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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Aurel A. Astilean

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Serial No. 76688551

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Myron Amer of Myron Amer, P.C. for Aurel A. Astilean.

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

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Before Quinn, Grendel and Bergsman, Administrative Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register of the mark **FIT TEST** (in standard character form) for Class 41 services identified in the application, as amended, as "fitness exercise and instruction, not including fitness testing or assessment in a health club."[1]

[1] Serial No. 76688551, filed on April 11, 2007. The application is based on use in commerce under Trademark Act Section 1(a), 15 U.S.C. §1051(a), and December 1, 2007 is alleged to be the date of first use of the mark anywhere and the date of first use in

At issue in this appeal are (1) the Trademark Examining Attorney's final rejection of applicant's proposed amendment to the identification of services; and (2) the Trademark Examining Attorney's final refusal of registration based on applicant's failure to submit a specimen which demonstrates use of the mark in connection with the identified services.

The appeal is fully briefed. We affirm the refusals to register.

Applicant's proposed amendment to the identification of services is impermissible.

Applicant seeks to amend the identification of goods and services in the application from Class 41 services identified as "fitness exercise and instruction, not including fitness testing or assessment in a health club" to Class 9 goods identified as "a DVD of exercises contributing to fitness."

Trademark Rule 2.71(a) provides that "[t]he applicant may amend the application to clarify or limit, but not to broaden, the identification of goods and/or services." We agree with the Trademark Examining Attorney that

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commerce. In the application as originally filed, the Class 41 identification of services was "fitness exercise and instruction."

applicant's proposed amended identification does not merely clarify or limit the original identification of services, but rather impermissibly broadens it. That is, the goods identified in the proposed amended identification are beyond the scope of the services as originally identified in the application.

Applicant is correct in noting that there is no per se rule forbidding amendment of an identification from goods to services or vice versa. However, TMEP §1402.07(b) clearly provides:

> The applicant should only be permitted to amend from goods to services, or vice versa, when the existing identification of goods and services fails to specify a definite type of goods or services and when the existing identification provides reasonable notice to third parties that the applicant may be providing either goods or services within the scope of the existing identification.

In this case, the Trademark Examining Attorney is not seeking to apply any per se rule that goods cannot be amended to services, or vice versa. Instead, she correctly contends that the exception to the rule as set forth in TMEP §1402.07(b) is not applicable in this case. Applicant's original identification of services is not ambiguous as to whether it identifies goods versus services. The current recitation clearly and definitely sets forth Class 41 services; it cannot be read as

potentially or ambiguously identifying Class 9 goods as well. Therefore, applicant may not amend the identification from Class 41 services to Class 9 goods.

