

THIS OPINION IS NOT
A PRECEDENT OF THE
TTAB

Mailed: 8/29/2012

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Cantor G&W, L.P.

Serial No. 77819424

Jason M. Vogel and Jill K. Tomlinson of Kilpatrick Townsend & Stockton for Cantor G&W, L.P.

Dominic J. Ferraiuolo, Trademark Examining Attorney, Law Office 102 (Karen M. Strzyz, Managing Attorney).

Before Quinn, Zervas and Taylor,
Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Cantor G&W, L.P. filed, on September 3, 2009, an intent-to-use application under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), to register the mark IN-RUNNING (in standard characters) for the following services:

Gaming and gambling machines, mobile and wireless gaming and gambling machines; computer hardware; computer software for mobile and electronic wagering through wireless devices; computer gaming and gambling hardware and software; wireless telecommunications devices; computer hardware and software for wireless telecommunications devices; apparatus for

wireless transmission and reception of data
(in International Class 9); and

Wagering services; casino services; gaming,
gambling and betting services; online
gaming, gambling and betting services;
casino services offered via wireless
telecommunications devices; wagering based
on the outcome of sporting events; sports
betting; providing information in the fields
of sports, betting, wagering, and sports
betting; providing information in the fields
of gambling and gaming; providing
information in the field of sporting events;
providing online casino games via
telecommunication or computer networks (in
International Class 41).

The 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, when used in connection with
applicant's goods and services, is merely descriptive thereof.

When the refusal was made final in each class, applicant
appealed. Applicant and the examining attorney filed briefs.

Applicant argues that its proposed mark is inherently
distinctive and, at worst, only suggestive, and that the
examining attorney has failed to meet his burden to show mere
descriptiveness. Applicant claims that it coined the term "IN-
RUNNING" and that it uses the term in a trademark manner to
identify the source of its goods and services; further, the term
has no commonly recognized merely descriptive meaning in this
country. Applicant gives a detailed critique of the examining
attorney's evidence, asserting that nearly half of the websites

emanate from foreign countries and that, therefore, such evidence is of minimal probative value. Applicant also points to the illegality of offshore online gambling in the United States under the Unlawful Internet Gambling Enforcement Act (UIGEA) of 2006. In this connection applicant argues:

"Consequently, the meaning that should be ascribed to the mark for purposes of evaluating its distinctiveness for trademark registration purposes is the meaning the term has in the legal gambling marketplace within the United States, not whatever meaning the term purportedly has in illicit online gambling operations, or even legitimate overseas gambling sites that are not authorized to render such services in the United States marketplace." (Brief, p. 9). In support of its arguments, applicant submitted dictionary evidence, excerpts of third-party websites, the results of a Google search report, and a listing from Wikipedia.

The examining attorney maintains that the term sought to be registered is merely descriptive of gambling goods and services that feature a specific type of wagering, namely betting on a sporting event during the course of the event as, for example, placing a bet after the game has started; the betting odds fluctuate based upon changes during the sporting event. According to the examining attorney, "in-running" is a popular form of gambling that is now legally accessible to consumers in

the United States. The examining attorney goes on to argue that it is irrelevant that online gambling, to which some of his evidence pertains, is illegal in the United States. In support of the refusal the examining attorney submitted excerpts of third-party websites, some of which are of foreign origin. In response to applicant's criticisms of this evidence, the examining attorney asserts that the foreign websites are accessible to gamblers in the United States.

The examining attorney bears the burden of showing that a term is merely descriptive of the relevant goods or services. *In re Merrill, Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987). A mark is deemed to be merely descriptive of goods or services, within the meaning of 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. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828 (TTAB 2007); and *In re Abcor Development*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A mark 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; rather, it is sufficient that the mark describes one significant attribute, function or property of the goods or services. *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); and *In re MBAssociates*,

180 USPQ 338 (TTAB 1973). Whether a mark 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 on or in connection with the goods or services, and the possible significance that the mark would have to the average purchaser of the goods or services because of the manner of its use. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). It is settled that "[t]he question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods or services are will understand the mark to convey information about them." *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002).

The term "running" is defined as "the act of a person, animal, or thing that runs; going or carried on continuously; sustained: a running commentary." (Ex. A, 1/3/11) (www.dictionary.com). None of the definitions of "running" is associated with gambling, wagering or gaming devices. As shown by applicant's "negative" dictionary evidence, there are no listings for the term "in-running." (Ex. B, 1/3/11).

