

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: May 28, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Track Draft, LLC

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Serial No. 90704707

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Henry J. Cittone of Cittone Demers & Arneri LLP, for Track Draft, LLC.

Jeri Fickes, Trademark Examining Attorney, Law Office 107,
Leslie Bishop, Managing Attorney.

—
Before Shaw, Thurmon and Lebow,
Administrative Trademark Judges.

Opinion by Lebow, Administrative Trademark Judge:

Applicant, Track Draft, LLC, appeals from the Trademark Examining Attorney's final refusal to register the mark TRACK DRAFT, in standard characters on the Principal Register, for

Entertainment services in the nature of fantasy motorsports, automobile racing, and motorcycle racing leagues; Entertainment services in the nature of production of multimedia entertainment content in the field of motorsports, automobile racing, and motorcycle racing and fantasy motorsports, automobile racing, and motorcycle racing; Online gaming services in the nature of motorsports, automobile racing, and motorcycle racing gambling; Entertainment services, namely, providing a web site featuring photographic, video and prose presentations featuring motorsports, automobile racing, and motorcycle

racing and fantasy motorsports, automobile racing, and motorcycle racing, in International Class 41,¹

on the ground that the mark is merely descriptive under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1). Applicant filed an appeal, which has been fully briefed. For the reasons discussed below, we affirm the refusal to register.

I. Preliminary Issues

Before proceeding to the merits of the refusal, we address two preliminary issues.

A. New Evidence Filed with Applicant's Brief

“The record in [an] application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal.” 37 C.F.R. § 2.142(d). We therefore sustain the Examining Attorney's objection to the website printouts submitted for the first time as attachments to Applicant's appeal brief on the ground that they were untimely submitted during the appeal, and we have not considered that evidence. *See In re tapio GmbH*, 2020 USPQ2d 11387, at *3 (TTAB 2020) (“screen shots” from applicant's website embedded in applicant's brief and other materials first filed with applicant's brief not considered); *In re Quantum Foods Inc.*, 94 USPQ2d 1375, 1377 n.2 (TTAB 2010) (page from applicant's website submitted with appeal brief not considered).

¹ Application Serial No. 90704707 (“the Application”) was filed on May 11, 2021, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant's allegation of a bona fide intention to use the mark in commerce.

TTABVUE and Trademark Status and Document Retrieval (“TSDR”) citations in this opinion refer to the docket and electronic file database for the involved application and are to the downloadable .PDF version of the documents.

B. Applicant’s Proposed Amendment to the Recitation of Services After Briefing and Remand of the Application

On July 6, 2023, one day after filing its reply brief on appeal, Applicant filed an amendment of its recitation of services that deletes all specific reference to fantasy sports.² The term “fantasy sport” describes “any of a number of games that permit a person to play either a virtual game or a virtual season of a sport.”³ In such games, “the fans pose as both general manager and field manager of their team, building a roster through a draft and trades and making lineups in pursuit of the greatest statistical production.”⁴

The Board construed Applicant’s amendment as a request for remand; suspended action on the appeal; and remanded the file to the Examining Attorney for consideration of the amendment.⁵ Thereafter, the Examining Attorney issued a Reconsideration Letter, which stated that:

Applicant’s request for reconsideration is denied. See 37 C.F.R. §2.63(b)(3). The trademark examining attorney has carefully reviewed applicant’s request and determined the request did not: (1) raise a new issue, (2) resolve the outstanding issue, (3) provide any new or compelling evidence with regard to the outstanding issue, or (4) present analysis and arguments that were persuasive or shed new light on the outstanding issue. TMEP §§715.03(a)(ii)(B), 715.04(a).

In the request for reconsideration, applicant restates its argument that

² 8 TTABVUE.

³ <https://www.britannica.com/sports/fantasy-sport> (accessed May 23, 2024). “The Board may take judicial notice of information from encyclopedias,” *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1087 n. 3 (TTAB 2016), and we do so here.

