THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: May 7, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Shenzhen Tianjian Business Co. Limited
v.
Shenzhen Ruiquansheng Technology Co., Ltd.

Opposition No. 91273631

Xionghui Murong of Glacier Law LLP,
for Shenzhen Tianjian Business Co. Limited.

Adriano Pacifici of Intellectual Property Consulting LLC,
for Shenzhen Ruiquansheng Technology Co., Ltd.

Before Goodman, Heasley, and Cohen,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Applicant, Shenzhen Ruiquansheng Technology Co., Ltd., seeks registration on the Principal Register of the proposed mark SLEEP HEADPHONES (in standard characters, with "HEADPHONES" disclaimed) for "Audio speakers; Calculators;

Camera flashes; Cases for smartphones; Contact lens cases; Dust masks; Earphones; Protective glasses," in International Class 9.[1]

Opposer, Shenzhen Tianjian Business Co. Limited, opposes registration of Applicant's proposed mark on the grounds that it is generic or merely descriptive. 1 TTABVUE.[2] Applicant's Answer denies the salient allegations of the Notice of Opposition. 5 TTABVUE.[3]

We sustain the opposition.

I. The Record

The record consists of the pleadings, and, by operation of Trademark Rule 2.122(b), the file of Applicant's involved application. In addition, Opposer submitted testimony, notices of reliance, and exhibits as listed in its brief.[4] Applicant submitted

[1] Application Serial No. 90585777 was filed on March 17, 2021, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant's claim of first use anywhere and in commerce since at least as early as March 10, 2021.

[2] Opposer amended its Notice of Opposition to add claims that Applicant had not made bona fide use of the proposed mark in commerce when it filed its application, and that Applicant committed fraud in the course of instituting and prosecuting its application. 28 TTABVUE. However, Opposer did not pursue these additional claims in its brief, so they are deemed forfeited. *In re Google Tech. Holdings, LLC*, 980 F.3d 858, 862 (Fed. Cir. 2020) (argument not pursued is forfeited). In its Notice of Opposition, as amended, Opposer also "alternatively seeks relief under Section 18 of the Lanham Act, 15 U.S.C. § 1068, requiring Applicant to disclaim 'sleep headphones' in the Application." 1 TTABVUE 4, 28 TTABVUE 14. This fails to state a viable claim, as one cannot disclaim an entire standard character mark. *Dena Corp. v. Belvedere Int'l Inc.*, 950 F.2d 1555, 1560 (Fed. Cir. 1991) ("A mark which must be entirely disclaimed has no 'unregistrable component,' but is instead entirely nonregistrable."). Nonetheless, Opposer's claims of genericness and mere descriptiveness are adequately pleaded.

[3] In its Answer, as amended, Applicant advanced four purported affirmative defenses, 4 TTABVUE 5-6, 33 TTABVUE 7-8, but it did not file a brief, so those defenses are waived or forfeited. *Hangzhou Mengku Tech. Co. v. Shanghai Zhenglang Tech. Co.*, 2024 WL 5265081, *1 (TTAB 2025).

[4] Opposer's main brief, 57 TTABVUE 8-9.

no evidence and no brief. We have carefully considered the entire record, and discuss relevant evidence throughout this opinion. *See Quiktrip W., Inc. v. Weigel Stores, Inc.,* 984 F.3d 1031, 1036 (Fed. Cir. 2021) (Board not obliged to expressly discuss every piece of evidence); *In re Miracle Tuesday LLC*, 695 F.3d 1339, 1348 (Fed. Cir. 2012) ("[T]he mere fact that the Board did not recite all of the evidence it considered does not mean the evidence was not, in fact, reviewed."); *Plant Genetic Sys., N.V. v. DeKalb Genetics Corp*., 315 F.3d 1335, 1343 (Fed.Cir.2003) ("We presume that a fact finder reviews all the evidence presented unless he explicitly expresses otherwise.").[5]

II. Entitlement

Opposer, as plaintiff in this opposition proceeding, bears the burden of establishing its entitlement to a statutory cause of action and its substantive claims by a preponderance of the evidence. *Hangzhou Mengku v. Shanghai Zhenglang*, 2024 WL 5265081, at *2. To establish entitlement to a statutory cause of action, a plaintiff must demonstrate: (i) an interest falling within the zone of interests protected by the statute and (ii) proximate causation. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303-06 (Fed. Cir. 2020). Demonstrating a real interest in opposing registration of a mark satisfies the zone-of-interests requirement, and demonstrating a reasonable belief in damage by the registration of a mark demonstrates damage proximately

[5] As part of an ongoing pilot, this opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the pages on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this opinion cites to the Westlaw (WL) legal database and cites only precedential decisions, unless otherwise noted. Practitioners should also adhere to the practice set forth in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03(a) (2024).

caused by registration of the mark. *Id*. at 1305-06. *Shenzhen IVPS Tech. Co. Ltd. v. Fancy Pants Prods., LLC*, 2022 WL 16646840, *6 (TTAB 2022).

