

This Opinion is Not a
Precedent of the TTAB

Mailed: June 10, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Skechers U.S.A., Inc. II
—

Serial No. 90701471
—

Marshall A. Lerner and Bradford E. Mattes of Kleinberg & Lerner LLP,
for Skechers U.S.A., Inc. II.

Jules Dean, Trademark Examining Attorney, Law Office 120,
David Miller, Managing Attorney.¹

—
Before Cataldo, Taylor and Coggins,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Skechers U.S.A., Inc. II, seeks registration on the Principal Register of the proposed standard character mark WORKOUT WALKER, identifying the following goods, as amended:

Footwear; Apparel, namely, tops, shirts, sports jerseys, sports bras, bralettes, tank tops, shelf bras, shell tops, halter tops, tube tops, body suits, bandeau tops, off-the-shoulder tops, t-shirts, sweatshirts, blouses, pullovers, hooded tops, sweaters, cardigans, jackets, vests, coats, bottoms, trousers, pants, shorts, capris, leggings, sweatpants, skirts,

¹ The Trademark Examining Operation reassigned the involved application to the above-signed Examining Attorney during prosecution.

skorts, jump suits, unitards, dresses, jumpers, singlets, underwear, lingerie, briefs, swimwear, swimsuits, beachwear, bathing suit cover-ups, caps being headwear, hats, visors being headwear, baseball caps, golf hats, beanies, headbands, wristbands, scarves, ties, gloves, socks, and belts in International Class 25.²

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 identified in the application.

When the Examining Attorney made the refusal final, Applicant appealed and requested remand for consideration of evidence not previously available during prosecution. (6 TTABVUE) The Board remanded the file to the Examining Attorney (7 TTABVUE), who maintained the finality of the refusal of registration. (8 TTABVUE.) The appeal is fully briefed.³ We affirm the refusal to register.

I. Issue on Appeal

The sole issue on appeal is whether the proposed WORKOUT WALKER mark merely describes a function, feature or characteristic of the identified goods under Section 2(e)(1) of the Trademark Act.⁴

² Application Serial No. 90701471 was filed on May 10, 2021, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant's allegation of a bona fide intent to use the mark in commerce.

³ 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. Applicant's brief and reply brief appear at 10 TTABVUE and 13 TTABVUE, respectively. The Examining Attorney's brief appears at 12 TTABVUE.

⁴ Applicant did not submit a claim of acquired distinctiveness under Trademark Act Section 2(f). Nor does the involved application appear to be eligible for registration on the Supplemental Register. As a result, the questions of whether the proposed mark has acquired

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 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 2003) (citing *In re TMS Corp. of the Ams.*, 200 USPQ 57, 59 (TTAB 1978) and *In re Entenmann’s, Inc.*, 15 USPQ2d 1750, 1751 (TTAB 1990), *aff’d unpub’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 Com. of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012)).

The descriptiveness of a mark must be determined by 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*

distinctiveness under Trademark Act Section 2(f) or is capable of registration on the Supplemental Register are not before us.

Network, Inc., 32 USPQ2d 1542 (TTAB 1994). Whether a mark is merely descriptive is “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 Com.*, 102 USPQ2d at 1219 (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)), 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 the term WORKOUT WALKER. “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)).

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.

- Workout – a session of exercise or practice to improve fitness, as for athletic competition. A strenuous test of ability and endurance;⁵
- Walker – something used in walking: such as a walking shoe.⁶

Based upon these definitions, WORKOUT WALKER may be defined as a walking shoe used for exercise or athletic competition.

The Examining Attorney also relies upon pages from Applicant’s website⁷ and third-party websites,⁸ excerpted below.

⁵ November 30, 2021 first Office action at 6 (ahdictionary.com).

⁶ *Id.* at 8 (Merriam-Webster.com).

⁷ *Id.* at 17-20.

⁸ *Id.* at 21-33.

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<https://www.skechers.com/women/shoes/relaxed-fit-d-lux-walker--infinite-motion/149023.html>
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New Markdown
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The Examining Attorney further introduced website evidence demonstrating third-party use of WORKOUT (Nike, Adidas, Target, Women's Health, GQ, Under Armour

and Walmart) or WALKER (Kohl's, Brooks, Walking Co., Ames Walker, Nordstrom, Vionic and Runner's World) to describe various types of shoes.⁹

In response to the Examining Attorney's information requirement,¹⁰ Applicant provided the following responses.¹¹

INFORMATION REQUIREMENT

Fact sheets, instruction manuals, brochures, advertisements and pertinent screenshots of applicant's website as it relates to the goods and/or services in the application, including any materials using the terms in the applied-for mark. Merely stating that information about the goods and/or services is available on applicant's website is insufficient to make the information of record.