The majority of the examining attorney's evidence in support of the refusal comprises excerpts of third-party websites wherein the authors refer to a form of wagering as "in-running." Several of the websites introduced by the examining

attorney are of foreign origin, and involve online gambling. Applicant and the examining attorney argued back and forth over the relevancy of the fact that online gambling is now illegal in the United States, and applicant urged that the foreign websites involving online gambling are of no relevance in deciding this appeal.¹

To state the obvious, the Internet is a resource that has become universally available to the general public in the United States. In that connection the Board on occasion has considered evidence from websites located outside the United States inasmuch as such evidence may have probative value depending on the circumstances. See, e.g., *International Business Machines Corp.*, 81 USPQ2d 1677, 1681 n.7 (TTAB 2006). In the present case, however, we do not believe that gamblers will reference a foreign website to learn about a type of wagering that is now legally available in the United States. That is to say, the fact that the term "in-running" may refer to a type of gambling in the United Kingdom is not probative of how relevant purchasers would perceive the term in this country. Thus, we have focused our attention on the domestic websites heralding

¹In this connection, the record includes a copy of the Safe Port Act that, in part, prohibits online gambling in the United States, and an article about the ramifications of this legislation. However, inasmuch as wagering on sporting events while they are in progress has made its way to Las Vegas, where gambling is legal, this evidence and arguments based thereon are irrelevant.

the arrival of "in running" wagering in the United States, specifically Las Vegas, Nevada, where gambling is legal.

As described on applicant's website (a printout of which is in the record), its goods and services consist of a mobile wagering platform offered on applicant's mobile gaming devices. These devices are available at no less than three Las Vegas casinos, enabling patrons there to make bets directly on the device in various locations in and around the casinos, including restaurants, cocktail lounges and by the pool.

The following articles discuss the emergence of a type of gambling, referred to as "in-running" wagering, that allows betting on a sporting event after the event has begun:

In Running Wagering - The new way to bet on sports.

With sports betting seeming to be more like the stock market every day its [sic] no surprise to hear about the latest Las Vegas creation from Wall Streets [sic] Cantor Fitzgerald's subsidiary Cantor Gaming. The newest innovation to Vegas is called in running wagering and it allows you to place multiple sports bets throughout any given game.

Dr. Robert Hunter who is a renowned gambling psychologist in the Vegas area thinks that in running wagering is a nifty idea and a novelty that may or may not catch on...
(www.cooperspick.com)

"In-running" football betting arrives in Las Vegas

M Resort...began offering "in-running" bets last spring during the NCAA basketball tournament. It then used it in the NBA

playoffs and Triple Crown horse races as well as the baseball season. But this is the first time it will be offered for football, which is, by far, the most popular sport to bet in Las Vegas. In addition to NFL games, "in-running" will also be available for select NCAA football games this season.

"The addition of 'in-running' is certainly going to enhance our sportbook offering and be a huge hit with the many sports aficionados who spend time at our properties," said Robert Goldstein....While The Venetian and Palazzo will be the only sportsbooks on the Strip to offer "in-running" this football season, D'Amico said the popularity of the new concept may help it to proliferate to other books in the very near future.

(www.casinocitytimes.com) (Sept. 4, 2009)

We are pleased to offer in-running betting on selected televised games.

In-Running Betting Odds

Once the game starts, in-running odds will be posted in the site under "In-Running" and will be updated whenever there is a time-out or a stoppage of play during the game, unless the game becomes extremely one-sided, in which case in-running betting will be suspended.

In-running wagers are based on the final result of the entire game including any overtimes.

(www.sportsbook.com)

Sports Betting In-Running

Welcome to Sports Betting In-Running, the number one source of information on In-Running wagering, online sports book reviews, and live odds on sports games from around the world.

In-Running Wagering

In-Running betting, also known as Live Betting, In-Play Betting, or In-Game Betting, is the fastest growing form of sports betting in the world today. While traditional sports books allow bets to be placed before a game begins, In-Running wagers are placed while the game or race is in progress. Do you think that the QB is just about to throw an interception, or that the next batter is going to knock one out of the park, or the player at the free throw line is going to toss up a brick? Wanna bet? Well, now you can. With live, up to the second odds on every play, on every sports professional sports game, you'll never want to miss a single minute when you're Sports Betting In-Running.