Opposer does not have to assert a proprietary interest in "SLEEP HEADPHONES" to show entitlement. "An absence of proprietary rights does not in itself negate an interest in the proceeding or a reasonable belief of damage." *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 1372 (Fed. Cir. 2020). Opposer may prove its entitlement by establishing that it has a present or prospective interest in using the term in its business. *Cf. De Walt, Inc. v. Magna Power Tool Corp.*, 289 F.2d 656, 661 (CCPA 1961) (Standing "will be presumed or inferred when . . . the opposer or petitioner is one who has a sufficient interest in using the descriptive term in its business."), *quoted in U. of Kentucky v. 40-0, LLC*, 2021 WL 839189, *6 (TTAB 2021).

Our reviewing Court's predecessor explained the real interests a party may have in opposing registration based on a term's mere descriptiveness or genericness:

> One who opposes on the ground that registration should be refused as proscribed by section 2(e)(1) alleges use of, or the right to use, a descriptive term in his business and is trying to prevent a claim of exclusive ownership of that term, asserting a privilege which he holds in common with all others, including the applicant, to the free use of the language. Any use by opposer, whether begun prior or subsequent to applicant's, and whether in a descriptive context or in the manner of a mark, may be sufficient to defeat the applicant's claim that the term is distinctive of its goods or has become distinctive thereof within the meaning of section 2(f) of the Lanham Act. In some instances, for example where the term is generic, no use at all need be shown, but only a right to use. Section 2(e)(1) is thus concerned with the prevention of harassment, based on a registration, under which an exclusive right could be claimed in a term which does not identify source.

Otto Roth & Co. v. Universal Foods Corp., 640 F.2d 1317, 1320 (CCPA 1981).

Bright Zhang, Opposer's manager, testifies that:

Opposer is and has been in the business of selling products on Amazon since 2016. In connection with this business, Opposer offers for sale and sells various sleep associated products including sleep headphones. …

The … designation of 'sleep headphones' has also been used by members of the public and industry to identify audio devices that can be worn while sleeping or otherwise resting. …

Starting from 2015, the term of 'sleep headphones' had been used by Amazon sellers to describe the good to be used on the head of the consumer while sleeping. …

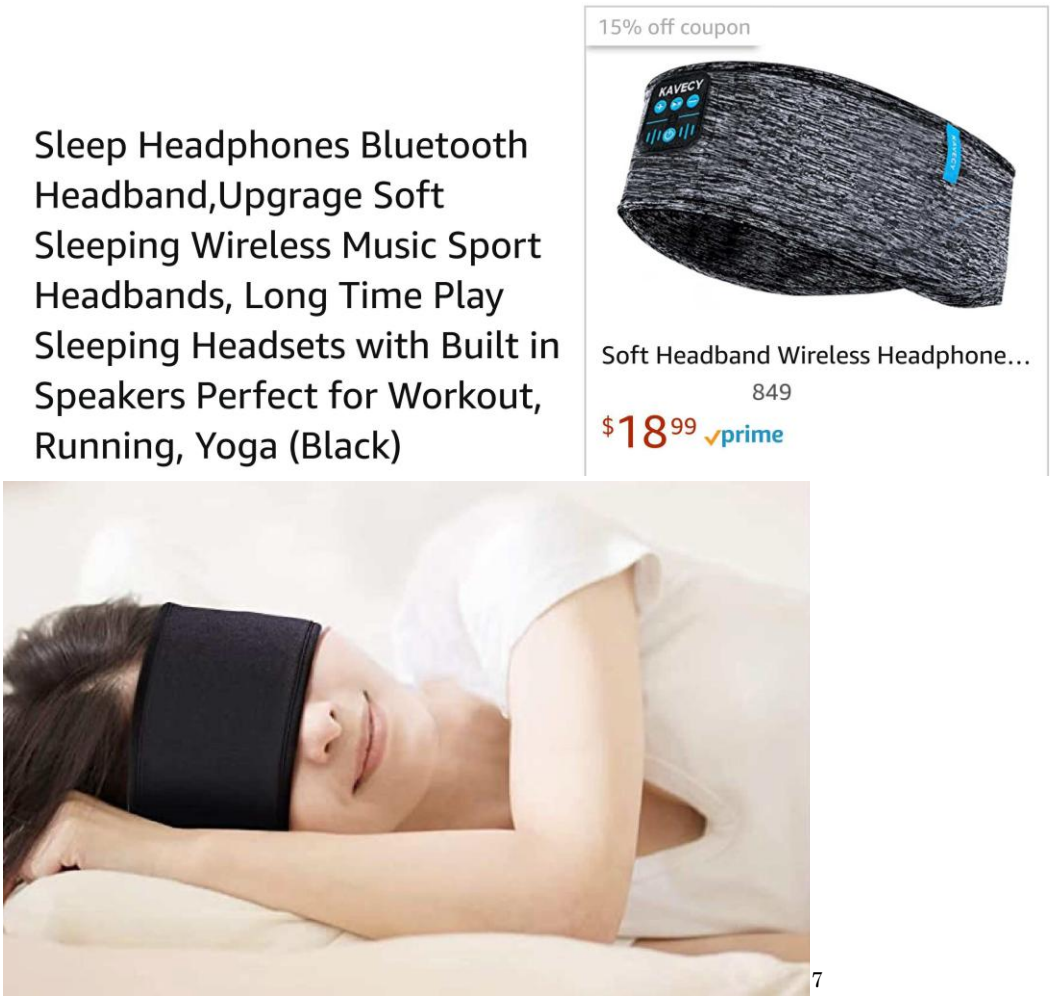
Since at least as early as … April of 2019, Opposer has used 'sleep headphones' to identify and describe audio device[s] that can be worn while sleeping or otherwise resting.

