

This Opinion is a
Precedent of the TTAB

Mailed: August 24, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Jimmy Moore LLC
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Serial No. 86353015
—

Stan S. Sastry of The Law Office of Stan Sastry PLLC for Jimmy Moore LLC.

Tasneem Hussain, Trademark Examining Attorney, Law Office 118,
Thomas G. Howell, Managing Attorney.

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Before Seeherman, Bergsman and Lykos,
Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

On July 30, 2014, Jimmy Moore LLC, dba Jimmy Moore (“Applicant”), filed an application to register the mark **pitchingsmart** in standard characters on the Principal Register for services identified as “entertainment in the nature of baseball games” in Class 41.¹ As more fully discussed below, Applicant subsequently attempted several times to amend this identification, and the Examining Attorney has refused to accept such amendments on the basis that they extend the

¹ Application Serial No. 86353015, filed July 30, 2014, and based on Section 1(a) of the Trademark Act, asserting first use and first use in commerce as early as May 11, 2011.

identification of services beyond the scope of the original identification, ultimately making such refusal final. The Examining Attorney also made final the requirement for an acceptable specimen, finding each specimen submitted by Applicant unacceptable to show use of the mark for the identified services.

After the Trademark Examining Attorney issued a “subsequent final action” on June 24, 2015, Applicant appealed to this Board on December 4, 2015. We affirm the refusal to register.

I. Evidentiary Issues

Before proceeding to the merits of the refusal, we address certain evidentiary matters concerning exhibits attached to Applicant’s appeal brief.

Applicant’s Recently-Issued Patent

With its appeal brief, filed on January 26, 2016, Applicant submitted for the first time a copy of the first page of its patent, No. 9,072,953, for a “pitching device and method for baseball and softball sports” because, according to Applicant, “[t]his patent is the corner stone of . . . [its] business and was relied upon in making the preliminary amendment.” 4 TTABVUE 27 and 8 TTABVUE 4. Before addressing the procedural issues presented by this submission, we note that the patent has marginal relevance to the issues in this appeal so that, even if its first page were of record, it would not affect our ultimate decision. Nevertheless, the procedural issues raised by Applicant’s attempt to have this submission considered extend beyond this particular case and, so, merit discussion.

In the accompanying “request for consideration of Exhibit A,” 5 TTABVUE, Applicant requested that the Board take judicial notice of this exhibit, explaining that the patent issued on July 7, 2015, and that this date was “after close of prosecution,” *i.e.*, after the denial of the Request for Reconsideration on February 5, 2015. The Examining Attorney has objected to this document as being untimely, and in its reply brief Applicant has made further arguments as to why the Examining Attorney’s objection should be overruled. Specifically, Applicant contends that, because the patent did not issue until July 7, 2015, it was not possible for Applicant to submit it before the Examining Attorney issued the subsequent final refusal on June 24, 2015. However, Applicant claims that the Examining Attorney had notice that the patent was pending during the prosecution of the trademark application, and that because the Examining Attorney made reference to Applicant’s specimen as discussing Applicant’s “patent pending,” the Examining Attorney “has constructively made the U.S. Patent a part of the record.” 8 TTABVUE 4.² Applicant also claims that the patent is constructively part of the record because Applicant’s specimens indicate that Applicant has a patent pending. Finally, Applicant argues that its patent is admissible under Trademark Rule 2.122(e), 37 C.F.R. § 2.122(e), as an official record and/or a printed publication. 8 TTABVUE 5.

² The Examining Attorney, in discussing the acceptability of Applicant’s specimen, provided some principles regarding acceptable specimens, and stated, “In the present case, the specimen shows the mark on applicant’s website offering seminars (educational services) and discussing applicant’s ‘patent pending pitchingsmart strike zone system’ and seminars using that system.” Office action mailed December 31, 2014.

We agree with the Examining Attorney that the page of the patent submitted by Applicant with its brief should be given no consideration. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), provides:

The record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed. After an appeal is filed, if the appellant or the examiner desires to introduce additional evidence, the appellant or the examiner may request the Board to suspend the appeal and to remand the application for further examination.

