. The case of *In re Big Stone Canning Co.*, 169 USPQ 815 (TTAB 1971) is instructive. In that case, the mark FLASH COOK clearly appeared on the top of canned vegetables. However, the board held that: "As the mark is used on the containers for the goods it is apparent that it refers to a particular process rather than serves to identify" applicant's canned vegetables. 169 USPQ at 816. Despite being used on the containers for the goods, the term FLASH COOK was held not

to function as a trademark but rather it referred to the method of preparing the vegetables.

Thus, the "mere fact that a designation appears on the specimens of record does not make it a trademark." *In re Aerospace Optics Inc.*, 78 USPQ2d 1861, 1862 (TTAB 2006). *See also Bose*, 192 USPQ at 216 (SYNCOM used on instruction sheets did not function as a trademark for loudspeaker systems. "[I]t is quite apparent that, in the specimens of record, only INTERAUDIO identifies the loudspeaker systems for high-fidelity music reproduction as originating with appellant and distinguishes such goods from those manufactured and sold by others. The mark SYNCOM merely relates to a speaker-testing computer"). *Accord In re Moody's Investors Service, Inc.*, 13 USPQ2d 2043, 2049 (TTAB 1989):

That is, the significance of the symbols, as they are used in the specimens, is that of rating symbols (i.e., indications of applicant's opinion of the investment quality of debt instruments), not service marks. While it is not inconceivable that a particular designation could be used, and therefore function, both as a rating symbol and as a trademark or service mark, applicant's designation "Aaa" is not so used in the specimens of record.⁶

⁶ The board indicated that it was "inclined to agree" with the examining attorney's point that the designations appear to be registrable as certification marks. 13 USPQ2d at 2043 n.5.

Here, we agree that consumers seeing the term POWER BOND in the sentences "PowerBelt Platinum AeroTip Bullets utilize PowerBond™ technology" and "PowerBelt Platinums are plated using PowerBond technology" would not understand the term to be a trademark for the goods but rather a term that describes how the goods were made in much the same way that the term FLASH COOK referred to how the canned vegetables were prepared in *Big Stone Canning*. Therefore, we affirm the examining attorney's refusal to register on the ground that applicant's term does not function as a trademark.

Specimen

The Trademark Act requires that applications that are based on use must include: "Such numbers of specimens or facsimiles of the mark as used as may be required by the Director." 15 U.S.C. § 1051(a)(1). A trademark is used in commerce when "it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto." 15 U.S.C. § 1127. See also 37 CFR § 2.56(b)(1) ("A trademark specimen is a label, tag, or container for the goods, or a display associated with the goods"). However, "[n]ot every word, name, phrase, symbol or design, or combination thereof which appears on a product functions as a trademark." *In re Pro-Line Corp.*, 28 USPQ2d 1141, 1142 (TTAB 1993). See

also *In re Gilbert Eiseman, P.C.*, 220 USPQ 89, 90 (TTAB 1983) ("It is established that when a designation or slogan imparts an impression of conveying advertising or promotional information rather than of distinguishing or identifying the source of goods or services, it cannot be the basis for registration"). "The starting point for this analysis is the specimen submitted to show use of the mark. We must determine whether the specimen is mere advertising or whether, in addition to advertising, the specimen is also a display associated with the goods." *In re Osterberg*, 83 USPQ2d 1220, 1222 (TTAB 2007).

The examining attorney argues that the specimen is not acceptable because "[p]ackage inserts such as invoices, announcements, order forms, and the like are not acceptable specimens to use on goods." Brief at 6. According to the examining attorney, applicant's specimen is not acceptable "because it consists of advertising material for goods." Brief at 5. In response, applicant argues that the "fact that the brochure is informational, and therefore instructional, plus the established fact that Applicant's brochure is clearly always associated with the goods, satisfies the statutory requirements for use of the mark 'on or with' the goods." Reply Brief at 2-3. While the examining attorney describes the brochure as being

advertising, applicant has provided a declaration (¶ 1) from Daniel Hall of its technical department who stated that the brochure "is put in every package of the company's POWER BELT® bullets."