By [Applicant] claiming exclusive rights to the designation of 'sleep headphones', Opposer would be precluded from using the term of 'sleep headphones' to describe its products and compelled to cease selling its sleep headphones products.

Additionally, Opposer and others in the industry would suffer further injury due to the registration sought by Applicant. This registration would prevent them from using 'sleep headphones' as ordinary terminology to describe their goods, resulting in a loss of traffic for search queries related to sleep headphones.[6]

Opposer attaches an example of its goods as offered on Amazon.com:

[6] Zhang declaration ¶¶ 2-3, 5-8, 41 TTABVUE 3-4.



[7]

Opposer has shown a real interest in using the term "SLEEP HEADPHONES" and a reasonable belief in damage by registration of that term. Granting Applicant a Principal Register registration for "SLEEP HEADPHONES" would accord it the presumptions afforded under Section 7(b) of the Trademark Act. That section provides that registration on the Principal Register is prima facie evidence of the registrant's "exclusive right to use the mark in commerce on or in connection with the goods...." 15 U.S.C. § 1057(b). "To put [Applicant] in possession of a right it does not

[7] Zhang decl. ex. 4, 41 TTABVUE 62.

have, which it might at any time decide to assert..., would, in our opinion, be damaging... since it could at least be used to harass [Opposer] into ceasing use of [the term] on pain of defending a lawsuit." *De Walt, Inc. v. Magna Power Tool Corp.*, 289 F.2d 656, 661 (CCPA 1961) *quoted in U. of Kentucky v. 40-0, LLC*, 2021 WL 839189, at *8.

Opposer has thus demonstrated by a preponderance of the evidence that it is entitled to oppose registration of Applicant's proposed mark.

III. Applicant's motion to amend Identification of Goods

Two years after the commencement of this opposition proceeding, Applicant filed a motion for summary judgment, which the Board denied, noting that:

> Applicant bases its motion for summary judgment on arguments that, because none of its goods are for use while sleeping, its mark is neither merely descriptive nor generic. 21 TTABVUE. However, Applicant's goods include "earphones." Both parties have introduced evidence showing use of the wording SLEEP HEADPHONES by Applicant and others to identify a particular type of earphones to be worn while sleeping. … Accordingly, we find that Applicant has failed to establish that there is no genuine dispute that the wording SLEEP HEADPHONES is neither merely descriptive nor generic for any of Applicant's identified goods. In view thereof, Applicant's motion for summary judgment is denied.[8]

Upon receiving the Board's denial, Applicant a motion to delete "earphones" from its identification of goods, leaving "Audio speakers; Calculators; Camera flashes; Cases for smartphones; Contact lens cases; Dust masks; ~~Earphones~~; Protective

[8] Board Order, 25 TTABVUE 5-6.

glasses" in International Class 9. 26 TTABVUE. Based on that proposed deletion of goods, Applicant also filed another motion for summary judgment. 27 TTABVUE.

Opposer opposed both the renewed motion for summary judgment and the motion to amend, stating in pertinent part that the Application's identification of goods would still identify "audio speakers." Opposer noted that "'earphones' usually fall into the broad category of 'audio speaker', and the sleep headphone products sold by Applicant contain speakers. The scope of the Subject Application will not be narrowed in contrast to Applicant's assertion that removal of 'earphones' from Applicant's list of goods will narrow the scope of Subject Application."[9]

The Board found that:

> Applicant has failed to consent to entry of judgment with regard to the broader identification of goods and has made no showing that the proposed amendment changes the nature and character of the goods or services or restrict their channels of trade and customers so as to introduce a substantially different issue for trial. Accordingly, the motion to amend the identification of the involved application is deferred. Because the motion for summary judgment is based on the proposed amended identification, that motion will receive no consideration.[10]

We now consider Applicant's deferred motion to amend its identification of goods. *See Enbridge Inc. v. Excelerate Energy L.P.*, 2009 WL 3541047, *2 n.3 (TTAB 2009) (motion to amend identification of goods and dates of use deferred until final hearing); TBMP § 514.01 (motion to amend generally deferred).

[9] Opposer's response in opposition to Applicant's motion for summary judgment and to amend identification of goods. 30 TTABVUE 12.

[10] Board Order, 32 TTABVUE 7 (citing *Johnson & Johnson v. Stryker Corp.*, 2013 WL 6664934 (TTAB 2013) and *Drive Trademark Holdings LLC v. Inofin*, 2007 WL 616039 (TTAB 2007)).