Clearly Applicant's submission of the patent page with its brief was after the filing of the notice of appeal. Therefore, it is untimely. We do not accept Applicant's argument that the patent was "constructively" made of record because there was a mention of a pending patent in its specimens, or because the Examining Attorney characterized a statement in Applicant's substitute specimen as discussing Applicant's pending patent. A mere mention in a specimen that there is an application for a patent does not make the pending patent or the details of the pending patent of record, any more than a mention in a specimen that a product has been advertised in a magazine makes the magazine or the advertisement of record.

With respect to Applicant's point that there was no opportunity for it to make its patent of record prior to the filing of the appeal, the subsequent final refusal issued on June 24, 2015, the patent issued on July 7, 2015, and the appeal was not filed until December 4, 2015. There was clearly time prior to the appeal being filed for Applicant to file a request for reconsideration in order to make the patent of record. Although Applicant apparently believed that it was not permitted to file a further request for

reconsideration, Trademark Manual of Examining Procedure (“TMEP”) § 715.03(b) (2016) provides that if, in response to a request for reconsideration, an Examining Attorney issues an “Examiner’s Subsequent Final Refusal” with a six-month response clause, as occurred in the present case, “this provides applicant with the opportunity to respond before filing an appeal.”³

In any event, nothing prevented Applicant from filing a request for remand in order to introduce the evidence. Again, that is exactly what Rule 2.142(d) specifies should be done (“if the appellant ... desires to introduce additional evidence, the appellant ... may request the Board to suspend the appeal and to remand the application for further examination”).

³ As discussed in more detail *infra*, Applicant filed a petition to the Director that was denied. We note that the decision on petition stated that, after the Examining Attorney issued the “subsequent final Office action,” Applicant would then have six months to file a proper response, and that “generally” the only proper response to a final action is a notice of appeal or compliance with an outstanding requirement. The use of the term “generally” shows that Applicant was not limited to these two options, and therefore Applicant could have submitted a copy of its patent during the six-month response period. We point out that final Office actions normally include similar language to the effect that an applicant may respond by providing either or both 1) a response that fully satisfies all outstanding requirements and/or resolves all outstanding refusals or 2) an appeal to the Board. However, an Applicant may also file a request for reconsideration of a final Office action, as Applicant did in the present case, despite the fact that the Office action did not specifically mention that this was an option.

This situation, in which the applicant may file a further request for reconsideration or response to a subsequent final Office action prior to filing a notice of appeal, is to be distinguished from the situation when a “subsequent final refusal” issues after a notice of appeal has already been filed, and the application has been remanded to the examining attorney to consider the request for reconsideration. In such situation, the examining attorney would return the application to the Board for resumption of proceedings in the appeal. *See* TBMP § 1204 (2016).

Applicant's reliance on Trademark Rule 2.122(e) is misplaced. That rule refers to how evidence may be made of record in an *inter partes* trial proceeding. By contrast, this is an *ex parte* appeal of a refusal to register. Moreover, the issue in this appeal is not whether an issued patent *can* be made of record; the problem with Applicant's submission of the page of its patent goes not to the nature of the evidence, but the timeliness of the submission.

Finally, Applicant asks that we take judicial notice of its patent. However, the Board does not take judicial notice of records residing in the Patent and Trademark Office. See *In re Pedersen*, 109 USPQ2d 1185 (TTAB 2013); *In re Duofold Inc.*, 184 USPQ 638 (TTAB 1974). Applicant's request that we take judicial notice is denied.