"[I]nvoices, announcements, order forms, bills of lading, instruction sheets as well as other types of leaflets and brochures... do not constitute acceptable specimens of use of a mark referred to therein as a trademark for goods." *In re Bright of America, Inc.*, 205 USPQ 63, 71 (TTAB 1979). However, we point out that not all materials that are included in packaging for the goods are necessarily unacceptable as specimens. Compare *In re Chicago Rawhide Mfg. Co.*, 455 F.2d 563, 173 USPQ 8, 9 (CCPA 1972) ("We find nothing more than use of the mark on a carbon copy of an invoice which copy accompanies the goods 'in containers in which the goods are shipped.' Such does not constitute use on the goods as required by the clear and unambiguous language of section 45 of the Lanham Act") with *In re Ultraflight Inc.*, 221 USPQ 903, 906 (TTAB 1984) ("[A]pplicant concedes that placing its mark on instruction manuals packed with the goods is not use in the manner of a display associated with the goods. Applicant's position is, rather, that such use of the mark is an affixation of the mark to the goods themselves. We agree"). While

applicant argues that its brochure is "instructional," this is not the critical point. It is not unusual for various products to have instructional materials included with them. This fact does not convert all of these materials into acceptable specimens. See, e.g., *Bright of America*, 205 USPQ at 71 ("[I]nstruction sheets ... do not constitute acceptable specimens of use"). The critical distinction is if the instructional manual such as the manual for the *Ultraflight* powered hang-glider is considered the goods themselves. The manual for operating a hang-glider was considered use on the goods themselves. The *Ultraflight* "assembly instruction manual," which was sold as part of a kit, was "as much a part of applicant's goods as are the various parts that are used to build the gliders." 221 USPQ at 906. We cannot come to the same conclusion for applicant's brochure that accompanies applicant's packages of bullets. While it does provide some information about the bullets, it appears to be an advertising brochure. See, e.g., "PowerBelt Bullets are available in three different performance grades, with all three designed to deliver the same benefits that have made PowerBelt the #1 muzzleloading bullets in America. Once you shoot PowerBelts, you'll see why they're the bullets that made sabots obsolete." We conclude that applicant's brochure is

not an integral part of the goods themselves, such as the *Ultraflight's* assembly instruction manual. Instead, it is typical advertising and informational material often included with goods and, under *Bright of America*, it is not an acceptable specimen.

The next question is whether applicant's specimen is a display associated with the goods. Applicant argues that "the established fact that Applicant's brochure is clearly always associated with the goods, satisfies the statutory requirements for the use of the mark 'on or with' the goods." Reply Brief at 3 (emphasis added).

A display associated with the goods within the scope of Section 45... comprises essentially point-of-sale material such as banners, shelf-talkers, window displays, menus, or similar devices which are designed to catch the attention of purchasers and prospective purchasers as an inducement to consummate a sale and which prominently display the mark in question and associate it or relate it to the goods in such a way that an association of the two is inevitable.

In re Bright of America, Inc., 205 USPQ 63, 71 (TTAB 1979).

Inasmuch as applicant has not argued that its specimen is used in the manner of device "designed to catch the attention of purchasers." Its advertising and instructional inserts would not constitute acceptable displays associated with the goods. *Bright of America*, 205 USPQ at 7. See also *Osterberg*, 83 USPQ2d at 1224 ("[A]pplicant's webpage is simply advertising or

promotional material and it does not constitute a display used in association with the goods").

Additionally, we point out that even if applicant's specimen was an acceptable type of specimen, applicant's use of the term in sentences that appear in the text of the page would not lead purchasers to conclude that the term POWER BOND is a trademark for applicant's bullets.

Osterberg, 83 USPQ2d at 1223 ("Buried in the middle of the text is the purported mark. CondomToy condom is not so prominently displayed in the website that customers will easily associate the mark with the products. While the mark is printed in bold type, so are the [other] terms").

"[T]he mark must be used in such a manner that it would be readily perceived as identifying the specified goods and distinguishing a single source or origin for the goods").

Consumers reading applicant's brochure and finally encountering the term "PowerBond" would understand the term to refer to a process of plating the bullets not the source of the bullets.

Finally, while applicant has used the TM symbol, at least once, on the material it submitted as a specimen, the use of the use of the letters "TM" or "SM" does not by itself convert a term that does not function as a trademark or service mark on the specimens into one that does. *In re*

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Crystal Geyser Water Co., 85 USPQ2d 1374, 1379 n.4 (TTAB 2007) ("We further note that use of the TM designation does not in itself elevate descriptive matter to a trademark"); *Osterberg*, 83 USPQ2d at 1223 n.4 ("The mere use of a superscript 'tm' cannot transform a nontrademark term into a trademark"); and *In re Caserta*, 46 USPQ2d 1088, 1090 (TTAB 1998).

Ultimately, we conclude that applicant's term POWER BOND does not function as a trademark for applicant's bullets and the specimens of record are not acceptable because they are advertising and not use of the mark on the goods or displays associated with applicant's goods.

Decision: The refusals to register are affirmed.