The amendment of an application that is the subject of an opposition proceeding is governed by Trademark Rule 2.133(a):

> An application subject to an opposition may not be amended in substance nor may a registration subject to a cancellation be amended or disclaimed in part, except with the consent of the other party or parties and the approval of the Trademark Trial and Appeal Board, or upon motion granted by the Board.

37 C.F.R. § 2.133(a).

Applicant's motion proposes an amendment "in substance," within the meaning of this rule. *Giant Food Inc. v. Standard Terry Mills, Inc.*, 1986 WL 83724, *7 (TTAB 1986) (amendment to identification of goods). The Board may grant or deny such a motion at its discretion. TBMP § 514.03. *U. of Kentucky v. 40-0*, 2021 WL 839189, at *9. We deny Applicant's motion for several reasons.

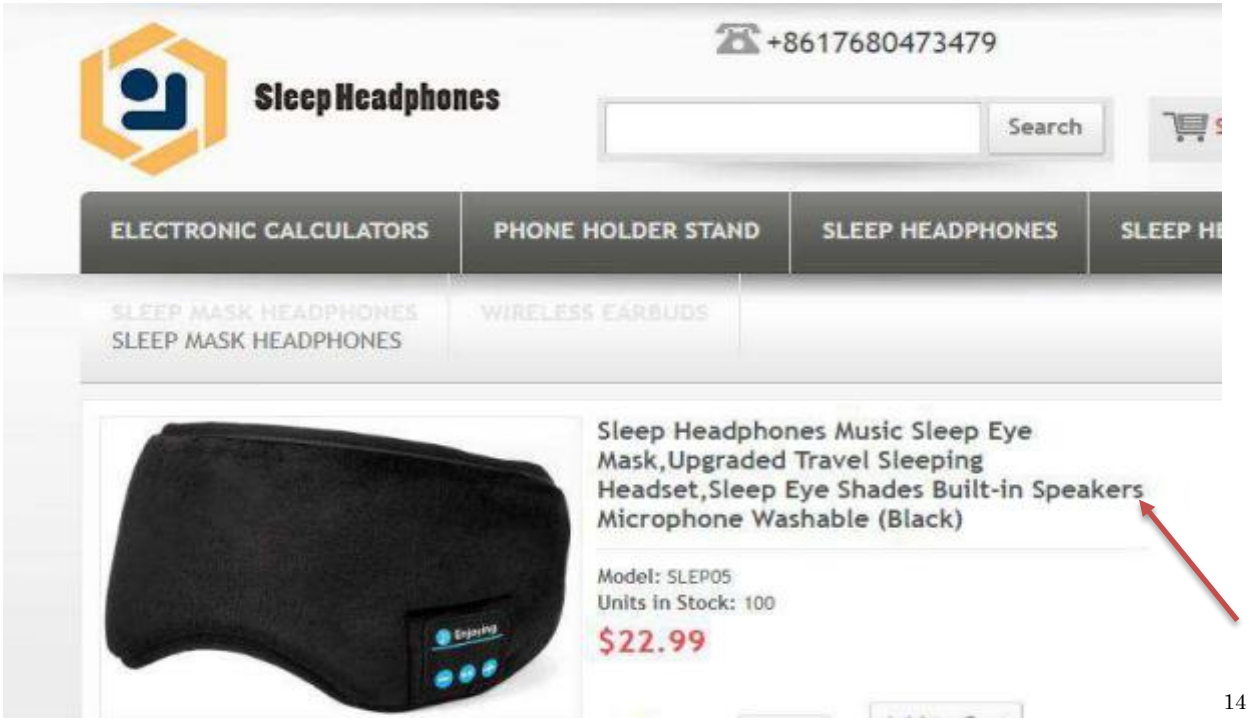
To begin with, as Opposer correctly observes, Applicant's identified "earphones" are subsumed under its more broadly identified "audio speakers." An "earphone" is "a device that changes electrical energy into sound waves and is worn over or inserted into the ear."[11] "Audio" means "of or relating to sound or its reproduction and especially high-fidelity reproduction"[12] And a "speaker" is "a device that converts

[11] Merriam-webster.com (accessed May 1, 2025). "The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or regular fixed editions. *In re Cordua Rests. LP*, 2014 WL 1390504, at *2 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594 (Fed. Cir. 2016)." *Look Cycle Int'l v. Kunshan Qiyue Outdoor Sports Goods Co., Ltd.,* 2024 WL 3739358, *14 n. 36 (TTAB 2024).

[12] Merriamwebster.com (accessed May 1, 2025); *see also* Opposer's fourth Notice Of Reliance (NOR), 38 TTABVUE 18.

electric signals to audible sound."[13] So earphones are a type of audio speaker.

Applicant even advertises the speakers contained in its headphones; for example:



[14]

And on Amazon:

[15]

[13] AHDictionary.com (accessed May 1, 2025); *see also* merriamwebster.com ("loudspeaker"), Opposer's fourth NOR, 38 TTABVUE 29.

[14] Applicant's website, Sleep-Headphones.site, Opposer's first NOR 34 TTABVUE 11.

[15] Applicant's Amazon advertisement, Opposer's first NOR 34 TTABVUE 36.