Print-outs of Online Definitions from Various Sources

In addition to the patent submitted with its appeal brief, Applicant has submitted, and requested that the Board take judicial notice of, the definitions provided in Exhibits B-H. Applicant states that these definitions were obtained as a result of a Google search. To the extent that the exhibits show definitions that were taken from an online dictionary that is also available in printed form, e.g., www.merriam-webster.com, we grant such request. *Univ. of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); *In re Driven Innovations, Inc.*, 115 USPQ2d 1261, 1266 n.18 (TTAB 2015). However, we deny the request to judicially notice the definitions of "baseball" and "strike zone" taken from Wikipedia because Wikipedia is an Internet source whose contents are continuously subject to change via collaborative user-

input. Although we permit evidence from Wikipedia and similar such sources to be made of record when timely introduced, so that the examining attorney has an opportunity to submit rebuttal evidence, *see, e.g., In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1959 n.3 (TTAB 2016); *In re IP Carrier Consulting Grp.*, 84 USPQ2d 1028, 1032 (TTAB 2007), such rebuttal is not permissible on appeal.

Further, some of the definitions in the exhibits to Applicant's reply brief ("entertainment," "nature") do not indicate their source. Still other statements regarding some terms are taken from commercial websites ("Umpires: Strike Zone" at mlb.com) that do not constitute the kind of dictionary definitions of which we will take judicial notice. However, the Examining Attorney, too, has submitted dictionary definitions of "entertainment," "baseball" and "softball" with her brief and has requested that the Board take judicial notice of them. Because these definitions are appropriate subjects for judicial notice and taken from appropriate sources, we grant her request. Further, the Board may, *sua sponte*, take judicial notice of dictionary definitions, and therefore we take notice of the definitions of "strike zone" and "nature" found at merriam-webster.com.⁴

The Examining Attorney has also requested we take judicial notice of the fact that baseball and softball are not interchangeable. Brief, 7 TTABVUE 10. The dictionary

⁴ As defined in merriam-webster.com, "strike zone" is "the area over home plate through which a pitched baseball must pass to be called a strike." "Nature" has multiple definitions, the ones in merriam-webster.com that are most similar to the definitions Applicant has submitted from an unattributed source are "the physical world and everything in it (such as plants, animals, mountains, oceans, stars, etc.) that is not made by people" and "the inherent character or basic constitution of a person or thing: ESSENCE."

definition of “softball” submitted by the Examining Attorney with her brief states that “softball” is “a sport that is similar to baseball but that is played on a smaller field and with a ball that is pitched underhand and that is larger and softer than a baseball.” In view of that definition, we conclude that the games of baseball and softball are not the same game or, in the Examining Attorney’s words, are not interchangeable.

II. Analysis

Background

The series of Amendments, Office actions, responses and even a petition that comprise the application file all stem from Applicant’s error in identifying its services. In its initial application, filed July 30, 2014, Applicant identified its services as “entertainment in the nature of baseball games.” Applicant has explained that it did not intend to list this as the identification, and that the error was noticed in the filing receipt. Brief, 4 TTABVUE 4. As a result, virtually as soon as Applicant could do so,⁵ on August 9, 2014, Applicant filed a “Voluntary Amendment” seeking to amend the identification to “baseball and softball pitching training system for pitchers to improve pitching skills for accurate and intelligent placement of baseball and softball in a strike zone.” The Examining Attorney, in the November 13, 2014 Office action, found the proposed amendment to be unacceptable because it exceeded the scope of

⁵ Applicant could not file an amendment until the application data for its application had been posted.

the original identification in the application (and found the specimens unacceptable to show use of the mark for that original identification).

On December 12, 2014, Applicant reverted to the original identification, which the Examining Attorney had previously found to be acceptable, and submitted substitute specimens in an attempt to show use of its mark for “entertainment in the nature of baseball games.” The Examining Attorney, on December 31, 2014, accepted this identification of services, but found the substitute specimens unacceptable to show use for such services, and made final the requirement for an acceptable specimen.

Applicant then, on February 1, 2015, filed a request for reconsideration in which it sought to amend the identification of services again, this time to “educational services, namely, providing seminars for baseball and softball pitching.” The Examining Attorney denied the request on February 5, 2015, refusing to accept that proposed amendment to the identification because it, too, exceeded the scope of the original identification of services. Further, because the specimens submitted with the request for reconsideration did not support use of the mark for the original identification, the Examining Attorney maintained the requirement for acceptable specimens.