⁴ *Id.*

⁵ 12 TTABVUE. “If an applicant that has filed a timely appeal to the Board files an amendment to its application after the expiration of the time provided after the issuance of the final action, ... the Board will treat the amendment as a request for remand.” TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1205.01(b)(1) (June 2023).

there is no evidence of record that motorsports use a draft (i.e., a process to select drivers akin to a ranked choice or other system) and thus the term “DRAFT” in the proposed mark is not descriptive of anything associated with motorsports. The examining attorney disagrees. ...⁶

However, it does not appear that the Examining Attorney “carefully reviewed” the request, as she claims, since she does not even mention Applicant’s proposed amendment in her reconsideration letter. Furthermore, and contrary to her assertion, Applicant did not restate its argument; in fact, Applicant made no argument at all.

Ordinarily, in a situation such as this, we might have remanded the file once again to the Examining Attorney for consideration of the amendment as we instructed in our previous order. However, we find it unnecessary to do so in this case because the Examining Attorney already stated in her brief that “[e]ven if direct reference to fantasy sports was eliminated from the identification, applicant’s remaining broadly worded language would still implicitly encompass this mode of sports.”⁷ Consequently, returning the file to the Examining Attorney once again for consideration of the amendment would not promote judicial economy.

Given the foregoing, the recitation of services at the time the notice of appeal was filed remains the operative recitation of services for purposes of this appeal. However, we also consider the recitation of services as if it had been amended. In the end, as discussed herein, we find that the evidence in this case supports the mere descriptiveness refusal of Applicant’s TRACK DRAFT mark, regardless of whether the recitation of services had been amended in the manner requested by Applicant.

⁶ 13 TTABVUE 1-2.

⁷ 6 TTABVUE 7 (Examining Attorney’s Brief).

II. Mere Descriptiveness – Applicable Law

Section 2(e)(1) of the Trademark Act precludes registration on the Principal Register of terms that merely describe an applicant's goods or services. 15 U.S.C. § 1052(e)(1). Terms that are merely descriptive cannot be registered on the Principal Register unless they acquire distinctiveness. *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1373 (Fed. Cir. 2018) (citing 15 U.S.C. § 1052(f)).

“A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services.” *In re Zuma Array Ltd.*, 2022 USPQ2d 736, at *5 (TTAB 2022) (internal quotations and citations omitted). By contrast, a mark is suggestive, and not 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., In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1515 (TTAB 2016).

“A mark need not immediately convey an idea of each and every specific feature of the goods [or services] in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of the goods [or services].” *Zuma Array*, 2022 USPQ2d 736, at *5 (quoting *Fat Boys*, 118 USPQ2d at 1513 (citing *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987)). In addition, “a mark need not be merely descriptive of all recited goods or services in an application. A descriptiveness refusal is proper ‘if the mark is descriptive of any of the [goods or] services for which registration is sought.’” *Id.* at *5-6 (quoting *In re Chamber of*

Commerce of the United States, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005)).

“We ‘must consider the commercial impression of a mark as a whole.’” *Fallon*, 2020 USPQ2d 11249, at *7 (TTAB 2020) (quoting *Real Foods*, 128 USPQ2d at 1374). “In considering [the] mark as a whole, [we] ‘may not dissect the mark into isolated elements,’ without consider[ing] . . . the entire mark,” *id.* (quoting *Real Foods*, 128 USPQ2d at 1374) (internal quotation omitted), “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 *Real Foods*, 128 USPQ2d at 1374) (internal quotation omitted)). “Indeed, we are ‘required to examine the meaning of each component individually, and then determine whether the mark as a whole is merely descriptive.’” *Id.* (quoting *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1753 (Fed. Cir. 2012)).

“Where a mark consists of multiple words, the mere combination of descriptive words does not necessarily create a non-descriptive word or phrase.” *In re Omniome, Inc.*, 2020 USPQ2d 3222, at *4 (TTAB 2019). “If the words in the proposed mark are individually descriptive of the identified goods [or services], we must determine whether their combination ‘conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.’” *Fallon*, 2020 USPQ2d 11249, at *7 (quoting *Fat Boys*, 118 USPQ2d at 1515-16) (internal quotation omitted)). “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.* (quoting *Fat Boys*, 118 USPQ2d at 1516) (internal quotation omitted)). “A mark comprising a combination of merely descriptive components is registrable only if the combination of terms creates a unitary mark with a non-descriptive meaning, or if the composite has a bizarre or incongruous meaning as applied to the goods or services.” *Omniome*, 2020 USPQ2d 3222, at *4.

