

This Opinion is Not a
Precedent of the TTAB

Mailed: March 13, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Simple Mobility Tools LLC
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Serial No. 87717065
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Jeffrey Sturman of Sturman Law LLC,
for Simple Mobility Tools LLC.

Barney L. Charlon, Trademark Examining Attorney, Law Office 104,
Zachary B. Cromer, Managing Attorney.

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Before Zervas, Cataldo and Goodman,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Simple Mobility Tools LLC, seeks registration on the Principal Register of the mark MOBILIZER (in standard characters), identifying, as amended, “massage apparatus and instruments” in International Class 10.¹

¹ Application Serial No. 87717065 was filed on December 12, 2017, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s allegation of January 23, 2016 as a date of first use of the mark in commerce.

Upon the Examining Attorney’s requirement, Applicant amended the identification goods in its March 29, 2018 response to the Examining Attorney’s March 23, 2018 first Office Action. In response to the refusal of registration under Section 2(e)(1), Applicant amended the involved application to seek registration on the Supplemental Register, but subsequently

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that MOBILIZER merely describes the identified goods or, in the alternative, that the mark is deceptively misdescriptive thereof. Applicant and the Examining Attorney filed briefs.

I. Mere Descriptiveness

In the absence of acquired distinctiveness,² Section 2(e)(1) of the Trademark Act prohibits registration on the Principal Register of “a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . . of them.” 15 U.S.C. § 1052(e)(1). A term is “merely descriptive” within the meaning of Section 2(e)(1) if it “immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.” *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); see also *In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015); *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). “On the other hand, if one must exercise mature thought or follow a multi-stage reasoning process in order to determine what product or service characteristics the term indicates, the term is

withdrew that amendment and again seeks registration on the Principal Register. Thus, the question of whether MOBILIZER is capable of registration on the Supplemental Register is not before us.

² Applicant has not made a claim of acquired distinctiveness. Accordingly, the question of whether Applicant's MOBILIZER mark has acquired distinctiveness under Trademark Act Section 2(f) is not before us.

suggestive rather than merely descriptive.” *In re Tennis in the Round, Inc.*, 199 USPQ 496, 498 (TTAB 1978); *see also In re Gyulay*, 3 USPQ2d at 1009.

A term need only describe a single feature or attribute of the identified goods to be descriptive. *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1812 (Fed. Cir. 2001). Whether a mark is merely descriptive cannot be determined in the abstract or on the basis of guesswork. Descriptiveness must be evaluated “in relation to the particular goods for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use.” *Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219 (quoting *In re Bayer AG*, 82 USPQ2d at 1831). The question is not whether a purchaser could guess the nature of the goods from the mark alone. Rather, we evaluate whether someone who knows what the goods are will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012); *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002).

In his brief,³ the Examining Attorney argues

In the present case, the term MOBILIZER describes a feature, characteristic, purpose and use of applicant’s massage apparatus and instruments in that it describes their capacity to therapeutically mobilize joints. In this regard, the word MOBILIZER is listed in dictionary.com as a noun formed from the word “mobilize,” which is

³ 10 TTABVUE 4-5.

Page references herein to the application record refer to the .pdf version of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. References to the briefs refer to the Board’s TTABVUE docket system.

defined as “To make mobile or capable of movement” and “To restore the power of motion to a joint.” See the definitions from dictionary.com enclosed with the initial Office action dated March 23, 2018, at pp. 9, 11 in TIGRS.⁴ In addition, see the entry from thefreedictionary.com enclosed with the denial of request for reconsideration dated June 20, 2019, at p. 3 in TIGRS, citing the word MOBILIZER as a noun form of the word “mobilize,” which is defined as “To make mobile, put into action.”⁵ Thus, by its plain meaning the word MOBILIZER is descriptive of applicant’s massage apparatus and instruments in that they are used to make mobile and/or restore the power of motion to a joint.

In further support of this contention, the Examining Attorney introduced into the record screenshots from the following websites utilizing the term “mobilizer” to describe or identify Applicant’s goods under its mark as well as other exercise and mobility enhancing devices (emphasis provided by the Examining Attorney):

Applicant, at its website simplemobilitytools.com, advertises and displays its goods (pictured below) offered under the MOBILIZER mark.