Applicant then filed a petition to the Director, on February 24, 2015, to review the Examining Attorney’s actions, and in particular asserting that the Examining Attorney’s refusal to accept either of Applicant’s two proposed amendments to the

identification was procedural error.⁶ The Director, in a decision dated June 22, 2015, found that the Examining Attorney's action in "changing the record back to the original identification was proper," and dismissed the petition. However, the Director found that the Examining Attorney, instead of just denying the request for reconsideration in the February 5, 2015 Office action, should have "issued a new final Office action in order to repeat the refusal of the amendment to identification of services and provide the applicant with time to appeal," and remanded the application to the Examining Attorney. Therefore, on June 24, 2015, the Examining Attorney issued a subsequent final action, in which she again made final the refusal to accept Applicant's proposed amendment to the identification, and again made final the requirement for an acceptable specimen. It is from this action that Applicant filed its appeal.

Issues

We note that Applicant has characterized the issues in this appeal as:

1. Whether Examining Attorney's refusal to accept applicant's diligent and timely preliminary amendment that was filed two days [sic—it was ten days] after the original application, and later reinstatement of a defective original ID was proper in light of the totality of circumstances.
2. Whether rejection of preliminary amendment without prior notice and opportunity to be heard, even though the Office admitted to the dates of original and amended filings, was violative of substantive due process rights of applicant under the Administrative Procedure Act (APA) and the US Constitution's Fifth Amendment.

⁶ Trademark Rule 2.146(a), 37 C.F.R. § 2.146(a) provides, *inter alia*, that a petition may be taken to the Director from any repeated or final formal requirement of the Examining Attorney in the *ex parte* prosecution of an application. See §2.63(a) & (b).

3. Whether Examining Attorney's refusal to accept the multiple specimens showing applicant's use of the mark in commerce was improper because Examining Attorney unilaterally reinstated an original wrong ID of services that was expressly amended by the applicant because it did not correspond with the applicant's trade services.

Appeal Brief, 4 TTABVUE 3.

All three of the issues, as expressed by Applicant, relate to Applicant's contention that the Examining Attorney, "without due process of prior notice and opportunity to be heard, removed the preliminary amendment and reinstated the original identification of services." Brief, 4 TTABVUE 2. However, by its petition to the Director, Applicant has already sought review of the Examining Attorney's actions during the course of examination, and particularly with respect to the Examining Attorney's refusal to accept Applicant's Voluntary Amendment that was filed ten days after the original application. In its petition, Applicant detailed its interactions with the Examining Attorney, and requested that the Director review the facts, procedure and record in the case, and also requested that the Examining Attorney's refusal to accept the preliminary amendment filed on August 9, 2014 and the amendment filed on February 1, 2015 be reversed as procedural error.

The Director found that merely because Applicant voluntarily filed an amendment to the identification shortly after filing the application did not require the Examining Attorney to accept an amendment that would exceed the scope of the original identification, and that the Examining Attorney's actions in changing the record back to the original identification were proper:

While the subsequent final action changes the procedural posture of the case [referring to the fact that the Examining Attorney should have issued a new final Office action in denying the request for reconsideration, and returning the file to the Examining Attorney to issue such a subsequent final action], it is unlikely to affect the merits regarding the rejection of the proposed amendment as outside the scope of the identification. Petitioner's statement that the services were amended prior to substantive examination is accepted. This application was filed on August 7, 2014 [sic-the actual filing date was July 30, 2014]. On August 9, 2014, a voluntary amendment was received and entered into the electronic record for this application. The electronic system permits applicants to file proposed amendments regardless of the scope of the identification, but the filing of the proposed amendment does not mean that it is accepted. Pursuant to Trademark Rule 2.71, 37 C.F.R. § 2.71(a), the scope of goods and services cannot be broadened. An examining attorney may not accept a voluntary amendment that is outside the scope of the services in the original application. TMEP § 401.01. Thus, an applicant who selects the wrong identification of services in the initial application must file a new application if the identification cannot be amended within the scope of the original identification. Therefore, the examining attorney's action in changing the record back to the original identification was proper.

