

This Opinion is not a  
Precedent of the TTAB

Mailed: May 31, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re FreeStyle Fitness Academy, LLC*  
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Serial No. 86490859  
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Gene Bolmarcich of the Law Offices of Gene Bolmarcich,  
for FreeStyle Fitness Academy.

April Reeves, Trademark Examining Attorney, Law Office 102,  
Mitchell Front, Managing Attorney.

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Before Kuhlke, Bergsman and Shaw,  
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

FreeStyle Fitness Academy (“Applicant”) seeks registration on the Principal Register of the mark **FreeStyle Fitness Academy** (in standard characters) for “training of fitness instructors; educational services, namely, providing training of instructors for certification in the field of fitness and exercise; educational services, namely providing classes, workshops and instruction in the fields of fitness and

exercise to fitness instructors,” in International Class 41.<sup>1</sup> Applicant disclaimed the exclusive right to use the phrase “Fitness Academy.”

The Trademark Examining Attorney refused registration of Applicant’s mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles the mark F2 FREESTYLE FITNESS and design, shown below,



for the services set forth below as to be likely to cause confusion:

Conducting fitness classes; consulting services in the fields of fitness and exercise; counseling services in the field of physical fitness; dance club services; dance events; dance instruction; dance reservation services, namely, arranging for admission to dance events; dance schools and studios; education services, namely, providing classes and instruction in the field of dance; entertainment and educational services, namely, the presentation of seminars, workshops and panel discussions, and ongoing television and radio shows all in the field of dance; entertainment in the nature of dance performances; entertainment services in the nature of live visual and audio performances, namely, musical band, rock group, gymnastic, dance, and ballet performances; organizing community festivals featuring a variety of activities, namely, art exhibitions, sporting events, flea markets, heritage markets, ethnic dances and the like; organizing community festivals featuring primarily dance and also providing fitness; physical fitness conditioning classes; physical fitness

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<sup>1</sup> Application Serial No. 86490859 was filed on December 26, 2014, based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as of January 1, 2014.

instruction; physical fitness studio services, namely, providing exercise classes, equipment and facilities, body sculpting classes and group fitness classes; providing an interactive website featuring information on exercise and fitness and links relating to fitness; providing an on-line computer database featuring information regarding exercise and fitness; providing assistance, personal training and physical fitness consultation to individuals and corporate clients to help their employees make physical fitness, strength, conditioning, and exercise alterations in their daily living; providing classes, workshops, seminars and camps in the fields of fitness, exercise, boxing, kick boxing and mixed martial arts; providing dance halls; training of dance instructors,” in Class 41.<sup>2</sup>

Registrant disclaimed the exclusive right to use the phrase “Freestyle Fitness.”

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board.<sup>3</sup> We reverse the refusal to register.

### I. Evidentiary Issue

Before proceeding to the merits of the refusal, we address an evidentiary matter. Despite the fact that the Trademark Examining Attorney submitted definitions of the word “freestyle” from multiple sources in her April 13, 2015 Office Action, Applicant, in its brief, submitted a copy of a definition of the word “freestyle” from the Oxford Dictionaries and requested that the Board take judicial notice of that definition.<sup>4</sup> The

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<sup>2</sup> Registration No. 4551243, registered on June 17, 2014.

<sup>3</sup> In the April 13, 2015 Office Action, the Trademark Examining Attorney also refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that Applicant’s mark is merely descriptive of Applicant’s services. However, the Trademark Examining Attorney withdrew the descriptiveness refusal in the July 14, 2015 Office Action. *See* TBMP § 1209.01 (June 2015) (“[T]he Board will not remand an application for consideration of a requirement or ground for refusal if the examining attorney had previously made that requirement or refused registration on that ground and then withdrew it.”)

<sup>4</sup> 4 TTABVue 5.

Trademark Examining Attorney objected to Applicant's submission of the dictionary definition on the ground that it was not timely filed.<sup>5</sup> Because the Board will take judicial notice of dictionary definitions and because Applicant's dictionary definition is cumulative, the Trademark Examining Attorney's objection is overruled.

## II. Applicable Law

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

### A. The similarity or dissimilarity and nature of the services.

Applicant is seeking to register its mark for training fitness instructors while Registrant uses its mark for conducting fitness training and training dance instructors. To show that the services are related, the Trademark Examining Attorney submitted excerpts from seven websites offering both training for fitness

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<sup>5</sup> 6 TTABVUE 7-8.

instructors and fitness training services.<sup>6</sup> The 24 Hour Fitness website (24hourfitness.com) is illustrative. The excerpt below displays information regarding 24 HOUR FITNESS exercise instructor training services.