“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,” *Zuma Array*, 2022 USPQ2d 736, at *8 (quoting *Fallon*, 2020 USPQ2d 11249, at *7 (quoting *Real Foods*, 128 USPQ2d at 1374)), as well as websites. *Id.* (quoting *Fallon*, 2020 USPQ2d 11249, at *7-8 (quoting *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017) (internal quotation omitted))).

III. Evidence and Argument

It is the Examining Attorney’s position that the terms TRACK and DRAFT in Applicant’s mark TRACK DRAFT “are, respectively, descriptive and potentially descriptive of features of applicant’s entertainment services” and that “[t]he pairing of these two descriptive terms does not result in a mark with a unitary non-descriptive meaning.”⁸ As support for her contentions, she “relie[s] on applicant’s identification of services referencing motorsports and automobile and motorcycle

⁸ 4 TTABVUE 7 (Examining Attorney’s Brief).

racing as the subject of applicant’s entertainment services”⁹

The Examining Attorney also made of record dictionary definitions for each term in the mark. A “track” is “a piece of ground, often oval-shaped, that is used for races involving running, cars, bicycles, horses, or dogs called greyhounds,”¹⁰ and a “draft” as “[a] system [in sports] in which the exclusive rights to new players are distributed among teams.”¹¹

Further, the Examining Attorney made of record website excerpts showing third-party use of the term ‘draft’ in the context of the “fantasy motorsports, automobile racing, and motorcycle racing” as recited in Application. For example:

- An excerpt from the Google Play app store shows a smartphone app titled “Dirt Draft – Fantasy Dirt Track Racing” which promotes itself as “the first grassroots racing fantasy sports app. On Dirt Draft you play a salary draft game for specific racing events through the year (for entertainment purposes only).”¹²

- An article from the website How They Play (howtheyplay.com) titled “Beginner’s Guide to Fantasy Auto Racing” explains that “fantasy auto racing” is “a game where you build your own dream team of NASCAR drivers and compete against the other teams in your league.”¹³ The article goes on to explain that while “[t]here are three

⁹ *Id.* at 2.

¹⁰ January 21, 2024 Office Action, TSDR 14-15 (definition from THE AMERICAN HERITAGE DICTIONARY).

¹¹ *Id.* at 16-17 (definition from COLLINS DICTIONARY).

¹² January 21, 2022 Office Action, TSDR 8-10.

¹³ August 11, 2022 Final Office Action, TSDR 7. The article focuses on NASCAR racing, but notes that “other variations of fantasy auto racing are based on Formula One, Indy Car, or other racing series instead of NASCAR.” *Id.* at 8.

main variations of Fantasy Auto Racing,” the “Draft Based” version “is the most like other fantasy sports. You draft a team of drivers prior to the start of each season and each driver can only race for one team.”¹⁴ The article also includes tips for selecting drivers, one of which is to “Know the Track”:¹⁵

NASCAR races are run on a variety of tracks, such as flat tracks, road courses, superspeedways, and short tracks. Some drivers do better or worse on different track types, so check their stats. If the race is on a short track like Bristol or Richmond, where wrecks can be frequent, consider starting fewer big names and go with guys who will be spread out through the pack. That way, a wreck upfront won't take out all of your drivers.

- An excerpt from the website Fantrax The Home of Fantasy Racing (fantrax.com) invites potential users to “[p]lay the only fantasy NASCAR commissioner leagues on the web or mobile. Now you can create your own FREE league, invite friends to play and draft your team of winning drivers! Our NASCAR league manager is fully customizable, so you can create and run the league the way you want! Sign up now!”¹⁶

In view of the foregoing, we find that the individual words TRACK and DRAFT in Applicant’s mark merely describe features of Applicant’s fantasy motor sports, automobile racing, and motorcycle racing services, because fantasy car racing involves the use of both a track and a draft as features of that game or sport. We further find that the combination of those words as TRACK DRAFT does not create a unitary mark with a non-descriptive meaning or a mark with a bizarre or

¹⁴ *Id.* at 9.

