

<p>This Opinion is Not a Precedent of the TTAB</p>
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re UDP Labs, Inc.

Serial No. 88573702

Molly B. Markley of Young, Basile, Hanlon & MacFarlane P.C. for UDP Labs, Inc.

Miroslav Novakovic, Trademark Examining Attorney, Law Office 108,
Kathryn Coward, Managing Attorney.

Before Cataldo, Wellington and Goodman,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, UDP Labs, Inc., seeks registration on the Principal Register of the proposed mark BED METRICS (in standard characters, METRICS disclaimed), identifying “Computer hardware; downloadable computer software for the collection, processing, analysis, measuring, monitoring, tracking and distribution of biometric data; electronic sensors for monitoring movement, respiration, and heart rate,” in International Class 9; and “Software as a Service (SaaS) services featuring software

for the collection, processing, analysis, measuring, monitoring, tracking and distribution of biometric data,” in International Class 42.¹

The Trademark Examining Attorney refused registration of Applicant’s proposed mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the proposed mark is merely descriptive of the goods and services identified in the application.

When the Examining Attorney made the refusal final, Applicant appealed and requested reconsideration, which was denied.² Applicant and the Examining Attorney have filed briefs.³ We affirm the refusal to register.

I. Issue on Appeal

The issue on appeal is whether the proposed BED METRICS mark merely describes a function, feature or characteristic of the identified goods and services under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1).

The questions of whether Applicant’s proposed BED METRICS mark has acquired distinctiveness under Section 2(f) or is generic, are not before us.

¹ Application Serial No. 88573702 was filed on August 9, 2019 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s assertion of a bona fide intent to use the mark in commerce.

² Citations in this opinion to the application record, including the request for reconsideration and its denial, are to the .pdf version of the USPTO’s Trademark Status & Document Retrieval (TSDR) system pages in the Trademark Status & Document Retrieval (“TSDR”) database of the United States Patent and Trademark Office (“USPTO”).

³ We draw no negative inferences from Applicant’s decision to not file a reply brief.

Citations in this opinion to the briefs refer to TTABVUE, the Board’s online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page number(s) of the docket entry where the cited materials appear.

II. Analysis of Refusal

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 [or services] of the applicant is merely descriptive . . . of them.”

“A mark is ‘merely descriptive’ within the meaning of Section 2(e)(1) ‘if it immediately conveys information concerning a feature, quality, or characteristic of the goods or services for which registration is sought.’” *In re Omniome, Inc.*, 2020 USPQ2d 3222, *3 (TTAB 2020) (quoting *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017)). To be merely descriptive, a mark must forthwith convey such information with a “degree of particularity.” *Goodyear Tire & Rubber Co. v. Cont’l Gen. Tire, Inc.*, 70 USPQ2d 1067, 1069 (TTAB 2008) (citing *In re TMS Corp. of the Ams.*, 200 USPQ 57, 59 (TTAB 1978) and *In re Entenmann’s, Inc.*, 15 USPQ 2d 1750, 1751 (TTAB 1990), *aff’d*, 90-1495 (Fed. Cir. Feb. 13, 1991)). “A mark need not recite each feature of the relevant goods or services in detail to be descriptive, it need only describe a single feature or attribute.” *Omniome*, 2020 USPQ2d 3222 at *3 (quoting *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012)).

The descriptiveness of a mark must be determined in the context of the goods or services identified in the application. *See Octocom Sys. Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787-88 (Fed. Cir. 1990); *In re Vehicle Identification Network, Inc.*, 32 USPQ2d 1542 (TTAB 1994). Whether a mark is merely descriptive is “evaluated ‘in relation to the particular goods [or services] 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 [or services] because of the manner of its use or intended use,” *Chamber of Commerce*, 102 USPQ2d at 1219 (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)),⁴ and “not in the abstract or on the basis of guesswork.” *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)).

We ask “whether someone who knows what the goods and services are will understand the mark to convey information about them.” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018) (quoting *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (internal quotation omitted)). A mark is suggestive rather than merely descriptive if it requires imagination, thought, and perception on the part of someone who knows what the goods or services are to reach a conclusion about their nature from the mark. *See, e.g., Fat Boys*, 118 USPQ2d at 1515.