Response: Please see Ex. 18, attached, and pages 6-8 below. [Both reproduced below.]

If these materials are unavailable, applicant should submit similar documentation for goods and services of the same type, explaining how its own product or services will differ. If the goods and/or services feature new technology and information regarding competing goods and/or services is not available, applicant must provide a detailed factual description of the goods and/or services. Factual information about the goods must make clear how they operate, salient features, and prospective customers and channels of trade. For services, the factual information must make clear what the services are and how they are rendered, salient features, and prospective customers and channels of trade. Conclusory statements will not satisfy this requirement.

Response: Since applicant provided the materials identified in number (1) above, no response is required for this requirement.

Applicant must respond to the following questions:

Do applicant's goods include walking shoes used for exercising?

Answer: Yes.

⁹ September 1, 2023 denial of request for remand at 4-153.

¹⁰ June 29, 2022 second non-final Office action at 2.

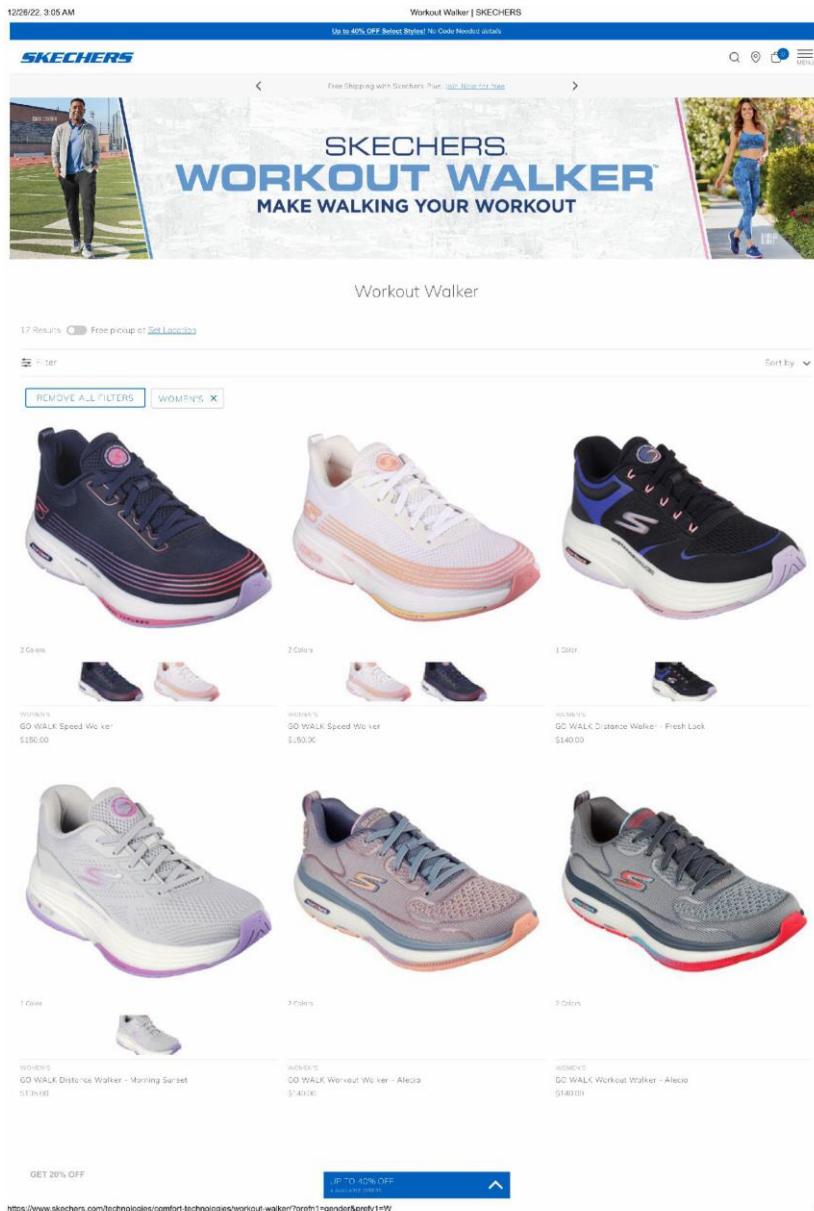
¹¹ December 28, 2022 response to second non-final Office action at 8-10, 13-15, 58-60. The screenshots below are representative of Applicant's response.