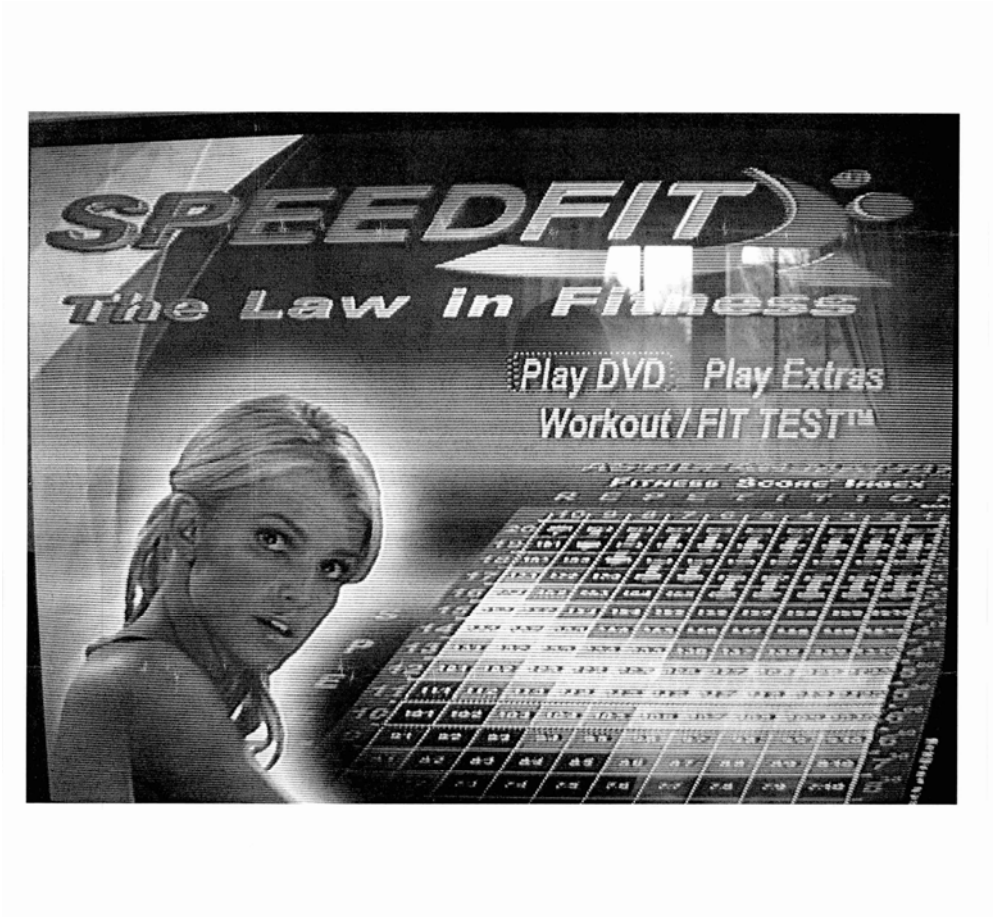
For these reasons, we find that the Trademark Examining Attorney's rejection of the proposed amendment to the identification of services is proper, because the proposed amendment impermissibly broadens the scope of the original identification of services. Trademark Rule 2.71(a). The original identification of services, i.e., "fitness exercise and instruction, not including fitness testing or assessment in a health club," remains the operative identification of services in the application.

Applicant has failed to submit a specimen which demonstrates use of the mark in association with the identified services.

An applicant for registration must submit a specimen showing the mark as used in commerce. Trademark Act Section 1(a), 15 U.S.C. §1051(a); Trademark Rule 2.34(a)(1)(iv), 37 C.F.R. §2.34(a)(1)(iv). A service mark specimen "must show the mark as actually used in the sale or advertising of the services." Trademark Rule 2.56(b)(2), 37 C.F.R. §2.56(b)(2). A service mark specimen must show an association between the mark and the services

for which registration is sought. *In re Adair*, 45 USPQ2d 1211 (TTAB 1997); TMEP §1301.04(b).

Applicant's original specimen is a photocopy of the opening screen of a DVD, reproduced below, which is aptly described in applicant's proposed (and rejected) identification of goods as "a DVD of exercises contributing to fitness."



Although this specimen might be acceptable as a specimen for a Class 9 DVD (and we are not finding that it is), it is not an acceptable specimen showing use of the mark in connection with the services identified in the application. Nowhere on this specimen is there any reference to the Class 41 services recited in the application, i.e., "fitness exercise and instruction, not including fitness testing or assessment in a health club." Therefore, the specimen is unacceptable as a service mark specimen.

Applicant has proffered a substitute specimen consisting of merely a sheet of paper upon which the words FIT TEST are stamped. Again, there is no reference at all to the recited services, and no association between the alleged mark and the recited services. The substitute specimen therefore is not an acceptable specimen of service mark use.

Because neither of the specimens submitted by applicant is an acceptable service mark specimen, the Trademark Examining Attorney's final refusal of registration on the ground that applicant has failed to submit an acceptable specimen is proper.

In summary, we affirm the Trademark Examining Attorney's rejection of applicant's proposed amendment to the identification of services on the ground that the

amendment impermissibly broadens the scope of the original identification of services. The current identification of services, "fitness exercise and instruction, not including fitness testing or assessment in a health club," remains operative. We also find that neither of applicant's specimens shows use of the mark sought to be registered in association with the recited services. The Trademark Examining Attorney's refusal of registration on this basis is affirmed.

Decision: The refusals to register are affirmed.