In-Running in Vegas

Multiple Las Vegas casinos have just begun offering In-Running Sports Betting. The Venetian, Palazzo, M Resort, and Hard Rock Casino now offer the non-stop action of live sports betting. Cantor Gaming, a Nevada based corporation, is offering casinos the opportunity to incorporate their newest product, Pocketcasino In-Running, into their existing sports book. Customers can now check out one of these iPhone-size devices from the casino sports book and make live, In-Running wagers right from the comfort of their seats. The first casinos began using this system in late 2009 and new ones are added to the list every month, so you can bet that In-Running betting is going to be the new standard in live sports betting. (www.sportsbettinginrunning.com)

Another anomaly Cantor has instituted is a form of sports betting known as in-running. Typically, in Las Vegas casinos, gamblers can only bet on a game before it starts and make a handful of so-called proposition bets (say, betting on who will be ahead at the end of the first half). With in-running, gamblers can bet on the game even during play, accepting ever-changing point-spreads

and odds. They can invest money on a Knicks foul shot going through the hoop or a Dodger getting to first base--contending with ever evolving odds.

This form of wagering is new to Las Vegas but old-hat in other markets. "The idea evolved over the last 10 years," says Andrew Garrood, who helped create the program at M Resort and serves as executive director of Las Vegas Sports Consultants, the sports-handicapping service owned by Cantor. "We started in-running wagering in 2001. We did it as a bookmaker [in England] and we were principal to all the action. We built models and figured we could bring it to Nevada.

Because in-running provides opportunities for gamblers to make more bets per game than they can with traditional wagering, Cantor stands to generate more "vigorous," which is casino-lingo for the 10% commission that bookies collect on all losing wagers.

Garrood has a background in financial derivatives, and he maintains that in-running is no different.

Critics of in-running maintain that some people don't want to bet sports as if they're day-trading a stock. Sometimes, the reasoning goes, you just want to sit back, drink a beer and enjoy the game.

Kenny White, who runs Cantor's Las Vegas Sports Consultants, sees it differently. He points out that casual gamblers view in-running as a convenience rather than a complex puzzle of wagers. "You see momentum changing and can make a bet."

[Garrood] makes the in-running operation sound easy for a company like Cantor, which he says handles \$150 trillion in Treasury business each year.

(www.dailyfinance.com) (June 30, 2010)

In-running playoff wagering brings out the crazy uncles.
(Las Vegas Review-Journal, May 27, 2011).

"The in-running gives people an opportunity to hedge off their bets or try to middle something," said Mark Tomita, a Hilton supervisor who posted the numbers at timeouts. "The in-running, especially with the NBA, is really exciting because there are so many point swings."
(www.lvri.com)

**New Sports Betting Options Unveiled
Is In-Running Wagering the Next Big Thing in Pro-Sports Wagering?**

Las Vegas-based Cantor Gaming is the company chiefly driving the boom in In-Running, offering their product dubbed E-deck at the Venetian, and Palazzo, all in Las Vegas. It is essentially a mobile device that will operate anywhere in the casino or a guest's room.
(www.suite101.com)

"In-running" football betting arrives in Las Vegas

...the first NFL game to offer the new "in-running" wagers.
"In-Running" betting allows players to wager on live sporting events during the actual flow of the game.
(www.garytask.casinotimes.com)

Although we concur with applicant's claim that some of the articles refer to the applied-for mark in a proprietary manner,²

²In this connection applicant also introduced a Google search report summary showing three pages of "hits" for "in-running." Applicant contends that the majority of the online uses of the term are references to applicant's proprietary goods and services offered under the mark. A summary of Internet search results has little probative

the evidence includes references, even within the same article, to the proposed mark as the name of a specific type of wagering. That is to say, the authors of the articles refer to "in-running" as the name of a particular form or type of gambling, separate and apart from as a source indicator for applicant's goods and services. Even discounting the foreign websites as we have done, the remaining evidence shows that the term "in-running" has made its way to Las Vegas as the name of a type or form of gambling. Based on the current record, we conclude that the term "in-running" is merely descriptive for applicant's goods and services featuring the placement of wagers on sporting events while the events are running.

When the applicant is the only source of the goods or services, use alone does not automatically represent trademark recognition. *See, e.g., J. Kohnstam, Ltd. v. Louis Marx & Co.*, 280 F.2d 437, 126 USPQ 362, 364 (CCPA 1960). The fact that applicant may be the first and to date only user of the term "in-running" in this country does not justify registration if the only significance conveyed by the term is merely descriptive as the name of a form of wagering. *See In re National Shooting Sports Foundation, Inc.*, 219 USPQ 1018 (TTAB 1983).

value, because such a list does not show the context in which a term is used on the listed web pages. *See In re Bayer Aktiengesellschaft*, 82 USPQ2d at 1833; and *In re Thomas Nelson Inc.*, 97 USPQ2d 1712, 1715 (TTAB 2011).

Ser. No. 77819424

Decision: The refusal to register in each class is affirmed.