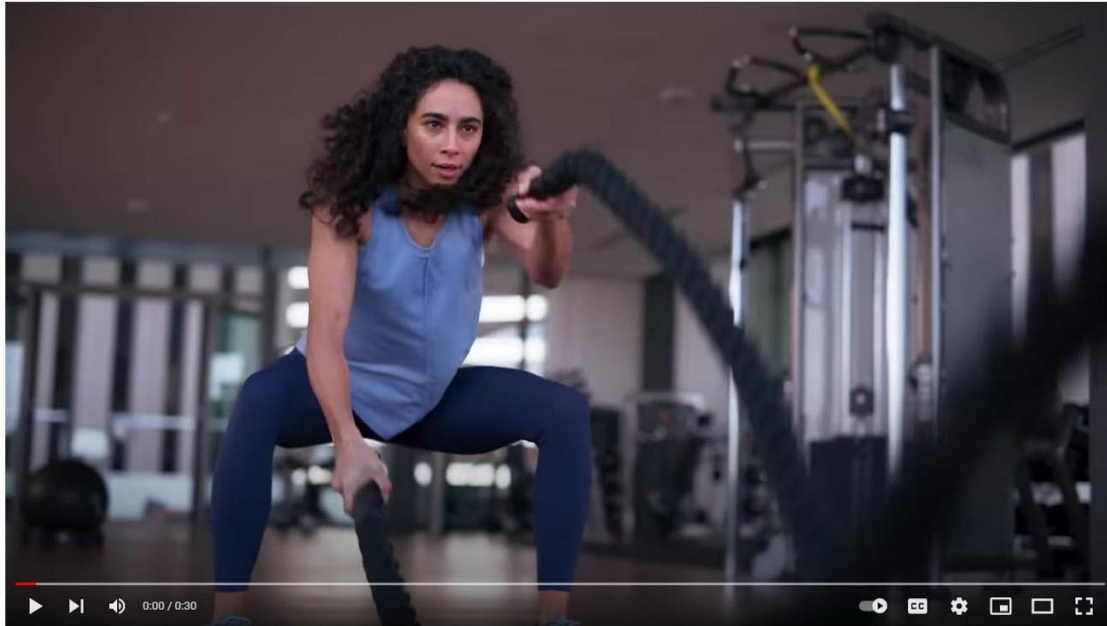
Do applicant's competitors use the wording **WORKOUT WALKER** and/or **WALKER** to advertise similar footwear and/or apparel goods?

Answer: No as to major competitors Nike, New Balance, Vans, Puma, Reebok, and Adidas based on searching for the terms "WORKOUT WALKER" and "WALKER" on their respective websites.

Does applicant use the wording "exercise", "exercising", "workout", "working out", "walker", and/or "walking" to advertise its footwear and/or apparel goods?

Answer: Yes.





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Cris Carter for the Skechers Workout Walker

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Hall of Fame wide receiver Cris Carter understands that working out doesn't have to be complicated. Don't stress about using the right equipment when you can just make walking your workout with the Skechers Workout Walker. Every pair is loaded with performance and comfort technologies like a Carbon Infused Forefoot Plate to add more spring to your step, plus Skechers Arch Fit®, Hyper Burst® cushioning, and a Goodyear® Performance Outsole. The Workout Walker, only from Skechers.

The Examining Attorney asserts (12 TTABVUE 4):

The evidence shows that wording WORKOUT and WALKER are used to describe the purpose and category of the applicant's goods. Viewing the mark in whole as WORKOUT WALKER, the mark merely describes a type of shoe that is used for a session of exercise involving walking. Therefore, the mark WORKOUT WALKER is descriptive because it describes the type of shoes the applicant will be proving [sic].

We agree that the record shows that the term WORKOUT WALKER merely describes the type of shoes Applicant will provide. In its responses to the Examining Attorney's requirement for information, Applicant acknowledges that its goods include walking shoes used for exercising, and that it uses, inter alia, "workout" and "walker" to advertise its footwear and apparel.¹² Evidence of record demonstrates that third parties, including entities Applicant acknowledges as competitors such as Nike and Adidas, use the terms WORKOUT and WALKER to describe footwear used for exercise and walking. This evidence corroborates that the dictionary definitions of the terms comprising the mark as combined, describes a walking shoe used for exercise. Applicant's video advertisements for its goods under the WORKOUT WALKER designation further state: "Don't stress about using the right equipment when you can just make walking your workout with Skechers Workout Walker."¹³

Applicant's own descriptive use of WORKOUT and WALKER to refer to its footwear further supports that Applicant's proposed mark is descriptive of Applicant's goods. *In re Mecca Grade Growers, LLC*, 125 USPQ2d at 1958-59 (applicant's website and marketing materials found probative of how the relevant public perceives term).

