

THIS DECISION IS NOT A
PRECEDENT OF THE TTAB

Mailed: March 19, 2009

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Astilean

Serial No. 76686920
Filed February 19, 2008

Myron Amer of Myron Amer, P.C. for applicant.

Andrea P. Butler, Trademark Examining Attorney, Law Office
102, Karen M. Strzyz, Managing Attorney.

**Before Grendel, Taylor, and Mermelstein, Administrative
Trademark Judges.**

Opinion by Mermelstein, Administrative Trademark Judge:

Aurel A. Astilean seeks registration of the mark
SPEEDOMETER (standard characters) on the Supplemental
Register for "monitoring device worn on the person for
tracking fitness of the walking and running exercises, and
not concerned with the speed of the walking and running
exercise," in International Class 9.¹

The examining attorney issued a final refusal to
register under Trademark Act § 23, 15 U.S.C. § 1091, on the

¹ Based on first use and use in commerce as of December 15, 2007.

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ground that applicant's mark is generic for applicant's goods, and therefore ineligible for registration on the Supplemental Register.²

Applicant appealed. Both applicant and the examining attorney filed briefs.

We affirm.

I. Applicable Law

A mark is a generic name if it refers to the class, genus, or category of goods or services on or in connection with which it is used. *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1810 (Fed. Cir. 2001), citing *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987); *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986).

The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question. See, e.g., *Department of Justice, Federal Bureau of Investigation v. Calspan Corp.*, 578 F.2d 295, 299, 198 USPQ 147, 149 (CCPA 1978); *Maremont Corp. v. Air Lift Co.*, 463 F.2d 1114, 1118, 174 USPQ 395, 398 (CCPA 1972); *In re Automatic Radio Mfg. Co.*, 404 F.2d 1391, 1394-95, 160 USPQ 233, 235-36 (CCPA 1969). Determining

² The application was originally filed seeking registration on the Principal Register. Following an initial refusal of registration on the ground of mere descriptiveness, Trademark Act § 2(e)(1), applicant amended to seek registration on the Supplemental Register, at which point registration was refused on the basis that the mark is generic.

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whether a mark is generic therefore involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered or retained on the register understood by the relevant public primarily to refer to that genus of goods or services?

H. Marvin Ginn Corp., 228 USPQ at 530.

The reason generic terms cannot be trademarks is "plain:"

To allow trademark protection for generic terms, *i.e.*, names which describe the genus of goods being sold, even when these have become identified with a first user, would grant the owner of the mark a monopoly, since a competitor could not describe his goods as what they are.

Merrill Lynch, 4 USPQ2d at 1142, quoting *CES Publ'g Corp. v. St. Regis Publ'n, Inc.*, 531 F.2d 11, 188 USPQ 612, 615 (2d Cir. 1975).

The examining attorney has the burden of establishing by clear evidence that a mark is generic and thus unregistrable. *Merrill Lynch*, 4 USPQ2d at 1143. Evidence of the relevant public's understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers, and other publications. *In re Northland Aluminum Products, Inc.*, 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985).

II. Discussion

A. What is the Genus of Goods?

Applicant's goods are identified as a "monitoring device worn on the person for tracking fitness of the walking and running exercises, and not concerned with the speed of the walking and running exercise." The examining attorney identifies the genus of goods "a speedometer."³ Ex. Att. Br. at 5. We find this suggestion unhelpful, however, because the issue on appeal is the meaning of the term "speedometer" with respect to the identified goods. Instead, we find that the genus of the goods is most appropriately described as wearable fitness-tracking devices. While not precisely coextensive with the identified goods, this definition comports with the identification while aptly defining the category of goods to which applicant's device belongs. See *In re Reed Elsevier Prop., Inc.*, 77 USPQ2d 1649, 1654 (TTAB 2005) ("we consider applicant's identification as largely defining the genus of services involved in this case"), *aff'd* 482 F.3d 1376, 82 USPQ2d 1378 (Fed. Cir. 2007).

³ Applicant's three-page brief and two-page reply ignores this critical issue entirely.

B. Does Applicant's Mark Primarily Refer to the Genus?

The examining attorney has introduced evidence bearing on the meaning of SPEEDOMETER with respect to the genus of goods, including the following items:

Dictionary Definitions

speedometer

...

1. An instrument for indicating speed. **2a.** An instrument for indicating distance traveled as well as the rate of speed. **b.** An odometer

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) (online at Bartleby.com July 28, 2008).

speedometer

...

1: an instrument for indicating speed: TACHOMETER
2: an instrument for indicating distance traversed as well as speed of travel, *also*: ODOMETER

MERRIAM-WEBSTER'S ONLINE DICTIONARY (www.merriam-webster.com June 1, 2008).

Online Advertisements

Tech40 Running Speedometer Fitness Monitor

When you know your target, it's easier to hit it. That's why our running speedometer measures speed, distance and heart rate....

<http://shopping.yahoo.com> (June 1, 2008).

Total Fit Speedometer/Pedometer

....

Keep sight of your training goals with the Bell TotalFit 2-in-1 Speedometer/Pedometer, which measures both performance and calories burned when walking, running, or riding your bike.

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www.amazon.com/bell-Total-Fit-Speedometer-Pedometer (May 27, 2008).

Sharper Image Fitness Watch ... Speedometer pedometer.
This specially designed watch features an advanced pedometer that not only counts your walking steps, but also calculates the distance, speed, exercise time and calories burned as you walk. Includes timekeeping, chronograph, countdown timer and pedometer functions....