We will not revisit the Director's decision that Applicant does not have an absolute right to amend its identification as long as the amendment is filed shortly after the filing of the original application, and prior to the application being examined. *See* Trademark Trial and Appeal Board Manual of Procedure ("TBMP") § 1201.05 (2016) ("a formal requirement which was the subject of a petition decided by the Director may not thereafter be the subject of an appeal to the Board.")⁷ Therefore, the issues properly before us on appeal are:

⁷ Accordingly, we give no consideration to Applicant's argument that the Examining Attorney's refusal to accept Applicant's Preliminary Amendment frustrated the purpose of Trademark Rule 2.71(a) to give the public notice of identifications. The Director has effectively addressed this in the decision on petition, finding that the Examining Attorney's action in changing the record back to the original identification was proper.

Applicant has also claimed, in its brief, that the petition decision "did not address substantive due process issue as to prior notice and opportunity to be heard before removal of the

1. Is either of Applicant's proposed amendments to the identification of services acceptable, such that the Examining Attorney's refusal to accept the amended identification was incorrect; and
2. Are the specimens submitted by Applicant acceptable to show use of Applicant's mark for its identified services.

Amendments to the Identification of Services

Trademark Rule 2.71(a), 37 C.F.R. § 2.71(a), provides, in relevant part, that “the applicant may amend the application to clarify or limit, but not to broaden, the identification of goods and/or services....” The original identification, as we have noted above, is “entertainment in the nature of baseball games.” In the preliminary amendment, filed 10 days after the filing of the application, Applicant sought to amend the identification to “baseball and softball pitching training system for pitchers to improve pitching skills for accurate and intelligent placement of baseball and softball in a strike zone.” Applicant makes two arguments regarding the acceptability of this amendment. The first is that, whether or not the amended identification exceeded the scope of the original identification, it should have been accepted because it was filed three months before examination began. Applicant appears to believe that the rule prohibiting an amendment which expands the scope of the original identification has to do with not changing the application once an Examining Attorney has begun to examine it. Applicant points to the language of the

preliminary amendment.” 4 TTABVUE 6. We disagree. The Director addressed this point by stating that “the examining attorney’s action in changing the record back to the original identification was proper.” The only irregularity found by the Director was that the Examining Attorney did not issue a subsequent final action in denying Applicant’s request for reconsideration so that Applicant would have an opportunity to respond or file a notice of appeal.

preamble of Rule 2.71, which provides, “The applicant may amend the application during the course of examination, when required by the Office or for other reasons,” and asserts that this language governs subsection (a).

As already discussed, the Director, in deciding the petition filed by Applicant on February 24, 2015, determined that Trademark Rule 2.71 applies to a voluntary amendment filed prior to examination. The petition decision specifically accepted “Petitioner’s statement that the services were amended prior to substantive examination.” However, the decision made clear that, upon examination of the application, the Examining Attorney’s action in not accepting the amendment to the identification was proper. We cannot revisit the Director’s decision on this point.⁸

Applicant’s second argument is that its two proposed amended identifications do not exceed the scope of the original identification. To reach that conclusion, Applicant puts forth several rather convoluted arguments. For example, Applicant asserts:

Here, the original ID was “Entertainment in the nature of baseball games,” which has two terms that are extremely broad and vague, namely, “Entertainment” and “baseball games.” “Entertainment” is defined in [an] on-line dictionary as “the action of providing or being

⁸ We note that Applicant incorrectly interprets the word “examination” much too narrowly, apparently believing that the examination period commences only at the time an examining attorney first issues an Office action, or at least at the time an examining attorney first takes up the file in order to draft such an action. However, under our rules, the examination period begins at the time the application is filed, because the filing of the application provides the authorization (and ability) for the Office to consider the application. Examination includes, for example, determining whether the requisite fee has been submitted, which occurs almost at once. Applicant itself has acknowledged that it received notification that the Office had assigned a pseudo mark to its application on August 8, 2014; that, too, is part of the examination of the application. Moreover, Applicant’s interpretation is belied by the very fact that it filed its preliminary amendment approximately three months prior to the first Office action; since Rule 2.71 provides that an applicant may amend the application during the course of examination, if Applicant’s interpretation were correct there would have been no provision under the rules to file its preliminary amendment.

