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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85981686
Applicant	Jonathan Roche Fitness Ventures LLC
Applied for Mark	NO EXCUSES DIET
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**In the United States Patent & Trademark Office
Before the Trademark Trial and Appeal Board**

Applicant/Appellant: **Jonathan Roche Fitness Ventures LLC**
Serial No.: **85/981686**
Filing Date: **July 25, 2012**
Mark: **NO EXCUSES DIET**
Class: **016**
Description of Goods: **books in the field of food in health and wellness**
Docket: **SBT0.T0201US**
Examining Attorney: **David T. MURRAY**
Law Office: **113**
Appeal no. **ESTTA669401**

Appeal Brief

Commissioner for Trademarks
P.O. Box 1450
Alexandria, VA 22313-1450

Dear TTAB:

The present Appeal Brief is submitted in support of the Notice of Appeal filed electronically on April 29, 2015. A communication mailed April 29, 2015, from the Trademark Trial and Appeal Board (TTAB) indicated the deadline for filing the present Appeal Brief is sixty days from the mailing date thereof, i.e., June 28, 2015, and as that day fell on a Sunday, this is timely filed the next business day.

Appellant and owner of the refused mark “NO EXCUSE DIET,” Reg. No. 85/981686 is
Jonathan Roche Fitness Ventures, LLC.

I. Index of Cited Cases

In re Cooper, 254 F.2d 611, 615-16, 117 USPQ 396, 399-400 (C.C.P.A. 1958);
TMEP §§904.07(b), 1202.08.

In re Dell, 71 USPQ2d at 1727-29; TMEP §904.03(h).

In re Genitope, 78 USPQ2d at 1822; TMEP §904.03(h).

Herbko Int’l, Inc. v. Kappa Books, Inc., 308 F.3d 1156, 1162-63, 64 USPQ2d 1375,
1378-79 (Fed. Cir. 2002); TMEP §§904.07(b), 1202.08.

*In re King Productions, Inc. Serial Number 76703458; USPTO Trademark Trial and
Appeal Board; November 19, 2014, [not precedential] (attached).*

Lands’ End, 797 F. Supp. at 513-14, 24 USPQ2d at 1316; TMEP §904.03(h).

In re Sones, 590 F.3d at 1288-89, 93 USPQ2d at 1123-24; TMEP §904.03(h).

II. Statement of the Issue on Appeal and Requested Action by the TTAB

Registration of the present mark “NO EXCUSE DIET”, for use in connection with “books in the field of food in health and wellness” has been finally refused under Trademark Act Sections 1, 2 and 45, 15 U.S.C §§1051-1052, 1127. The refusal of registration is that the applied-for mark, as used on the specimen of record does not allegedly function as a trademark to indicate the source of applicant’s goods and to identify and distinguish them from others, based on alleged use as the title of a single creative work, namely, the title of a specific book.

Appellant respectfully requests reversal of the refusal of registration, acceptance of Applicant’s specimen of use and allowance of the present application as Appellant’s mark.

III. Arguments

There is a recent observation by the United States Trademark Trial and Appeals Board (TTAB) in the case, *In re King Productions, Inc. Serial Number 76703458; USPTO Trademark Trial and Appeal Board; November 19, 2014, [not precedential] (attached)* that a title of a single book can be a trademark so long as it functions as a mark, as for example if it is used for a series of works (i.e., as the indicative of a series), or by the applicant demonstrating that indeed the mark does act/function as a trademark. Some specific mention is made of showing acquired distinctiveness under Section 2(f). In any case, Appellant believes that it has in fact shown function as a trademark in this case.

For this particular case, we start with that point that it is now completely acceptable that what may in some senses appear to be a book title can nevertheless be a trademark under particular circumstances. Further, we note that the circumstances of this particular case indicate further that though in one sense, the mark may appear as if a title to a book, it is also simultaneously acting as a mark on a portal to numerous – i.e., a series – of other works accessible through this singular portal labeled with the mark in question. This case is thus different from the facts in the *In re King* case, mentioned above.