Since earphones are a type of audio speaker, the Application's identification of goods would still encompass earphones, and Applicant's proposed deletion of "earphones" would be an exercise in futility.

There is another reason, though, that Applicant's proposed deletion of "earphones" would be an exercise in futility. Where a term is generic or merely descriptive for one item in a class of goods, registration is refused for the entire international class:

> [I]t is a well settled legal principle that where a mark may be merely descriptive of one or more items of goods in an application but may be suggestive or even arbitrary as applied to other items, registration is properly refused if the subject matter for registration is descriptive of any of the goods for which registration is sought. *See: In re Canron, Inc.,* [1983 WL 50168] (TTAB 1983) and cases cited therein). There is no logical reason to treat differently a term that is generic of a category or class of products where some but not all of the goods identified in an application fall within that category.

In re Analog Devices Inc., 1988 WL 252496, *3 (TTAB 1988), *aff'd mem.*, 871 F.2d 1097 (Fed. Cir. 1989).

This principle has been confirmed by the Federal Circuit

> Our predecessor court, the Court of Customs and Patent Appeals, whose decisions bind us (*South Corp. v. United States*, 690 F.2d 1368, 1371 (Fed.Cir.1982) (en banc)), has stated that "registration should be refused if the mark is descriptive of any of the goods for which registration is sought." *Application of Richardson Ink Co.*, 511 F.2d 559, 561 (CCPA 1975). *See In re Am. Soc'y Clinical Pathologists, Inc.*, 58 C.C.P.A. 1240, 442 F.2d 1404, 1407 (CCPA 1971); *Quik Print Copy Shops*, 616 F.2d 523, 525 (CCPA.1980); 2 J. Thomas McCarthy, Trademarks and Unfair Competition § 11.18 (2d ed.1984).

In re Stereotaxis, Inc., 429 F.3d 1039, 1041 (Fed. Cir. 2005), *quoted in In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 1301 (Fed. Cir. 2012). *See also U.S. Search,*

LLC v. U.S. Search.com Inc., 300 F.3d 517, 525 n.9 (4th Cir. 2002) ("However, even if a mark may be suggestive or arbitrary as applied to some goods or services, that mark should be deemed descriptive if it is descriptive of any of the goods or services for which registration is sought. *See* 2 McCarthy on Trademarks, § 11:51.").

This principle has been applied in inter partes cases. *E.g.*, *Electro-Coatings, Inc. v. Precision Nat'l Corp.*, 1979 WL 24893, *13 (TTAB 1979) (well-settled principle that registration should be refused if the term is descriptive of any of the goods or services for which registration is sought); *Nextel Comm's., Inc. v. Motorola, Inc.*, 2009 WL 1741923, *19 (TTAB 2009) (proper to sustain opposition with respect to entire class of goods or services); *Alcatraz Media, Inc. v. Watermark Cruises*, 2013 WL 5407315, *13 (TTAB 2013), *aff'd*, 565 Fed. Appx. 900 (Fed. Cir. 2014) ("Respondent cannot circumvent a genericness finding on the basis that the mark ANNAPOLIS TOURS may be used to identify guided tour services of other cities.") (citing *Analog Devices*, 1988 WL 252496).

And it has been applied to the present day. *E.g.*, *In re Sheet Pile, LLC*, 2024 WL 1175785, *2 (TTAB 2024) ("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] for which registration is sought.'") (quoting *In re Chamber of Commmerce*, 675 F.3d 1297, and *In re Stereotaxis*, 429 F.3d 1039); *In re Erik Brunetti*, 2022 WL 3644733, *17 (TTAB 2022) ("If the refusal of registration applies to any of the goods or services within the class, registration is refused as to the entire class.")).

Applying this principle to the present case, if Applicant's proposed mark, SLEEP HEADPHONES, is generic or merely descriptive of any of its identified goods, whether they are earphones or audio speakers, then registration is properly refused as to the entire Class of goods. As in *Alcatraz Media, Inc. v. Watermark Cruises*, 2013 WL 5407315, at *13, Applicant cannot circumvent a finding of genericness or mere descriptiveness by arguing that the term is not generic or descriptive of its other Class 9 goods. Applicant's motion to amend is, in sum, too little, too late, and it is denied.

IV. Genericness

Section 2 of the Trademark Act provides for registration on the Principal Register of marks "by which the goods of the applicant may be distinguished from the goods of others...." 15 U.S.C. § 1052. This is consonant with the definition of a trademark, which acts to identify and distinguish goods from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown. 15 U.S.C. § 1127.