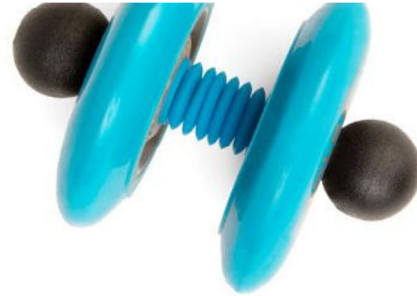
⁴ March 23, 2018 first Office Action at .pdf 10-13.

⁵ June 29, 2019 Denial of Request for Reconsideration at .pdf 4-8.

MEET THE MOBILIZER, BY SIMPLE MOBILITY TOOLS.

Introducing **The Mobilizer**, an adjustable, myofascial release tool that's engineered to deliver precise, focused pressure where you need it most – from your thoracic spine, glutes and hips, to your thighs, calves, and feet. Whether you're a seasoned athlete, new to fitness, or just looking to increase mobility, you'll feel results almost immediately.

[SEE THE BENEFITS](#)



GET MOVING TOWARD RELIEF.

Whether you spend hours sitting at a desk – or stretching and mobilizing after an intense workout – locked up joints and tight muscles can reduce your range of motion and put additional strain on your back and other joints. This can often result in injury.

Rugged, portable and easy to use, **The Mobilizer** quickly zeroes in on even the hardest-to-reach muscles and joints, digging deep to kick stiffness and immobility to the curb. From surfers, golfers and gymnasts to football, baseball and tennis players (Yogis, too!), **The Mobilizer** relieves stiffness and pain for athletes of all types. Drastically more effective than any other device on the market – it's the ultimate mobility tool.

[SHOP THE MOBILIZER](#)

THE MOBILIZER IMPROVES AND EXPANDS YOUR THORACIC SPINE MOBILITY IN ORDER TO HELP:



FIND THE MOBILIZER THAT'S RIGHT FOR YOU

Available in three different sizes, The Mobilizer is scaled for mild applications up to aggressive myofascial release. Whether you're an athlete, new to fitness, or you just sit at a desk all day, The Mobilizer can help relieve stiffness and pain.



April 19, 2018 second Office Action at .pdf 25-31.

A third-party review describes Applicant's goods under its MOBILIZER mark as "A Roller to Mobilize Your Muscles" and stating with regard to sore muscles that "Supporting mobility through increasing blood flow to these areas is a critical component of training for many athletes of all levels."

June 29, 2019 Denial of Request for Reconsideration at .pdf 21.

Excerpt from protherapysupplies.com, featuring Deluxe Full Spine Posture Pump (pictured below) including the testimonial "I have been a Registered Physical Therapist for 18 years. I started using the Posture Pump over 2 years ago and have found it to be an extremely effective spinal *mobilizer*."



April 19, 2018 second Office Action at .pdf 12-13.

Excerpt from reddit.com/crossfit/comments discussing self-myofascial release tools, stating “Lay on it like you would your foam roller but with less focus on moving or rolling, and find the point of tension and just try breathing it out. If you’re a frequent psoas *mobilizer*, and that’s not enough, I would try moving.” June 20, 2018 Denial of Request for Reconsideration at .pdf 14-15.

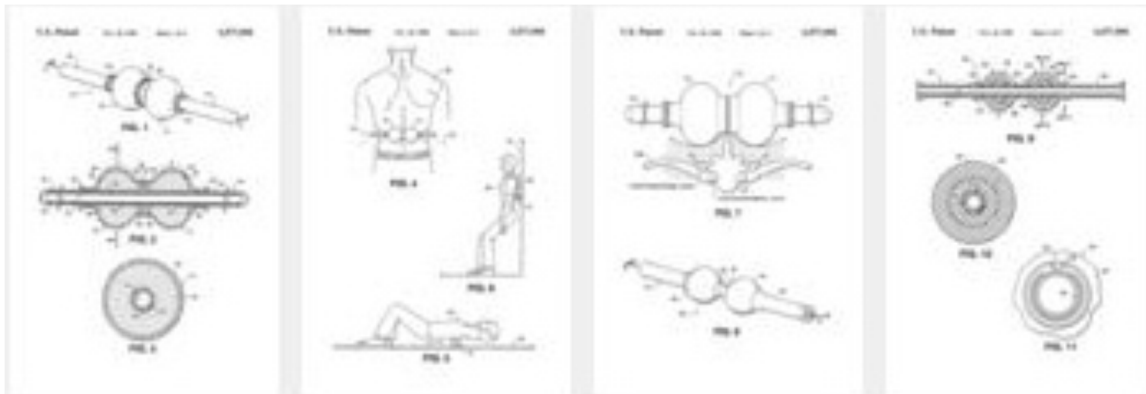
Excerpt from naiomt.com blog of the North American Institute of Orthopedic Manual Therapy entitled “Why Does Foam Rolling Work?” in which the author/practitioner states “The foam roller does many things, but I like to think of it as a tissue *mobilizer*.”