Applicant’s proposed mark consists of two words, BED METRICS. We “must consider the *commercial impression* of a mark as a whole.” *Real Foods*, 128 USPQ2d at 1374 (quoting *DuoProSS*, 103 USPQ2d at 1757 (citation omitted)). “In considering [a] mark as a whole, [we] ‘may not dissect the mark into isolated elements,’ without ‘consider[ing] . . . the entire mark,’” *id.* (quoting *DuoProSS*, 103 USPQ2d at 1757),

⁴ Registration may be refused if the proposed mark is merely descriptive of any of the goods or services in the same International Class identified in the application. *In re Stereotaxis, Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005).

but we “may weigh the individual components of the mark to determine the overall impression or the descriptiveness of the mark and its various components.” *Id.* (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004)). Indeed, we are “required to examine the meaning of each component individually, and then determine whether the mark as a whole is merely descriptive.” *DuoProSS*, 103 USPQ2d at 1758.

If the two words in the proposed mark are individually descriptive of the identified goods or services, we must then determine whether their combination “conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.” *Fat Boys*, 118 USPQ2d at 1515-16 (quoting *Oppedahl & Larson*, 71 USPQ2d at 1372). If each word instead “retains its merely descriptive significance in relation to the goods [or services], the combination results in a composite that is itself merely descriptive.” *Id.* at 1516 (citing *In re Tower Tech., Inc.*, 64 USPQ2d 1314, 1317-18 (TTAB 2002)); *see also In re Mecca Grade Growers, LLC*, 125 USPQ2d 1950, 1953-55 (TTAB 2018).

“Evidence of the public’s understanding of [a] term . . . may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers and other publications.” *Real Foods*, 128 USPQ2d at 1374 (quoting *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1046 (Fed. Cir. 2018)). “These sources may include [w]ebsites, publications and use ‘in labels, packages, or in advertising material directed to the goods.’” *N.C. Lottery*, 123 USPQ2d at 1710 (quoting *Abcor Dev.*, 200 USPQ at 218).

“It is the Examining Attorney’s burden to show, *prima facie*, that a mark is merely descriptive of an applicant’s goods or services.” *Fat Boys*, 118 USPQ2d at 1513 (citing *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987)). “If such a showing is made, the burden of rebuttal shifts to the applicant.” *Id.* (citing *In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003)). “The Board resolves doubts as to the mere descriptiveness of a mark in favor of the applicant.” *Id.* (citing *In re Stroh Brewery Co.*, 34 USPQ2d 1796, 1797 (TTAB 1994)).

III. Arguments and Evidence

In support of the refusal of registration, the Examining Attorney introduced into the record dictionary definitions reflecting the common usage of the terms comprising the mark. The evidence shows that the term BED is defined as:⁵

A piece of furniture for sleep or rest, typically a framework with a mattress;

A piece of furniture for reclining and sleeping, typically consisting of a flat, rectangular frame and a mattress resting on springs.

The dictionary definitions of record for METRICS define the term, inter alia, as follows:⁶

The application of statistics and mathematical analysis to a specified field of study;

A method of measuring something, or the results obtained from this.

We further take judicial notice of the following definition of “biometrics:”

⁵ November 18, 2019 first Office Action at 7-17, Oxford English Dictionary (Lexico.com); THE AMERICAN HERITAGE DICTIONARY, ahdictionary.com.

⁶ April 15, 2020 first Office Action at 18-21, Oxford English Dictionary (Lexico.com); THE AMERICAN HERITAGE DICTIONARY, ahdictionary.com.

The process by which a person's unique physical and other traits are detected and recorded by an electronic device or system as a means of confirming identity.⁷

Based upon these definitions, "biometrics" appears to be a subset of METRICS, and BED METRICS may be defined as the application of statistics and mathematical analysis to the field of furniture for sleep or resting. In relation to Applicant's goods and services, BED METRICS describes computer hardware, electronic sensors, and downloadable software or software provided as a service for the collection, processing, analysis, measuring, monitoring, tracking and distribution, and applying statistical and mathematical analysis, to a person's unique physical traits compiled from furniture for sleep or resting. "So long as any one of the meanings of a word is descriptive, the word may be merely descriptive." *In re IP Carrier Consulting Grp.*, 84 USPQ2d 1028, 1034 (TTAB 2007).

The Examining Attorney further introduced evidence from thirteen informational and commercial third-party websites that utilize the term "biometric(s)" to describe data gathering and analysis in the fields of beds and sleep. The following examples are illustrative:⁸

- RetailTouchPoints.com explains that Biometric Data Uncovers Health Benefits For Sleep Number Customers. The Sleep Number 360 smart bed! By generating over 4 billion biometric data points and measuring hundreds of

⁷ Dictionary.com, accessed on September 7, 2021. Definition retrieved from RANDOM HOUSE UNABRIDGED DICTIONARY (2021).