In contrast, "[a] generic name--the name of a class of products or services--is ineligible for federal trademark registration." *U.S. Patent & Trademark Office v. Booking.com B.V.*, 591 U.S. 549, 551 (2020), *quoted in State Permits, Inc. v. Fieldvine, Inc.*, 2024 WL 3825297, *11 (TTAB 2024). A generic term is the "ultimate in descriptiveness." *Bullshine Distillery LLC v. Sazerac Brands, LLC*, 130 F.4th 1025, 1029 (Fed. Cir. 2025) (citing 15 U.S.C. § 1052(3)(1)). Generic terms are "by definition incapable of indicating source, and therefore are the antithesis of trademarks, and can never attain trademark status." *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358,

1366 (Fed. Cir. 2018) (citation and quotation omitted); *accord In re Int'l Fruit Genetics, LLC*, 2022 WL 17222664, *12 (TTAB 2022). "The underlying rationale is the same — to prevent monopolies and foster competition:

> Generic terms, by definition incapable of indicating source, are the antithesis of trademarks, and can never attain trademark status. The reason is plain: To allow trademark protection for generic terms, i.e., names which describe the genus of goods being sold, … would grant the owner of the mark a monopoly, since a competitor could not describe his goods as what they are.

In re Int'l Fruit Genetics, LLC, 2022 WL 17222664, *12 (TTAB 2022) (citing *In re Pennington* Seed, 466 F.3d 1053, 1058 (Fed. Cir. 2006)).

Opposer has the burden of proving genericness by a preponderance of the evidence. *Royal Crown v. Coca-Cola*, 892 F.3d at 1366-67; *Interprofession du Gruyere v. U.S. Dairy Exp. Council,* 61 F.4th 407, 416 (4th Cir. 2023).

"Determining whether a mark is generic … involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered … understood by the relevant public primarily to refer to that genus of goods or services?" *In re PT Medisafe Tech.*, __ F.4th __, 2025 WL 1226471, *4 (Fed. Cir. 2025) (citing *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 990 (Fed. Cir. 1986)).

"The genus of the goods typically is determined by focusing on the identification of goods in the subject application." *Int'l Dairy Foods Ass'n v. Interprofession du Gruyère,* 2020 WL 4559436, *14 (TTAB 2020) *aff'd* 575 F.Supp.3d 627 (E.D. Va. 2021), *aff'd*, 61 F.4th 407 (4th Cir. 2023) (citing *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638,

640 (Fed. Cir. 1991)). Here, we find the genus is established by the identified goods "earphones." The relevant public is the purchasing public for earphones. *In re GJ & AM, LLC,* 2021 WL 2374670, *35-36 (TTAB 2021).

The issue, then, is whether this general purchasing public for earphones would understand SLEEP HEADPHONES to refer to the genus of earphones. *In re 1800Mattress.com IP LLC*, 586 F.3d 1359, 1364 (Fed. Cir. 2009); *Interprofession du Gruyere*, 61 F.4th at 416. "Evidence of the public's understanding of the term may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers and other publications." *Royal Crown v. Coca-Cola,* 892 F.3d at 1366. It can include "usage by consumers and competitors, and any other source of evidence bearing on how consumers perceive a term's meaning." *USPTO v. Booking.com*, 591 U.S. at 561 n.6.

Beginning with dictionary definitions, an "earphone," as noted, is "a device that changes electrical energy into sound waves and is worn over or inserted into the ear."[16] A "headphone" is "an earphone held over the ear by a band worn on the head —usually plural."[17] Applicant has accordingly disclaimed "HEADPHONE," thereby tacitly conceding that the term is generic or descriptive.[18] *Alcatraz Media v. Chesapeake Marine Tours*, 2013 WL 5407315, at *14.

[16] Merriam-webster.com (accessed May 1, 2025).

[17] Merriam-webster.com (accessed May 1, 2025). Oct. 27, 2021 Office Action at 4; Opposer's second NOR, 36 TTABVUE 26; Opposer's fourth NOR, 38 TTABVUE 14.

[18] Oct. 28, 2021 Office Action at 1.

The issue then becomes how SLEEP HEADPHONES, as a whole, would be understood by the relevant purchasing public. *See In re Steelbuilding.com*, 415 F.3d 1293, 1297 (Fed. Cir. 2005) ("An inquiry into the public's understanding of a mark requires consideration of the mark as a whole."); *In re Am. Fertility Soc'y*, 188 F.3d 1341, 1347 (Fed. Cir. 1999) ("[I]f the compound word would plainly have no different meaning from its constituent words, and dictionaries, or other evidentiary sources, establish the meaning of those words to be generic, then the compound word too has been proved generic. No additional proof of the genericness of the compound word is required.").

The evidence, including Applicant's, competitors' and commentators' use of the term, indicates, as Opposer states, that "'Sleep Headphones' is a compound of generic terms that does not create any additional meaning distinguishing the goods. 'Sleep' and 'Headphones' together simply describe headphones for sleeping, which is the product's primary purpose."[19] Applicant's own advertisements convey this use:

[20]

[19] Opposer's brief, 57 TTABVUE 17.

[20] Applicant's Amazon advertisement, Opposer's first NOR 34 TTABVUE 36.

Applicant's website is to the same effect:

[21]

The text on Applicant's website (written in English as a second language) conveys what its product does: "Keep Deep Sleep: Block light to make your sleep better, allows

[21] Sleep-headphones.site, Opposer's NOR, 34 TTABVUE 13-14.

you to listen to music without wearing additional headphones, which make you fall asleep faster. … Best for frequent flyers to sleep on long flights or sensitive sleepers (insomnia) who dislike glaring lights in any occasions. Sleep in a light blocked world whenever and wherever."[22]

"[A]n applicant's own website or marketing materials may be probative, or even, as in [*In re Gould Paper Corp.*, 834 F.2d 1017, 1019 (Fed. Cir. 1987)], 'the most damaging evidence,' in indicating how the relevant public perceives a term." *In re Mecca Grade Growers*, LLC, 2018 WL 1314995, *11 (TTAB 2018).