June 20, 2019 Denial of Request for Reconsideration at .pdf 22-23.

Excerpt from rehabpropulleys.com entitled “Exercise Benches: General Information” offering several types of exercise benches and stating that “The Mobilization Bench is known as the thoracic spine *mobilizer*.”

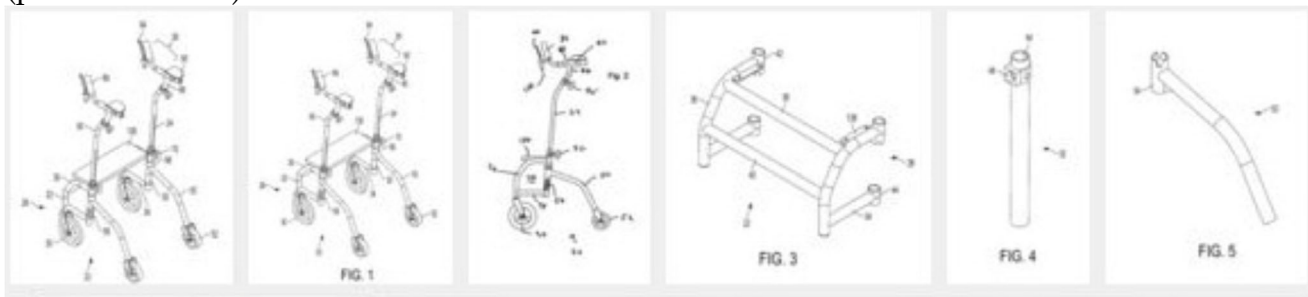
June 20, 2018 Denial of Request for Reconsideration at .pdf 24.

Excerpt of a patent from patents.google.com for a “Spinal and soft tissue *mobilizer*” (pictured below) describing “A therapeutic device to *mobilize* the spinal joints and soft tissues surrounding the human spine” and which reads in part “Joint *mobilization*, soft tissue *mobilization*, and *massage* can be accomplished by manual forces. In the case of the back, most of these techniques are difficult for patients to perform on themselves. Accordingly, there is a need for devices which can accomplish these techniques in an easy manner.”



April 19, 2018 second Office Action at .pdf 4-11.

Excerpt for a patent entitled “*Mobilizer* for Exercise, Rehabilitation and Wellness” describing “A *mobilizer* device providing *mobility* support to a user” (pictured below).

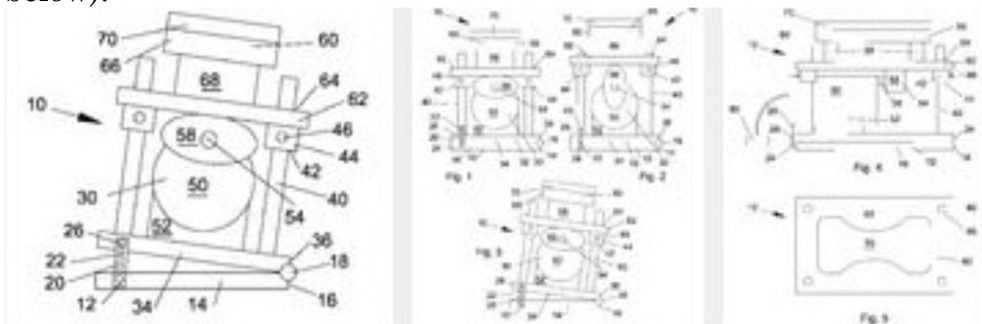


April 19, 2018 second Office Action at .pdf 14-24.