provided with amusement or enjoyment.["] “Baseball games” is defined as “of baseball [sic] is relating to the sports game between two teams where players have to hit a ball with a bat in order to score runs.” The Examining Attorney in the First Action states as follows: “The proposed amendment is beyond the scope of the original identification because a “pitching training system” identifies goods which are not within the scope of baseball game services.” As per the above definition, “baseball games” must include “pitching” (pitcher throwing a ball to batter), without which, there is no hitting the ball or scoring runs. Thus pitching is an inherent part of any baseball game. As to the term “pitching training,” it is an integral part of baseball games because, for example, “pitching training” occurs during warm-up practice pitching before and during a baseball game on the field, and the sidelines or in the bull-pen, with the coaches coaching. “Pitching training” also occurs before a batter steps in the batter’s box and while a pitcher is on the mound throwing practice training pitches. Thus “pitching training” occurs during a baseball game, and is inherent part of [a] baseball game. Thus, the term “pitching training” is logically encompassed by the term “baseball games” that is already included in the original identification and is within the practical ordinary meaning and scope of “baseball games.”

4 TTABVUE 7-8. Applicant also asserts, in its reply brief:

“pitching training” is a form of “entertainment” as broadly defined as “the action of providing or being provided with amusement or enjoyment” and “pitching” is a part of “baseball game” just as fielding and batting are the other parts. “Pitching training” is therefore not beyond the scope of “Entertainment in the nature of baseball games” in its broadest reasonable definition of the terms used.

8 TTABVUE 15 (citations to exhibits showing definitions omitted).

Although we find Applicant’s arguments quite creative, we are not persuaded by them. The original identification is not just two broad and vague terms, but a phrase, “entertainment in the nature of baseball games.” This language is one of the acceptable identifications set forth in the Trademark ID Manual. As such, the Office has found it to be definite, as an identification must be. *See* TMEP § 1402.01 (“The language used to describe goods and/or services must be specific, definite, clear,

accurate and concise.”). One purpose of identifying the services is “to provide public notice,” *id.*, and we have no doubt that the identification “entertainment in the nature of baseball games” would convey to the public, including anyone who was searching Office records, exactly what such services are. It is the service of putting on a baseball game for the entertainment of spectators. Applicant distorts what the common understanding of baseball game entertainment services is by taking one feature of the game—pitching—and *then* extrapolating from that aspect of the game that a pitcher throwing practice throws is a “baseball and softball pitching training system for pitchers to improve pitching skills for accurate and intelligent placement of baseball and softball in a strike zone,” to contend that such a training system is within the scope of “entertainment in the nature of baseball games.

Applicant’s second proposed amendment is “educational services, namely, providing seminars for baseball and softball pitching.” One of the problems raised by the Examining Attorney with respect to this identification was the inclusion of “softball.” Applicant claims that this is not a broadening of the original identification because both the original specimen and Applicant’s webpages make reference to softball, so that the amended identification “relates back to the scope of the original application as filed.” 4 TTABVUE 9. However, the issue is not whether Applicant actually performed the service in the proposed amended identification at the time it filed its application, or even whether the specimens it submitted would support the amended identification. The issue is whether the proposed identification is encompassed by the *original identification*. See 37 CFR § 2.71(a); *In re Fiat Group*

Mktg. & Corp. Comms. S.P.A., 109 USPQ2d 1593, 1597 (TTAB 2014). Clearly, the educational service of providing seminars, even if the subject of the seminars is baseball and softball pitching, is not encompassed by entertainment services in the nature of a baseball game. The inclusion of “softball” in the proposed identification would seem to be a more minor issue compared to the basic problem that entertainment services in the nature of a baseball game do not encompass seminars on pitching. But to be clear on that point as well, the original identification did not include softball games. Whether, as Applicant asserts, baseball and softball are “generically similar games legally included in the same international classes in the USPTO’s Trademark ID Manual,” *id.*, is not relevant.