¹² December 28, 2022 response to second non-final Office action at 8-10, 58-60.

¹³ December 28, 2022 response to second non-final Office action at 8-10, 13-15.

The third-party descriptive uses of WORKOUT or WALKER to describe footwear also support a finding that, upon encountering Applicant's mark, prospective consumers would immediately understand the combination of these descriptive terms, WORKOUT WALKER, to retain its descriptive meaning of a feature or characteristic of Applicant's goods, namely, that they are walking shoes worn for exercise. *Abcor Dev. Corp.*, 200 USPQ at 218.

That Applicant has recited additional goods in its identification has no bearing on our finding of mere descriptiveness. Registration may be refused if the proposed mark is merely descriptive of any of the goods identified in the single-class application. *In re Stereotaxis, Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005). It is well settled that where a mark is merely descriptive of one or more items identified in the description of goods but may be suggestive or even arbitrary as applied to other items, registration is properly refused if the mark sought to be registered is descriptive of any of the goods. *See, e.g., In re Canron, Inc.*, 219 USPQ 820, 821 (TTAB 1983).

Applicant, in traversing the refusal, argues (10 TABVUE 6):

Although applicant concedes that "workout" and "walker" are each individually descriptive with respect to footwear, as stated in TMEP § 1209.03(d), "a mark comprising a combination of merely descriptive components is registrable if the combination of terms creates a unitary mark with a unique, nondescriptive meaning."

First, Applicant argues that WORKOUT WALKER is incongruous (10 TTABVUE 6-7):

The incongruity of "workout" and "walk" was recently pointed out in a headline of the New York Times that stated: "Who says a Walk Can't be a Workout?" (August 10, 2023, Appellant Req. for Remand, TSDR Proceeding Documents, PDF p. 5/18). The obvious underlying assertion

of this headline is that a “walk” is not considered to be a “workout.” Thus, combining the terms “workout” and “walker” leads to an incongruity, not a description.

In support of this argument, Applicant cites to an article in The New York Times entitled “Who Says a Walk Can’t Be a Workout?” discussing the exercise benefits of walking.¹⁴

Notwithstanding the wide readership of The New York Times, we find that a single article discussing the exercise benefits of walking is far from persuasive evidence that consumers view WORKOUT WALKER as an incongruity based on Applicant’s postulation that walking assertedly is not perceived as exercise. Indeed, the article itself appears to make the opposite point, namely, that walking is a workout, and the title challenges those who contend otherwise. Thus, we find no incongruity in the term WORKOUT WALKER. As discussed above, the term WORKOUT WALKER in Applicant’s mark, in keeping with the dictionary definitions and website evidence of record, immediately describes walking shoes worn for exercise. Such a meaning presents no incongruity. *Cf., e.g., In re Shutts*, 217 USPQ 363, 364–5 (TTAB 1983) (SNO-RAKE incongruous in relation to snow removal hand tool).

Applicant further argues (10 TTABVUE 8) that WORKOUT WALKER is an alliterative lexical name that pairs its component terms to create an effective trademark.¹⁵

¹⁴ August 10, 2023 Request for Remand at 5-18.

¹⁵ May 15, 2022 Request for Reconsideration at 10-68.

The mark has the same initial consonant “w” in both of its terms and the same middle consonant “k” in both of its terms. This double alliteration conveys to consumers that this is a brand name or trademark because consumers know that alliteration is a common lexical device used to create a name for a product or service. As stated in *heyttutor.com*, using alliteration in a name “is a great way to get consumers to remember your brand.” (May 15, 2023, TEAS Request Reconsideration after FOA, TSDR Trademark Documents, p. 7). As stated in *ignytebrands.com*, “Lexical names [which include alliteration] . . . get their impact from pairing words for linguistic effect. . . . [T]his naming type has been used to great effect by consumer brands” (*Id.* at p. 21). The fact that applicant’s mark has double alliteration reinforces its overall impression as a catchy, memorable name, i.e., as a source identifier or trademark.

However, while Applicant’s evidence suggests that alliterative names can be effective devices “to get consumers to remember your brand,” Applicant has not submitted evidence that consumers of its WORKOUT WALKERS-branded goods will perceive the term as a trademark of its goods, including walking shoes worn for exercise. That alliteration may help to create a memorable trademark does not necessarily indicate that it has done so in this case. Simply put, there is insufficient evidence that the alliteration present in WORKOUT WALKER elevates the descriptive term into a source indicator.