The record also demonstrates third-party competitors' use of "sleep headphones" to advertise their own products to the relevant consumers. For example:

[23]

[22] Sleep-headphones.site, Opposer's NOR, 34 TTABVUE 11.

[23] Amazon.com, Opposer's NOR, 34 TTABVUE 107.

Sleep Headphones Breathable Bluetooth 5.2 Headband Sleeping Headphones, Wireless Eye Mask Sleep Earbuds for Side Sleeper Women Office Air Travel Cool Tech Gadgets Unique Gifts (Gray)

Visit the LC-dolida Store

1,127 ratings | 26 answered questions

Amazon's Choice for "casque anti bruit pour dormir"

Deal

-23% $22.99 ($22.99 / count)

Was: $29.99

Colour Name: Gray

$23.99 $23.99 $23.99

[24]

CozyPhones Sleep Headphones - Over Ear Headphones from Ultra Thin Cool Mesh Wired for Side Sleepers, Meditation, Running, Laptop, and Phone - Black

Visit the CozyPhones Store

4,272 ratings | 136 answered questions

-10% $17.99

List Price: $19.99

Get Fast, Free Shipping with Amazon Prime

FREE Returns

Color: Black

$17.99 $17.99 $17.99 $17.99

Brand	CozyPhones
Model Name	Lycra -Parent
Color	Black
Form Factor	Over Ear
Connectivity Technology	Wired

About this item

- HEADBAND EARPHONES: Lightweight, comfortable and washable sleep headband features a contour shape that dips down over your ears to provide the perfect fit. Thin 1/8" cushioned, removable speakers with a durable 52-inch cable provide rich, clear sound.
- COMFORTABLE EARPHONES FOR SLEEPING: Cool mesh lining keeps you cool at night and helps your sleep band stay in place, and the unique contour shape dips below the ears so the speakers stay secure within the headband.
- HEADPHONES FOR WORKING OUT, TRAVEL AND ACTIVE LIFESTYLES: Use for sports, yoga, running, the gym, meditation and relaxation. Ideal for children, teens, college students, dorm life, noisy roommates, airplane and car travel, snoring spouses and more.
- MADE TO LAST: Featuring a flexible and durable 52-inch braided cord that will not kink, twist or break under normal use. A 3.5 mm stereo plug is compatible with most cell phones, tablets, laptops and other devices.
- GET A GREAT NIGHT'S SLEEP: Drift away while blocking sounds that keep you awake or calm your racing mind with podcasts, music, or audiobooks. This comfortable headband with earphones is the perfect solution for side sleeping and will not hurt your ears.

Additional Details

Small Business

[25]

[24] Amazon.com, Opposer's NOR, 34 TTABVUE 125.

[25] Zhang decl. ex. 3, 41 TTABVUE 29.

"Use by competitors in the field is strong evidence of genericness. *See BellSouth Corp. v. DataNational Corp.,* 60 F.3d 1565, [1570] (Fed. Cir. 1995) ('The cases have recognized that competitor use is evidence of genericness.')." *In re Uman Diagnostics AB*, 2023 WL 2039689, *9 (TTAB 2023).

So is generic use by commentators, such as the New York Times:

[26]

The review continues:

> **Who should get sleep headphones**
> **Sleep headphones** are for people who have difficulty falling or staying asleep and find that audio—be it while noice, music, or meditations—can help. … **Sleep headphones** are supposed to be soft enough to lie on all night….[27]
> …
> [W]e called in every brand-name set of **sleep headphones** we could find and a selection of affordable but lesser-known options or Amazon.[28]

The reviewer evaluates various sleep headphones offered by third-party competitors:

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[26] NYTimes.com/wirecutter/reviews/best-sleep-headphones, Opposer's NOR, 34 TTABVUE 133.

[27] Opposer's NOR, 34 TTABVUE 137.

[28] *Id.* at 140 (emphasis added).

- **AcousticSheep's SleepPhones** Wireless sleep headphones are for the person who enjoys drifting off to the sound of their favorite sleep tunes….[29]
- **EverPlus Sleep Headphones** [30]
- **Musicozy Sleep Headphones** [31]
- **ToPoint Sleep Headphones** [32]
- **Vogtek Sleep Headphones** [33]

Another article in CNET reviewed "Best Headphones for Sleeping in 2022" and stated, inter alia: "Sure any decent set of headphones can do all of the above, but it's the design that sets **sleep headphones** apart. Regular headphones can be bulky and uncomfortable to lie on, but **sleep headphones** are made with a minimal, barely there feel that lets you drift off to sleep while wearing them comfortably throughout the night"[34] The article reviews more third-party competitors' sleep headphones:

- **Bedphones Sleep Headphones**
- **Fulext Sleep Headphones** [35]
- **SleepPhones Wireless Sleep Headphones** [36]
- **Watotgafer Sleep Headphones** [37]

[29] *Id.* at 141.