First, Appellant's particular circumstances include that this trademark is displayed commonly on a website page with a checkout feature and a price directly related and closely associated with each other.

Relative to this, there is additional caselaw about website usage of specimens and functionality of marks in general on a website and some of the rules for the website definition of functionality of trademark include that a webpage specimen is acceptable as a display associated with the goods. See particularly the references to *In re Sones*, 590 F.3d at 1288-89, 93 USPQ2d at 1123-24; *In re Genitope*, 78 USPQ2d at 1822; *In re Dell*, 71 USPQ2d at 1727-29; *Lands' End*, 797 F. Supp. at 513-14, 24 USPQ2d at 1316; TMEP §904.03(h). Rather, Appellant's prior submitted specimens do indeed meet the requirements thereof and are indeed not non-functional. In particular, the elements re-stated as necessary in view of the citations above are:

(1) a picture of the relevant goods or a textual description that identifies the actual features or inherent characteristics of the goods such that the goods are recognizable, (2) the mark appearing sufficiently near the picture or textual description of the goods so as to associate the mark with the goods, and (3) information necessary to order the goods (e.g., an order form or a phone number, mailing address, or e-mail address for placing orders) or a visible weblink to order the goods.

In sum:

1. Contains a picture or textual description of the identified goods;
2. Shows the mark sufficiently near the picture or description of the identified goods to associate the mark with the goods;
3. Provides information necessary to order the identified goods.

Each point mentioned above can be found in our specimen of use:

- The Mark is shown prominently in the center of the webpage, and is placed in close proximity to the goods.
- Reference to “NO EXCUSE DIET” is displayed on the shopping cart page and shows the mark sufficiently near the picture of the book to associate the mark with the goods;
- The “add to cart” button reinforces trademark use of the mark because it conveys that the book sold on the webpage.

- Webpage contains sufficient product details to make the decision to purchase the goods, including picture and description; quantity options; price; and material content of the goods.
- The ordering information is in the form of an “Add to cart” button adjacent to the picture and description of goods.

Thus, as to each of these points in order: Appellant's prior submitted specimens included, for example, pictures/photographs of the actual products with textual descriptions of those particular products set forth immediately adjacent (either to the immediate right and immediately below) the pictures/photographs. Thus point (1) is met by Appellant's prior submitted specimens. Next, the mark at issue here appears adjacent the product on the webpages, and is thus labeling for all that appears on that page and consequently, point (2) from above is also met. Finally, for point (3), the contact weblink, shopping cart, is exceedingly conspicuous in the upper right area of the respective webpages and when clicked, the page for completion of the order is reached - among other contact information necessary for purchasing or ordering the products. Thus, point (3) was also achieved by the prior submitted specimens and thus the prior submitted specimens were and indeed still are completely sufficient under the law, cited here and/or otherwise, to be compliant specimens.

The combination of all the above on the website shows all our features and thereby the use of our phrase “No Excuses Diet” appropriately functioning as a trademark on Appellant’s

webpage specimen provided. The fact that it also appears in the title of the book is not determinative of whether it is actually functioning as a mark and as such should be registered.

Further, the Refusal on the grounds of alleged "Title of a Single Work" included a note about two thirds down the page on page 2 thereof that the refusal may be overcome by submitting evidence that the applied-for mark is used to identify a series of creative works. Applicant has done so in response to the last office action showing in the there-attached evidence; first, a portal page entitled with the No Excuses Diet phrase and including a number of tools and materials accessible therefrom via live web-links. A user interface for web tool interactivity is thus provided (via website www.noexcusesworkout.com). The book includes references to the interactivity and points users to use the additional features, tools and materials available at the website. For a first example, on pages 128-132 of the book, reference is made to the website for download of the user usable checklists for multi-day progress tracking. Further, the book makes reference to the downloadable 15 Secrets for Better Health and to several alternative articles for user reference. Also included is a connection to an Audio Book accessible via the portal referenced above.

Thus, evidence in the nature of the previously-attached documents includes a printout of the webpage portal for additional "No Excuses Diet" tools and other materials for use in and/or with a No Excuses Diet program or system. Examples of such tools and materials are also attached and include the 15 Secrets to Better Health, the Win Today and Win Tomorrow checklists and the Audio Book has been attached.