Excerpt from violinist.com discussing a neck stretching technique entitled “Pain is inevitable. Suffering is optional” and suggesting “So if you start from a full slouch (i.e. with head hanging forward and down crown pointing forward) and extend through the top of your head, as if you were going to ‘head’ a soccer ball, you’ve got yourself a pretty good *mobilizer* for the whole spine.”

June 20, 2018 Denial of Request for Reconsideration at .pdf 11-13.

Excerpt of a patent entitled “Knee joint *mobilizer*” describing “an apparatus for applying a periodic motion to a limb includes a base, a chassis including a motor for providing rotational motion...for *mobilizing* the knee” (pictured below).



June 20, 2018 Denial of Request for Reconsideration at .pdf 16-20.

In addition, the Examining Attorney introduced website evidence demonstrating use of such terms as “mobilize” and “mobilization” in connection with various goods used in the field of therapeutic self-massage for relief of sore or tight muscles and other tissues.

Applicant essentially argues that its MOBILIZER mark only suggests a function, feature or characteristic of its goods and that the Examining Attorney’s evidence is insufficient to support his contention that the mark is merely descriptive thereof. Applicant further argues that the majority of the Examining Attorney’s evidence does not discuss the term MOBILIZER but rather displays other derivations of the term “mobilize.”

The Examining Attorney’s evidence, excerpted in most relevant part above, includes only a handful of uses of the term “mobilizer” in various contexts. These include screenshots from Applicant’s own website, using the term MOBILIZER as a mark, and such terms as “mobility” and “mobilizing” to describe the functions and uses of Applicant’s goods under the mark. A third-party review of Applicant’s goods uses MOBILIZER as a mark, and notes that Applicant’s goods under the mark may be used to “mobilize” the user’s muscles. A review of a third-party device called a “Deluxe Full Spine Posture Pump” describes it as a “spinal mobilizer.” However, it is not clear from the limited webpage excerpt that the goods described or pictured may be considered to be the “massage apparatus and instruments” identified in the involved application. The excerpt from the Reddit thread discussing myofascial

release tools suggests these may be “massage apparatus and instruments.” However the thread discusses the user as a “frequent psoas mobilizer,” and does not refer to the goods themselves as a “mobilizer.” The blog excerpt from the North American Institute of Orthopedic Manual Therapy discussing the benefits of foam rolling suggests that a foam roller, which appears to qualify as “massage apparatus and instruments,” functions as a “tissue mobilizer.” Similarly, the patent excerpt discussing a therapeutic “spinal and soft tissue mobilizer” appears to picture a type of massage apparatus used for joint and soft tissue “mobilization.” The webpage discussing exercise benches suggests that a “Mobilization Bench” serves as a “thoracic spine mobilizer,” although it is not clear that such a bench may be considered massage apparatus. Similarly, the patent excerpt for a “mobilizer device” displays a wheeled apparatus more in the nature of a walker than a type of massage apparatus. As a result, the record consists of two uses of MOBILIZER as a mark identifying or discussing Applicant’s identified goods, and six uses of the term “mobilizer” in connection with various therapeutic devices, of which no more than four appear to relate to massage apparatus or instruments.

The remainder of the Examining Attorney’s evidence discusses terms like “mobility,” “mobilize” and “mobilization,” but not MOBILIZER, in relation to various therapeutic devices. For instance, we agree with the Examining Attorney that the dictionary definitions discussed above list “MOBILIZER as a word that is derived from the word ‘mobilize,’ which, as previously indicated, is defined as ‘To make mobile

or capable of movement’ and ‘To restore the power of motion to a joint.’”⁶ However, the definition of “mobilize,” while indicating a meaning of its derivative MOBILIZER as something that makes mobile or restores the power of motion to a joint, does not demonstrate that MOBILIZER has a clearly recognized meaning in relation to the identified goods. The Examining Attorney succinctly states that “the word MOBILIZER and close variants thereof such as ‘mobilize,’ ‘mobilization’ and ‘mobility’ are frequently used descriptively in connection with massage apparatuses and related physical therapy modalities for making joints mobile and/or restoring their power of motion.”⁷ However, we find that the Examining Attorney’s evidence of “close variants” of MOBILIZER has limited probative value regarding the descriptiveness of the applied-for mark as applied to “massage apparatus and instruments.” Similarly, the definition of “mobilization” proffered by the Examining Attorney with his brief fails to define MOBILIZER or relate the mark to the identified goods. We further do not find Applicant’s own use of derivations of the term “mobilize” to describe its products under its mark to be particularly probative of whether MOBILIZER is merely descriptive thereof. Simply put, the majority of the Examining Attorney’s evidence shows that the term “mobilize” and derivations thereof are used to discuss various therapeutic devices and their uses. However, very little of the evidence demonstrates use of MOBILIZER to describe such devices.