[30] *Id.* at 151.

[31] *Id.* at 153.

[32] *Id.*

[33] *Id.*

[34] CNET.com (emphasis added), Opposer's NOR, 34 TTABVUE 154-55.

[35] *Id.* at 157.

[36] *Id.* at 158.

[37] *Id.* at 159.

Some of these companies are among Applicant's top ten competitors.[38] As noted above, "evidence of competitors' use of particular words as the name of their goods or services is, of course, persuasive evidence that those words would be perceived by purchasers as a generic designation for the goods and services." *Cont'l Airlines, Inc. v. United Air Lines, Inc.*, 1999 WL 1288981, 1395 (TTAB 1999). In the same vein, "examples of … commentators using the term to refer to a category of [goods] is persuasive evidence that the term would be perceived by the relevant public … as a generic designation of those [goods]." *In re Serial Podcast, LLC*, 2018 WL 1522217, *7 (TTAB 2018). *See In re Northland Aluminum Prods., Inc.*, 777 F.2d 1556, 1559-60 (Fed. Cir. 1985) (relying on publications' uses of the term to find BUNDT generic for a type of ring cake mix); *In re ActiveVideo Networks, Inc.*, 2014 WL 3686863, *9 (TTAB 2014) ("examples of industry writers using the term 'cloud TV' as a discrete category of goods and services are persuasive evidence that the relevant consumers perceive the term as generic").

Based on this evidence of the public's understanding of SLEEP HEADPHONES—dictionary definitions and use of the term by Applicant, by Applicant's competitors, and by commentators—we find by a preponderance of the evidence that the term denotes a category or class of goods, not a single source. As such, it is generic, and may not be monopolized by Applicant in the form of a registered trademark. "A generic term cannot be registered as a trademark because such a term cannot function as an indication of source." *BellSouth v. DataNational*, 60 F.3d at 1569.

[38] Applicant's Ans. To Int. No. 18, Opposer's third NOR, 35 TTABVUE 47-48.

V. Mere Descriptiveness

For the sake of completeness, we consider whether the proposed mark is merely descriptive. "Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), 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,' unless the mark has acquired distinctiveness under Section 2(f) of the Act." *In re Sheet Pile,* 2024 WL 1175785, at *2.

Since the generic name of a thing is in fact "the ultimate in descriptiveness." *Marvin Ginn v. Fire Chiefs*, 782 F.2d at 989, our finding that the proposed mark is generic also implies that it is at least merely descriptive of Applicant's goods. *In re ActiveVideo Networks, Inc.*, 2014 WL 3686863, at *11. "A mark 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 Chamber of Commerce*, 675 F.3d [at 1300]; *In re Abcor Dev.*, 588 F.2d 811, [813] (CCPA 1978)." *In re Positec Group Ltd.*, 2013 WL 5467010, *2 (TTAB 2013).

Here again, Applicant has disclaimed "HEADPHONES," thereby tacitly conceding that the word is at least descriptive of its goods. *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 974 (Fed. Cir. 2018). So the issue, once again, is whether SLEEP dispels the otherwise merely descriptive nature of the proposed mark.

We find it does not. "If each component retains its merely descriptive significance in relation to the goods or services, the combination results in a composite that is itself merely descriptive." *In re Positec Grp. Ltd.*, 2013 WL 5467010, at *3.

The term SLEEP HEADPHONES immediately conveys the function, purpose, and use of Applicant's earphones and audio speakers, as demonstrated by the above dictionary definitions, by Applicant's advertising, by competitors' use, and by commentators' use. *See In re Boulevard Entm't Inc.*, 334 F.3d 1336, 1340 (Fed. Cir. 2003) (dictionary definitions "represent an effort to distill the collective understanding of the community with respect to language"); *In re Berkeley Lights, Inc.*, 2022 WL 15733123, *5-6 (TTAB 2022) (applicant's website may evidence descriptive use); *Hangzhou Mengku v. Shanghai Zhenglang*, 2024 WL 5265081, at *13 (any competent source evidences public perception). Again, a descriptiveness refusal is proper if the proposed mark is descriptive of any of the goods in the Class for which registration is sought. *In re Stereotaxis*, 429 F.3d at 1041.

We therefore find by a preponderance of the evidence that Applicant's proposed mark is merely descriptive—indeed, highly descriptive, if not generic—of its identified goods, within the meaning of Section 2(e)(1). 15 U.S.C. § 1052(e)(1). "'Our society is better served if … highly descriptive or generic terms remain available for use among competitors.' *In re Water Gremlin Co.*, 635 F.2d 841, [844] (CCPA 1980) (footnote omitted)." *Spiritline Cruises LLC v. Tour Mgmt. Servs., Inc.*, 2020 WL 636467, *15 (TTAB 2020).

VI. Decision

The opposition to registration of the proposed mark SLEEP HEADPHONES in Application Serial No. 90585777 is sustained on the grounds of genericness and, in the alternative, mere descriptiveness.