Appellant has therefore previously-provided the requested evidence of multiple examples of additional materials constituting a series of creative works that are beyond the mere single book; i.e., the facts here are distinguished from any mere “title of a book” cases (whether *In re King*, or otherwise). These are all accessed and accessible via the PORTAL that has the mark/label “No Excuses Workout”. The Appellant thus respectfully requests that the refusal be overturned and this application be passed to registration. If the Appellant can provide anything further, the TTAB and/or Examining Attorney are encouraged to call the under-signed to speed processing.

IV. Conclusion

For the reasons set forth in detail above, inter alia, the refusal of registration based on the mark allegedly not functioning as a trademark are not supported and thereby refusal of registration should be reversed and the allowance of the present application is warranted and requested. Favorable action is respectfully requested.

Respectfully submitted this 29th day of June 2015.

/peterbscull/

Peter B. Scull; PTO reg. no. 37,932, Colorado and Arizona bar member

Hamilton, DeSanctis & Cha, LLP; 303-974-6794

**This Opinion is Not a
Precedent of the TTAB**

Mailed: November 19, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re King Productions, Inc.
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Serial No. 76703458
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Elliott N. Kramsky, Esq., for King Productions, Inc.

Jeffery Coward, Trademark Examining Attorney, Law Office 106,
Mary Sparrow, Managing Attorney.

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Before Seeherman, Quinn and Greenbaum, Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

King Productions, Inc. (“Applicant”) seeks registration on the Principal Register of the designation ROCK YOUR BODY (in standard characters) for

DVDs in the field of dance, exercise and fitness in
International Class 9, and

Books in the field of dance, exercise and fitness in
International Class 16.¹

¹ Application Serial No. 76703458 was filed on June 21, 2010, based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as May 21, 2009.

Applicant also claimed ownership of Registration No. 3845514 for ROCK YOUR BODY for “clothing, namely, shirts and t-shirts” in International Class 25, and “educational services, namely, providing classes, seminars, workshops and conventions in the field of dance” in International Class 41.

The Trademark Examining Attorney has refused registration of Applicant's proposed mark under Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052 and 1127, on the ground that ROCK YOUR BODY fails to function as a trademark as shown on the specimens of record because it is merely the title of a single work, i.e., of a single book and a single DVD. Applicant's original specimen of use, which Applicant describes as a copy of the home page on Applicant's website,² is reproduced in relevant part below:



When the Sections 1, 2 and 45 refusal was made final, Applicant appealed.

² App. Br. at 3. During prosecution, Applicant submitted a substitute specimen consisting of a colorized version of this webpage and other webpages that include ordering information for the DVD and book, and supporting affidavits from Jamie King, Applicant's president, Daniel Sladek, Mr. King's personal manager, and Amy Cara, Business Manager of the Online Books Business at Rodale, Inc., a distributor of Applicant's DVD and book.

I. Preliminary Matter - Specimens

Applicant consistently has focused on the issue of whether the original and substitute specimens are acceptable as displays associated with the goods rather than whether ROCK YOUR BODY is the title of a single work. Although the issue of whether ROCK YOUR BODY is the title of a single creative work is tied to the manner in which the specimens display the proposed mark, the basis for the Examining Attorney's final refusal is not the acceptability of the specimens. The basis is that ROCK YOUR BODY is merely the title of a single work in the form of one DVD and one book, both of which have the title ROCK YOUR BODY. Nonetheless, to the extent clarification is needed, we note that the original specimens were not refused as insufficient by the Examining Attorney and, regardless of whether they qualify as displays associated with the goods, are sufficient since they show the mark on photos of the respective goods. Further, we find that the substitute specimens, which include relevant ordering information that the original specimens lack, are acceptable as a display associated with the goods. *See In re Sones*, 590 F.3d 1282, 93 USPQ2d 1118, 1123 (Fed. Cir. 2009); *In re U.S. Tsubaki, Inc.*, 109 USPQ2d 2002 (TTAB 2014).