Applicant makes a number of additional arguments regarding the meaning of various words, such as “strike zone” and “system,” in an attempt to show that its proposed amendments to the identifications remain within the scope of the original identification. Applicant’s arguments regarding a pitching training system, discussed above, give a flavor of these additional arguments, and we see no need to detail each one. Although we do not repeat them here, we have given them full consideration but find them unpersuasive.

Accordingly, we affirm the Examining Attorney’s decision, pursuant to Trademark Rule 2.71(a), not to allow either of Applicant’s proposed amendments to the identification of services on the basis that they would broaden the identification of services.

Specimens

The second issue in this appeal, the requirement for an acceptable specimen, flows from the identification issue. Applicant does not even contend that the specimens it submitted support the use of the mark for the services as originally identified. On the contrary, Applicant's arguments with respect to the specimen requirement revolve around why the amendment to the identification should have been accepted, and its contention that its "specimens comply with amended ID..." 4 TTABVUE 14. In fact, Applicant specifically states that it "is not in the business of 'offering baseball games,' so applicant cannot deliver such specimens." 8 TTABVUE 24. Applicant has acknowledged that its specimens do not show use of the mark for "entertainment in the nature of baseball games."

We see no need, therefore, to discuss the specimens in detail. Quite clearly, they do not show use of the mark for "entertainment in the nature of baseball games." The requirement for acceptable specimens is affirmed.

III. Conclusion

As a final comment, we are not unmindful of the difficult position that Applicant has found itself in, even though Applicant acted promptly in an attempt to correct its original error. That is, Applicant followed Office procedure for filing an amendment as soon as it was possible to file such an amendment. Because Applicant did not learn until issuance of the first Office Action three months later that its Preliminary

Amendment did not correct the problem, Applicant did not, during that interim period, file a new application with the correct identification.⁹

Although we are sympathetic to Applicant's situation, Applicant committed the initial error by incorrectly identifying its services, and it was Applicant's choice to attempt to correct its error through amendment, rather than to pursue the option to file a new application. Trademark Rule 2.71(a) prevents the relief Applicant now seeks. This is one of many situations in which errors in an application cannot be cured by an amendment. *See*, for example, Trademark Rule 2.72(a)(2), 37 C.F.R. § 2.72(a)(2) (the applicant may amend the description or drawing of the mark only if "the proposed amendment does not materially alter the mark"); *In re Hacot-Columbier*, 105 F.3d 616, 41 USPQ2d 1523, 1526 (Fed. Cir. 1997). Applicant has already sought review by the Director regarding the Examining Attorney's actions in terms of whether Trademark Rule 2.71(a) applies to a preliminary amendment and the Examining Attorney's reinstatement of the original identification, foreclosing that issue from our consideration.¹⁰

Because Applicant's proposed amendments to its identification exceed the scope of its original identification, the Examining Attorney's refusal to accept those

⁹ Applicant has explained that it would have filed a new application but for the fact that intervening third-party applications were filed on October 21, 2014, and therefore Applicant believes it is critical to retain the current application, with its earlier filing date. 8 TTABVue 5-6.

¹⁰ Applicant did not, in its petition to the Director, specifically seek a remedy under Trademark Rule 2.146(a)(5), 37 C.F.R. § 2.146(a)(5), to request a waiver of Rule 2.71(a), but instead invoked the supervisory authority of the Director under Rule 2.146(a)(3) to review the Examining Attorney's actions in refusing to accept Applicant's proposed amendment to the identification of services.

amendments is affirmed. And because Applicant's specimens do not support use of its mark for the services in the original identification, the requirement for acceptable specimens is affirmed as well.

Decision: The refusal to register Applicant's mark **pitchingsmart** is affirmed.