The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format, definitions in technical dictionaries, translation dictionaries and online dictionaries, and we elect to do so here. *See In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n. 23 (TTAB 2013).

⁸ Capitalization has been added to the website addresses to enhance readability.

thousands of sleep sessions every night, SleepIQ is giving us insight to better understand the impact of sleep on overall health.⁹

- MobileIDWorld explains that Sleep Number's eponymous Sleep Number 360 bed uses biometrics to track users' sleeping positions and automatically adjust its mattress in order to better support them. ... One of them is Motio HW, a wearable device designed to monitor sleep apnea. It's in the form of a bracelet, and its makers...say it can track heart rate, respiratory rate, pulse, and motor activity – all of which are leveraged into a biometric algorithm that can track sleep apnea.¹⁰
- DorNob.com explains that Sleep Number unveiled its latest innovation at the CES 2017 trade show in Las Vegas, and it's more intuitive and adaptive than ever. The 360 Smart Bed uses biometric sleep tracking to sense how you're moving around at night, and what would make you more comfortable.¹¹
- FastCompany.com discusses Eight Sleep's new biometric-monitoring smart bed: In addition to the ultimate heating and cooling system, the mattress is equipped with piezoelectric sensors that deliver advanced health monitoring of biometrics such as sleep stages, heart rate, respiration rate, and heart rate variability to users via the Eight app so you can see how good you were in bed (sleeping that is).¹² and
- FurnitureToday.com explains the new SnoreTech adjustable bed utilizes a sleep monitor that collects the sleeper's biometric data and uses it to trigger automatic adjustments to the bed to stop snoring. The company says most sleep monitors on the market today are passive data collectors, while SnoreTech uses its monitor to solve the snoring problem.¹³

The Federal Circuit has approved the use of Internet evidence in ex parte proceedings. *See, e.g., In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007) ("Internet evidence is generally admissible and may be considered for purposes of evaluating a trademark") (citations omitted); *see also In re Pacer Technology*, 338

⁹ November 18, 2019 first Office Action at 24-29.

¹⁰ *Id.* at 30-36.

¹¹ *Id.* at 37.

¹² *Id.* at 38.

¹³ June 10, 2020 final Office Action at 24-34.

F.3d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003) (Federal Circuit is “mindful of the reality that the PTO is an agency of limited resources”); *In re Loew’s Theatres, Inc.*, 769 F.2d 764, 226 USPQ 865, 868 (Fed. Cir. 1985) (the examining attorney “does not have means” to undertake the research, such as a marketing survey, necessary to prove that the public would actually make the goods/place association asserted).

These third-party webpages demonstrate that BED METRICS describes biometric data obtained from computer hardware, electronic sensors, downloadable software or software provided as a service for the collection, processing, analysis, measuring, monitoring, tracking and distribution, or applying statistical and mathematical analysis in the field of beds, or furniture for sleep or resting.

When combined in Applicant’s mark, the terms BED and METRICS retain their descriptive significance with respect to Applicant’s goods and services. The evidence of record demonstrates that third parties use “biometrics,” which is a form of metrics concerning a person’s unique physical and other traits, to describe a feature or characteristic of electronic devices used to obtain sleep-related information from, inter alia, smart beds, electronic sensors and electronic sleep monitors.

We find no incongruity in the wording BED METRICS. As discussed above, the wording BED METRICS in Applicant’s mark immediately describes computer hardware, electronic sensors and software, either downloadable or available as a service, used to collect, process, track and analyze biometric data from various devices including beds. Such a meaning presents no incongruity. *Cf., e.g., In re Tennis in the Round Inc.*, 199 USPQ 496, 498 (TTAB 1978); *In re Shutts*, 217 USPQ 363, 364–5

(TTAB 1983); *In re Vienna Sausage Mfg. Co.*, 156 USPQ 155, 156 (TTAB 1967); and *In re John H. Breck, Inc.*, 150 USPQ 397, 398 (TTAB 1966).

We similarly are not persuaded that BED METRICS is a double entendre. We find no evidence that consumers will view BED METRICS in Applicant's mark as having several connotations in connection with Applicant's goods and services. *Cf. In re Colonial Stores Inc.*, 157 USPQ at 382; *In re Tea and Sympathy, Inc.*, 88 USPQ2d 1062 (TTAB 2008); *In re Simmons Co.*, 189 USPQ 352 (TTAB 1976); and *In re Del. Punch Co.*, 186 USPQ 63 (TTAB 1975).