II. Applicable Law

A. Title of Single Work/Series

It is well-established that the title of a single work, such as a book, is not considered a trademark, and therefore is unregistrable. *Herbko Int'l Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375 (Fed. Cir. 2002) ("the title of a single

book cannot serve as a source identifier.”); *In re Cooper*, 254 F.2d 611, 117 USPQ 396, 400 (CCPA 1958), *cert. denied*, 358 U.S. 840 (1958); *In re Arnold*, 105 USPQ2d 1953, 1954 (TTAB 2013); *In re Scholastic Inc.*, 223 USPQ 431 (TTAB 1984). In essence, the title of a work is treated as the name of the work, and therefore as describing the work. As the Court of Customs and Patent Appeals, a predecessor of our primary reviewing court, stated in *Cooper*:

However arbitrary, novel or non-descriptive of *contents* the name of a book—its title—may be, it nevertheless *describes* the book. Appellant has nowhere attempted to answer the question, How else would you describe it—what else would you call it? If the name or title of a book were not available as a description of it, an effort to denote the book would sound like the playing of the game “Twenty Questions.”

Cooper, 117 USPQ at 400 (emphasis in original).

However, it is equally settled law that the name of a series of works can be registered as a trademark even though the title of a single work cannot. The court explained this different treatment:

The name for a series, at least while it is still being published, has a trademark function in indicating that each book of the series comes from the same source as the others. The name of the series is not descriptive of any one book and each book has its individual name or title. A series name is comparable to the title of a periodical publication such as a magazine or newspaper. While it may be indicative either specifically or by association in the public mind, of the general nature of the contents of the publication, it is not the name or title of anything contained in it. A book title, on the other hand[,] especially one which is coined or arbitrary, identifies a specific literary work, of whatever kind it may be, and is not associated in the public mind with the publisher, printer or bookseller—the “manufacturer or merchant” referred to in the Trademark Act (Sec. 45, definition of Trademark). If a title is associated with anything, it is with the author for it is he who has produced the literary work which is the real subject of purchase.

Id. at 400.

Applicant does not argue that it uses ROCK YOUR BODY to identify a series of books or DVDs, and there is no evidence of record to support such a conclusion. Indeed, Applicant explains that “at the present time and as of the time that this application was filed,” the website only contained “information concerning two products (the displayed book and the displayed dvd).” Br. at 7. There is no question that ROCK YOUR BODY is the title of a single DVD and a single book, and we so find.

B. Statutory Basis for Title of Single Work Refusal

In the 55 years since the seminal decision in *Cooper*, this Board and the Federal Circuit, our primary reviewing court, consistently have found that the title of a single creative work is not a trademark. *See, e.g., Herbko*, 64 USPQ2d at 1379 (no proprietary rights in CROSSWORD COMPANION until publication of the second volume of a series of crossword puzzle books); *Mattel Inc. v. Brainy Baby Co.*, 101 USPQ2d 1140, 1144 (TTAB 2011) (LAUGH & LEARN and design considered a title of a single creative work, despite being used on a program offered in both VHS and DVD formats, and therefore petition to cancel registration granted); *In re Posthuma*, 45 USPQ2d 2011, 2014 (TTAB 1998) (title of live theater production unregistrable, notwithstanding variations necessarily arising because the performances were live).

Although *Cooper* referred to a title as being descriptive of the work, which would suggest Section 2(e)(1) of the Trademark Act as the appropriate basis for refusal, the registration of such titles has been refused on the basis that they fail to function

as a mark under Sections 1, 2 and 45 of the Trademark Act. *See* TMEP § 1202.08 (“Title of a Single Creative Work”) (October 2014). Indeed, the USPTO’s Trademark Operation interprets *Cooper* as an absolute bar to registration of the title of a single creative work, viewing such matter as incapable of trademark significance and, therefore, unprotectable and unregistrable even if the applicant submits proof of acquired distinctiveness. TMEP § 1202.08 (“The title of a single creative work is not registrable on either the Principal or Supplemental Register.”). This Board and the Federal Circuit have affirmed the refusals made under Sections 1, 2 and 45 of the Trademark Act.