We similarly find no evidence in the record that purchasers of Applicant’s clothing and footwear will perceive WORKOUT WALKER as a double entendre. The multiple interpretations that make an expression a double entendre must be associations that the public would make fairly readily, and must be apparent from the mark itself. *See, e.g., In re Yarnell Ice Cream, LLC*, 2019 USPQ2d 265039, at *7-8 (TTAB 2019) (finding SCOOP for ice cream, which merely described the serving size of the goods, did not present a double entendre because the applicant made no showing that the

interpretation of SCOOP in this context was that of a “news scoop”). Moreover, there simply is no evidence that consumers will view Applicant’s mark WORKOUT WALKER as having several connotations in connection with Applicant’s goods. *Cf. In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) (SUGAR & SPICE a double entendre in relation to bakery products); *In re Tea and Sympathy, Inc.*, 88 USPQ2d 1062 (TTAB 2008) (THE FARMACY a double entendre in relation to retail store services featuring natural herbs and organic products and related health and information services relating to dietary supplements and nutrition).

Applicant introduced dictionary and website evidence showing that the term WALKER has numerous meanings in various contexts, including a surname, a device to enable babies, the elderly and injured to walk, and an extra in theater performances.¹⁶ That a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). “The 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); *accord, In re Patent & Trademark Servs. Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998). The record in this case establishes that consumers familiar with Applicant’s clothing and footwear will understand WORKOUT WALKER to describe a feature thereof.

¹⁶ December 28, 2022 response to second non-final Office action at 4-5, 17-57.

Whether a term 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 those goods or services, 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. Evidence of record establishes that WORKOUT WALKER describes walking shoes worn for exercise. The fact that the component terms may have other meanings in in different contexts is not controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).

Applicant also submitted copies of third-party registrations in support of its position that “consumers are able to distinguish between registered marks in class 25 that include the term ‘walker’ in combination with another term.”¹⁷ These include the following registrations, all in standard characters except as noted and identifying various forms of footwear:¹⁸

- Reg. No. 1668031 for the mark TRAILWALKER;
- Reg. No. 5454317 for the mark STEELWALKER;
- Reg. No. 2845072 for the mark TRAVELWALKER;
- Reg. No. 1841382 for the mark VILLAGEWALKER;
- Reg. No. 3000291 for the mark WORLDWALKER (in stylized form);
- Reg. No. 3303589 for the mark WINTER WALKER (WALKER disclaimed);
- Reg. No. 1644792 for the mark WALKERWALKER;

¹⁷ May 31, 2022 response to first Office action at 10.

¹⁸ May 31, 2022 response to first Office action at 51-64.

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- Reg. No. 2850411 for the mark SWAMPWALKER;
- Reg. No. 5900844 for the mark BREATH WALKER (in stylized form, WALKER disclaimed);
- Reg. No. 1725813 for the mark LIFEWALKER (in stylized form);
- Reg. No. 1580176 for the mark ULTRA-WALKER; and
- Reg. No. 1755412 for the mark ECCO WALKER (WALKER disclaimed).

Evidence of record establishes that WORKOUT WALKER describes walking shoes worn for exercise, and Applicant's third-party registrations do not compel a different result. Applicant's argument that consumers are conditioned to distinguish between different registered WALKER formative marks is more appropriate in a likelihood of confusion analysis, and is far less persuasive in response to a mere descriptiveness refusal.

To the extent that Applicant has relied upon a variety of third-party registrations and decisions in other cases to bolster its contention that its proposed mark is not merely descriptive, as is often noted by the Board and the Courts, each case must be decided on its own merits. *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); *see also In re Kent-Gamebore Corp.*, 59 USPQ2d 1373 (TTAB 2001); *In re Wilson*, 57 USPQ2d 1863 (TTAB 2001). We further note that none of the third-party registrations submitted by Applicant and listed above include any marks consisting in part or whole of the term WORKOUT WALKER. Further, some of the registrations contain disclaimers of WALKER in recognition of the merely descriptive wording in the marks, and those that do not are unitary.

IV. Conclusion

It is clear on this record that the individual words WORKOUT and WALKER have descriptive significance with respect to Applicant's goods. When we consider the proposed mark as a whole, the combination of the descriptive components as WORKOUT WALKER does not convey any distinctive impression contrary to the descriptiveness of the individual parts. Instead, each component retains its merely descriptive significance in relation to the goods, and the combination results in a composite that is itself merely descriptive. *See Fat Boys*, 118 USPQ2d at 1515-16 (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004), and citing *In re Tower Tech Inc.*, 64 USPQ2d at 1317-18).

Based on the record before us, we find that the proposed mark WORKOUT WALKER is merely descriptive of a feature of Applicant's identified footwear.

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