Applicant presents the following argument:

Applicant agrees the term "metric" is descriptive of Applicant's goods as the software analyzes measurements taken from the sensors and agreed to disclaim this term apart from the mark as shown. However, the term "bed" is suggestive, rather than immediately descriptive of Applicant's software and hardware goods and the combination of the terms creates a unique designation.¹⁴

We agree with Applicant's acknowledgement that METRIC(S) describes Applicant's software that analyzes measurements from sensors. However, the Examining Attorney's evidence demonstrates that third parties place such sensors, inter alia, in beds for computer analysis of sleep patterns, conditions and disorders. Thus, we disagree that BED only suggests a feature or characteristic of the identified goods and services.

Applicant further argues:

Applicant's software is used to analyze a user's movement, respiration and heart rate. The software takes the collected data from a sensor and makes recommendations to the user regarding various health

¹⁴ 6 TTABVUE 5 (Applicant's brief).

conditions. Among a range of data and analysis, data can be collected while a user sleeps or an analysis can be made regarding a sleep condition. Applicant is not attempting to register SLEEP METRICS, but rather the mark BED METRICS. The sensors can be placed in any object where the user plans to collect data, such as a bed, chaise or chair. While the product can analyze the data collected from a person during sleep, the sensor can be used in any place a user wants to track their biometric data.¹⁵

However, Applicant acknowledges that its goods and services, like similar goods and services provided by third parties as discussed above, may collect data from objects including beds, and may be used to analyze conditions including sleep, snoring, heart rate, comfort, respiration, pulse and motor activity. The Examining Attorney's evidence demonstrates that BED METRICS describes Applicant's broadly identified goods and services that collect and analyze biometric data from objects including beds.

Applicant argues in addition:

The combined mark is immediately descriptive of goods or services that measure a bed, but does not tell the user the goods collect biometric data from a person, analyze it and provide health recommendations.¹⁶

We disagree. The evidence of record establishes that third parties utilize biometric sensors, inter alia, in beds to measure not the beds themselves but the condition of the individuals sleeping in them. The evidence establishes that Applicant's goods and services collect, process and analyze BED METRICS in order to monitor movement, respiration and heart rate of sleeping individuals or persons who are in bed. Further,

¹⁵ *Id.*

¹⁶ *Id.* at 6.

it is not necessary that Applicant's goods include smart beds¹⁷ in order for BED METRICS to be merely descriptive because the evidence of record establishes that third parties collect biometric data from beds, electronic sensors and wearable devices to monitor, analyze and, in some cases, alter people's sleeping habits. Thus, BED METRICS does not merely describe smart beds, but also the computer hardware, sensors and software that collects, processes and analyzes the data produced by a smart bed. Additionally, even if Applicant is the first or only user of BED METRICS in connection with its particular software, such use does not necessarily render the proposed mark incongruous, suggestive or distinctive in connection with Applicant's goods and services. *See In re Fat Boys*, 118 USPQ2d at 1514; *In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1826 (TTAB 2012); TMEP §1209.03(c).

Applicant further argues "the use of the term 'bed' is suggestive of sleep, giving the mark BED METRICS several connotations, such as the product functions while you sleep, the product collects sleep data, or the product gives recommendations regarding a sleep disorder."¹⁸ However, our consideration of whether a term is merely descriptive is determined not in the abstract, but in relation to the goods and services for which registration is sought, the context in which it is being used on or in connection with those goods and services, and the possible significance that the term would have to the average purchaser of the goods and services because of the manner of its use. The evidence of record establishes that BED METRICS describes a

¹⁷ Applicant deleted references to beds or smart beds from its original identification of goods and services.

¹⁸ 6 TTABVue 7.

characteristic or feature of Applicant's goods and services, namely, they collect, analyze and distribute biometric data obtained from electronic devices located in beds. That a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).

Moreover, "[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). *See also In re Patent & Trademark Servs. Inc.*, 49 USPQ2d 1537 (TTAB 1998); *In re Home Builders Assoc. of Greenville*, 18 USPQ2d 1313 (TTAB 1990); *In re Am. Greetings Corp.*, 226 USPQ 365 (TTAB 1985). In this case, the evidence of record demonstrates that consumers encountering BED METRICS will recognize the term as describing electronic sensors, computer hardware and software, downloadable or available as a service, to collect, measure and analyze biometric data from a sleeping individual or from the bed in which a person is sleeping.

IV. Conclusion

Based on the record before us, we find that the proposed mark BED METRICS is merely descriptive of Applicant's identified goods and services.

Decision: The refusal to register Applicant's mark under Section 2(e)(1) of the Trademark Act is affirmed.