⁶ Examining Attorney’s brief, 10 TTABVUE 7.

⁷ 10 TTABVUE 11.

As a result, the evidence of record falls somewhat short of demonstrating that MOBILIZER merely describes a function, feature or characteristic of Applicant's "massage apparatus and instruments." The evidence excerpted above clearly indicates that therapeutic products may be used to mobilize or otherwise increase mobility in joints, muscles and other body parts. Nonetheless, the evidence of record fails to show that the term MOBILIZER describes a function, feature or use of Applicant's identified goods. At best, the evidence indicates that MOBILIZER may be suggestive thereof.⁸

Finally, if doubt exists as to whether a term is merely descriptive, it is the practice of this Board to resolve doubts in favor of the applicant and pass the application to publication. *See In re Gourmet Bakers Inc.*, 173 USPQ 565 (TTAB 1972). In this way, anyone who believes that the term is, in fact, descriptive, may oppose and present evidence on this issue to the Board.

II. Deceptive Misdescriptiveness

The test for deceptive misdescriptiveness under Section 2(e)(1)⁹ has two parts. First, we must determine whether the matter sought to be registered misdescribes the goods or services. In order for a term to misdescribe goods or services, "the term must be merely descriptive, rather than suggestive, of a significant aspect of the goods or services which the goods or services plausibly possess but in fact do not." *In re*

⁸ We observe that on a different record, such as might be adduced in an inter partes opposition or cancellation proceeding, we might come to a different result on this issue.

⁹ The issue of whether Applicant's mark is deceptive under Trademark Act Section 2(a) is not before us.

Phillips-Van Heusen Corp., 63 USPQ2d 1047, 1051 (TTAB 2002); *see also In re Shniberg*, 79 USPQ2d 1309, 1312 (TTAB 2006). The examining attorney bears the burden of showing that a term is merely descriptive (and thus is potentially deceptively misdescriptive) of the relevant goods or services. *See In re Merrill Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987).

Second, if the term misdescribes the goods or services, we must ask whether consumers are likely to believe the misrepresentation. *In re White Jasmine LLC*, 106 USPQ2d 1385, 1394 (TTAB 2013); *In re Phillips-Van Heusen Corp.*, 63 USPQ2d at 1048; *In re Quady Winery Inc.*, 221 USPQ 1213, 1214 (TTAB 1984). The Board has applied the reasonably prudent consumer test in assessing whether a mark determined to be misdescriptive also would deceive consumers. *See R. J. Reynolds Tobacco Co. v. Brown & Williamson Tobacco Corp.*, 226 USPQ 169, 179 (TTAB 1985) (“On this evidence, we do not believe reasonably prudent purchasers are apt to be deceived.”).

As discussed above, based on the totality of the evidence of record, we find that the Examining Attorney has failed to carry the burden of demonstrating that MOBILIZER may plausibly describe a characteristic of Applicant’s “massage apparatus and instruments.”

Because the Examining Attorney has failed to demonstrate on this record that MOBILIZER is merely descriptive of a feature of the recited goods, we need not and do not engage in a separate analysis of whether consumers are likely to believe the misrepresentation.

III. Conclusion

The evidence submitted by the Examining Attorney falls short of establishing that the mark MOBILIZER is a merely descriptive term as applied to the identified goods. Because the evidence does not establish that MOBILIZER merely describes the goods, the Examining Attorney cannot establish that consumers are likely to believe that MOBILIZER misdescribes the goods.

Decision: The refusal to register Applicant's mark under Section 2(e)(1) on the basis that the mark MOBILIZER is merely descriptive of the identified goods, and deceptively misdescriptive of the goods, is reversed.