We have undertaken a thorough review of the case law and the underlying principles for refusing registration of titles, and have reached the conclusion that the refusal to register a title of a single work should be based on Section 2(e)(1) rather than on Sections 1, 2 and 45. A title of a single work is unregistrable because it is the ultimate in descriptiveness (“How else would you describe it—what else would you call it?” *Cooper*, 117 USPQ at 400), rather than because it cannot function as a trademark, for as we have seen, once a title is used for a second work, it becomes registrable as a mark designating a series. Further, because Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), provides a way to overcome a Section 2(e)(1) refusal if an applicant can show that the proposed mark has acquired distinctiveness, it follows that a title of a single work should be registrable if an applicant makes a sufficient 2(f) showing, such that it is no longer regarded merely

as the title of a single work, but an indicator of source.³ “To show that a mark has acquired distinctiveness, an applicant must demonstrate that the relevant public understands the primary significance of the mark as identifying the source of a product or service rather than the product or service itself.” *Steelbuilding.com*, 15 F.3d 1293, 75 USPQ2d 1420, 1422 (Fed. Cir. 2005). *See also Coach Services Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1721, 1729 (Fed. Cir. 2012). We therefore consider whether ROCK YOUR BODY has acquired distinctiveness as a trademark and thus has become, in the view of relevant consumers, a source identifier and not just a title of Applicant’s DVD and book.

C. Acquired Distinctiveness

Although the issue of acquired distinctiveness under Section 2(f) was not specifically discussed during prosecution of this application, it is clear that one way to overcome a Section 1, 2 and 45 refusal is to submit evidence that the proposed

³ Federal courts have protected unregistered titles from confusingly similar uses under Section 43(a) of the Lanham Act upon a showing of secondary meaning. *See Rogers v. Grimaldi*, 875 F.2d 994, 10 USPQ2d 1825, 1827 (2d Cir. 1989); *EMI Catalogue Partnership v. Hill, Holliday, Connors, Cosmopulos, Inc.*, 228 F.3d 56, 63, 56 USPQ2d 1270, 1274 (2d Cir. 2000), amended by 2000 US App. Lexis 30761 (2d Cir. 2000); and *Sugar Busters LLC v. Brennan*, 177 F.3d 258, 50 USPQ2d 1821, 1828 (5th Cir. 1999). Although the issue of registrability differs from Section 43(a) issues such as infringement, unfair competition and false designation of origin, and a right to register does not necessarily follow from an ability to protect, the courts’ approach of protecting titles upon a showing of secondary meaning would be in harmony with the approach, set forth herein, to consider registrability upon a showing of acquired distinctiveness.

We also note that in his treatise *McCarthy on Trademarks and Unfair Competition*, Professor McCarthy supports the policy of the federal courts to protect a single work title upon acquisition of secondary meaning, and states that “[t]he USPTO’s refusal to register single work titles that are recognized by both consumers and courts as marks only serves to lessen the value of the federal register as a useful source to search for and verify rights.” 2 J. Thomas McCarthy, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* § 10:4.10 (4th ed. 2014).

mark functions as a mark because it has acquired distinctiveness as a mark. *See In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 227 USPQ 417, 422-24 (Fed. Cir. 1985). It is Applicant's burden to establish a prima facie case of acquired distinctiveness. *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 1580, 6 USPQ2d 1001, 1006 (Fed. Cir. 1988); *In re Hollywood Brands, Inc.*, 214 F.2d 139, 102 USPQ 294, 295 (CCPA 1954) ("[T]here is no doubt that Congress intended that the burden of proof [under Section 2(f)] should rest upon the applicant."). The amount and character of such evidence depends on the facts of each case. *Roux Laboratories, Inc. v. Clairol Inc.*, 427 F.2d 823, 166 USPQ 34, 39 (CCPA 1970). "The applicant's burden of showing acquired distinctiveness increases with the level of descriptiveness; a more descriptive term requires more evidence of secondary meaning." *Steelbuilding*, 75 USPQ2d at 1424 (internal citations omitted). The evidence necessary to establish acquired distinctiveness may include the length of use of the mark, advertising expenditures, sales, survey evidence, and affidavits asserting source-indicating recognition. *See, e.g., Steelbuilding.com*, 75 USPQ2d at 1424.