¹⁵ *Id.* at 11-12.

¹⁶ *Id.* at 24-25.

incongruous meaning as applied to the services. Rather, it results in a combination that is itself merely descriptive. As the Examining Attorney concludes, Applicant's mark TRACK DRAFT "clearly describes features of applicant's services, namely, that applicant's entertainment services relate to sports with a track setting (such as motorsports, automobile racing, and motorcycle racing), and "applicant's entertainment services potentially involve draft picks or rankings for teams or races in those sports."¹⁷

A. Applicant Has Conceded Descriptiveness Under the Operative Recitation of Services

Applicant concedes that the mark is merely descriptive of the fantasy sport services recited in the recitation of services, and that the Examining Attorney's evidence supports a refusal based on those services. Specifically, Applicant states that "the only service with a rejection supported by evidence are the fantasy motorsports services under TRACK DRAFT."¹⁸ Applicant also states that the Examining Attorney's burden "has not been met because no evidence has been set forth except the evidence relating to fantasy motorsports. The evidence submitted reads only upon motorsports."¹⁹

Applicant's contentions that the Examining Attorney's burden "has not been met "because no evidence has been set forth **except** the evidence relating to fantasy motorsports," and that "[t]he analysis must include each of the claimed services, they

¹⁷ 6 TTABVUE 7 (Examining Attorney's Brief).

¹⁸ 4 TTABVUE 6 (Applicant's Brief).

¹⁹ *Id.* at 7.

cannot be limited together as one service,”²⁰ is wrong. As noted above, “a mark need not be merely descriptive of all recited goods or services in an application. A descriptiveness refusal is proper ‘if the mark is descriptive of any of the [goods or] services for which registration is sought.’” *Zuma Array*, 2022 USPQ2d 736, at *5-6 (quoting *Chamber of Commerce*, 102 USPQ2d at 1219 (quoting *In re Stereotaxis Inc.*, 77 USPQ2d at 1089).

B. The Mark Would Still Be Merely Descriptive if the Recitation of Services Had Been Amended As Requested by Applicant After Briefing

As mentioned above, even if Applicant’s recitation of services were amended as requested by Applicant after briefing, it would not have changed our finding of mere descriptiveness. Applicant, in that amendment, proposes to delete all of the specific references to fantasy motorsports in its recitation of services as shown below with tracked changes:²¹

041 Entertainment services in the nature of ~~fantasy motorsports~~, automobile racing, and motorcycle racing leagues; Entertainment services in the nature of production of multimedia entertainment content in the field of motorsports, automobile racing, and motorcycle racing ~~and fantasy motorsports, automobile racing, and motorcycle racing~~; Online gaming services in the nature of motorsports, automobile racing, and motorcycle racing gambling; Entertainment services, namely, providing a web site featuring photographic, video and prose presentations featuring motorsports, automobile racing, and motorcycle racing ~~and fantasy motorsports, automobile racing, and motorcycle racing~~.

However, as noted by the Examining Attorney, “[a]side from its direct reference to

²⁰ *Id.* at 8 (emphasis added).

²¹ 8 TTABVue.

fantasy motorsports, automobile racing, and motorcycle racing, applicant's recitation of services also contains broad language that encompasses entertainment services presented in a fantasy mode."²² This is because the services recited as "online gaming services in the nature of motorsports, automobile racing, and motorcycle racing gambling," which still remain, "encompass gaming services involving motorsports, automobile racing, and motorcycle racing gambling in a fantasy setting."²³ Therefore, as the Examining Attorney explains, "[e]ven if direct reference to fantasy sports was eliminated from the identification, applicant's remaining broadly worded language would still implicitly encompass this mode of sports."²⁴ We agree, and find that the mark is merely descriptive either way.

Decision: The refusal to register under Section 2(e)(1) is affirmed.

²² 6 TTABVUE 7 (Examining Attorney's Brief).

²³ *Id.*

²⁴ *Id.*