<http://storefront.linksynergy.com> (June 13, 2008).

Online Articles/Product Reviews

Beyond the Pedometer

Other cool fitness gadgets to help measure your progress

....

Walking Speedometer. As if knowing how far you're going wasn't enough, now you can track your speed and even your position on the globe. Some walking speedometers include Global Positioning System (GPS) technology.

www.rd.com/living-healthy/beyond-the-pedometer (July 24, 2008).

Top 10 Walking Speedometers and Odometers

From Wendy Bumgardner

....

Several walking speedometers-odometers claim they can tell you how far and how fast you are walking. My top pick works perfect right out of the box.

<http://walking.about.com> (May 27, 2008).

Garmin Forerunner 201 GPS Speedometer

By Wendy Bumgardner

....

Every walker and runner should have one. A single wrist unit uses GPS satellites to trace your outdoor workout. Displays speed, distance, pace, time, laps in large display. Charts your route as you walk or

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run, and can point you back to start. Pace alerts and a virtual partner can pace your workout.

<http://walking.about.com> (July 22, 2008).

Fitsense Speedometer Systems

By Laura Moncur

....

This is a speedometer, heart rate monitor and a link to upload your workout data to the computer.

www.starling-fitness.com (June 1, 2008).

Applicant contends that the term SPEEDOMETER is perceived by the public only in relation to motor vehicles:

As known by common experience, a vehicle has wheels and a dashboard display of a scale displaying speed in MPH (miles per hour), wherein the operating mode is that the rotational speed of a selected wheel is measured by contact and such measurement is correlated to the MPH displayed speed.

Applicant's goods accepted by the Trademark Attorney recites inter alia: "monitoring device worn on the person ..." (underlining added).

Being "worn on the person" brings into play legs in a running mode, not a rotating wheel, and not a MPH scale reading, and not other differences going far beyond the dictionary definitions of the Trademark Attorney.

Reply Br. at 1-2.

Not only is there no evidentiary support for applicant's argument, but the examining attorney's evidence proves the contrary: These materials demonstrate that the term SPEEDOMETER is commonly applied to a "monitoring device worn on the person..." and is readily understood by

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the public to designate such a device capable of variously displaying time, speed, distance traveled, heart rate, calories burned, and/or location. There is no basis to conclude that SPEEDOMETER only has meaning with reference to motor vehicles.

We note that applicant's amended identification states that its goods are "not concerned with the speed of the walking and running exercise." While the meaning of "not concerned with" is not entirely clear,⁴ for purposes of this appeal we consider the identification to exclude fitness monitors which measure speed, a construction which is most deferential to applicant's position.

Nonetheless, the evidence of record makes clear that the term SPEEDOMETER refers to more than a device for simply measuring speed. The examining attorney's

⁴ The record specimens provide no information about applicant's goods. Although the examining attorney issued a requirement for information about applicant's goods pursuant to Trademark Rule 2.61, the requirement was deemed satisfied when applicant submitted a certificate of registration for a different mark registered for services, not goods. Simply put, the information supplied by applicant pursuant to the examining attorney's requirement did absolutely nothing to further inform the examining attorney (or the Board) of the actual nature of applicant's goods. This application is based upon use of the mark in commerce, and the examining attorney would have been entirely justified in insisting on specific information about applicant's actual goods (including advertising materials and user manuals). Such information would clearly have been relevant - and most likely helpful - in examining the application. See generally, TMEP §§ 814 (Requesting Additional Information), 1209.02 (Procedure for Descriptiveness and/or Genericness Refusal), and cases cited therein.

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dictionary evidence indicates that the term is used to refer to devices which measure distance traveled, and the online advertisements and articles demonstrate the use of SPEEDOMETER to refer to wearable fitness-tracking devices with a wide variety of functions other than speed. Thus, even construing applicant's goods as to not measure speed, there is nothing in applicant's identification that excludes the measurement of distance traveled or any of the other functions provided by goods identified in the marketplace as "speedometers." And to the extent that applicant's goods are capable of measuring speed, it is clear that applicant cannot, by careful drafting, exclude from consideration a central purpose of those goods inextricably entwined with the identified functions. See *In re Reed Elsevier Properties Inc.*, 77 USPQ2d 1649 (TTAB 2005), *aff'd* (not precedential), 482 F.3d 1376, 82 USPQ2d 1378 (Fed. Cir. 2007).

Contrary to applicant's contention, we agree with the examining attorney that in this context, SPEEDOMETER goes beyond merely describing a feature or function of the identified goods. Rather, it refers to the genus to which the goods belong. As the evidence demonstrates, there are a number of devices in the marketplace referred to in whole or in part as a "speedometer," encompassing a range of

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functions and capabilities, and fitting easily within the genus to which applicant's goods pertain.

We do not mean to say that SPEEDOMETER is necessarily the only term that can be used to refer to such a genus. *Clairol, Inc. v. Roux Distrib. Co., Inc.*, 280 F.2d 863, 126 USPQ 397, 398 (CCPA 1960) (there may be a number of generic terms for a given good). But the evidence clearly establishes that it is one such term. Applicant's competitors do in fact use SPEEDOMETER to refer to their goods falling within the genus, and would be harmed by applicant's registration.

III. Conclusion

After careful consideration of the evidence and argument of record, we conclude that SPEEDOMETER is a generic term for "monitoring device worn on the person for tracking fitness of the walking and running exercises, and not concerned with the speed of the walking and running exercise," and that the mark is therefore ineligible for registration on the Supplemental Register.

Decision: The refusal under Trademark Act § 23 is affirmed.