As discussed above, because ROCK YOUR BODY is the title of a single work, ROCK YOUR BODY is highly descriptive of the eponymous book and DVD. Accordingly, Applicant has a significant burden to prove acquired distinctiveness. We therefore examine the record to determine whether Applicant has established acquired distinctiveness. *See Trademark Rule 2.41(a)*. We are concerned particularly with whether there has been sufficient public exposure of ROCK YOUR

BODY in such a manner that consumers would view ROCK YOUR BODY not merely as a title of the book or the DVD, but as a trademark indicating source. It is here that Applicant's showing falls short. *Cf. In re First Draft*, 76 USPQ2d 1183, 1192 (TTAB 2005) ("In short, while we agree with applicant that an author's name may, under appropriate circumstances, be registered as a trademark for a series of written works, applicant has failed to establish that such circumstances are present in this case.").

The record includes Applicant's ownership of a prior registration for ROCK YOUR BODY (for different goods and services) on the Principal Register. This registration is insufficient to prove acquired distinctiveness for the goods identified in the instant application. *See In re Loew's Theatres, Inc.*, 769 F.2d 764, 226 USPQ 865, 869 (Fed. Cir. 1985) (in discussing "appropriate cases" in which a prior registration "may" be accepted as "evidence" of distinctiveness under Trademark Rule 2.41(b), the court stated: "The examining attorney and the board considered LTI's registration but were unpersuaded as to the sufficiency of this proof alone in view of the absence of any evidence concerning the extent of actual usage."); *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1234 (TTAB 2014) (prior registration alone not sufficient to establish acquired distinctiveness in highly descriptive term).

Nor is the evidence of the prior registration, combined with the other evidence submitted by Applicant, sufficient to demonstrate acquired distinctiveness. Ms. Cara, who works for Rodale, Inc., a distributor of Applicant's DVD and book, testified that through September 2011, "Rodale received and filled 884 sales of sets

of ROCK YOUR BODY books and dvd's based upon orders originating with and taken from the rockyourbody.com website." Cara Aff., ¶ 5. The webpage that is the specimen, as noted previously, appears on the website.

The webpage shows ROCK YOUR BODY used not only as the title of the book and the DVD, but also as a trademark for apparel, choreography and dance workshops, and special event production services (the apparel and workshops being the subject of Applicant's prior registration). Although this manner of display would convey to consumers seeing the webpage that ROCK YOUR BODY plays a role other than as a title of a book or a DVD, the evidence fails to demonstrate that there has been significant exposure of this display, such that a significant portion of the consuming public would be aware of it. There is no specific direct evidence of public exposure to the webpage that is the specimen, such as the number of hits or visitors to the website. Although there were 884 sales of books and DVDs originating from the website, at most they represent 884 customers who visited the webpage.⁴ While other people might have viewed the webpage without making a purchase, absent more evidence from Applicant, any conclusion as to the number of people who visited the website or viewed the webpage would be purely speculative. Further, the number that is of record, 884 sales, is insufficient for us to find that consumers would view ROCK YOUR BODY as a trademark for the book and DVD, rather than just as the title of a single creative work. As noted previously, because a title of a single work is considered to be highly descriptive, Applicant's burden to prove

⁴ Obviously some of the buyers could have purchased multiple copies of the book and DVD.

acquired distinctiveness is heavy, and is not met by showing, at most, 884 exposures of the webpage.

Other than the specimen webpage, we simply have no evidence regarding sales or advertising, and no evidence from which we could conclude that ROCK YOUR BODY has acquired distinctiveness such that consumers would recognize it as a trademark for the book and DVD, rather than just as the title thereof.

Decision: The refusal to register Applicant's mark ROCK YOUR BODY is affirmed in each class.