The screenshot shows the 24 Hour Fitness website header with navigation links: HOME | MEMBERSHIPS | LOCATIONS | GROUP X® CLASSES | PERSONAL TRAINING | 24 HOUR FITNESS. There are buttons for 'FREE PASS' and 'JOIN TODAY'. The main content area is titled 'Become a Group Exercise Instructor' and includes the following text:

Find a job that will keep you in shape as you motivate others to reach their fitness goals. As a member of our national team of more than 5,000 24 Hour Fitness group exercise instructors, you can help improve people's lives one class at a time!

Our mission is to make fitness a way of life for everyone and our employees are the key to fulfilling that mission. Their dedication sets the tone, their drive yields results for themselves and for our fitness club members and their passion inspires positive change.

We are always looking for dedicated, knowledgeable and passionate group exercise instructors to join our team. You can complete your application right now, online.

[Get started!](#)

**Group Exercise Instructor Education**

We've teamed up with leading group fitness educational organizations to assist you in getting the training you need to get started.

Whether your passion is Zumba, Turbo Kick, indoor cycle, aqua, or strength classes, 24 Hour Fitness provides top-quality instructor training courses designed by leading organizations.

Choose from comprehensive courses in which talented and skilled educators share their valuable knowledge and tips to help you fine-tune your teaching skills and techniques. You can learn more about our educational partners and the learning opportunities provided below.

**Aerobic and Fitness Association of America**

The Aerobic and Fitness Association of America (AFAA) is the world's largest fitness and TeleFitness® educator. Since 1983, AFAA has issued more than 250,000 certifications to fitness professionals from 73 countries around the world.

AFAA provides a comprehensive written and practical examination accredited by Vital Research. The organization is an affiliate of the National Board of Fitness Examiners (NBFE), and a member of the National Organization of Competency Assurance (NOCA).

With AFAA, you can choose from a variety of certifications and specialty workshops.

The excerpt below displays an advertisement for a 24 Hour Fitness cycling classes.

The screenshot shows the 24 Hour Fitness website header with navigation links: HOME | MEMBERSHIPS | LOCATIONS | GROUP X® CLASSES | PERSONAL TRAINING | 24 HOUR FITNESS. There are buttons for 'FREE PASS' and 'JOIN TODAY'. The main content area features a video player showing a cycling class, a 'CYCLING CLASSES' section with a 'CLASS SCHEDULE' button and a 'SEE ALL CLASSES' button, and a promotional banner for 'ACE SUMMER' featuring a '24LIFE' magazine cover with the text 'DOWNLOAD THE NEW 24LIFE™ MAGAZINE FREE.' and a 'LEARN MORE' button.

**CYCLE CLASSES**

Take our cycling classes and pedal your way to great health. Combining energizing music with unique workouts, cycle exercise classes deliver a great fitness workout with powerful results, including cardiovascular strength, lower total cholesterol, decreased stress and improved quality of life.

**CYCLE CLASSES**  
[Watch video](#)

Experience the thrill of outdoor cycling inside the club. In our authentic and athletic cycling class, motivating instructors and up tempo music keep you energized as you sweat through grueling hill climbs, flat terrain, head winds, tail winds and anaerobic intervals.

**LES MILLS RPM®**  
[Watch video](#)

Ride to the rhythm of powerful music in RPM®, the LES MILLS® popular indoor cycling class. Take on challenging terrain as your coach leads the pack through hills, flats, mountain peaks, time trials and interval training. Discover your athletic within – and sweat and burn to reach your endorphin high.

**ACE SUMMER.**

DOWNLOAD THE NEW 24LIFE™ MAGAZINE FREE.

**LEARN MORE**

<sup>6</sup> July 14, 2015 Office Action.

In view of the foregoing, we find that the services are related.

B. Established, likely-to-continue channels of trade.

The above-noted excerpts from seven websites offering both training for fitness instructors and fitness training services illustrate that the third-parties advertise their respective services to the same classes of consumers (*i.e.*, consumers interested in fitness training courses may encounter advertising for fitness instructor training services and vice versa). Applicant argues that “[t]here are no consumers who would be exposed to applicant’s mark (*i.e.* professional trainers) *and* registrant’s mark (*i.e.* the general public who take fitness classes).”<sup>7</sup> However, that argument is contrary to the evidence in record.

We find that the services move in the same channels of trade.

C. The similarity or dissimilarity of the marks.

Applicant is seeking to register the mark **FreeStyle Fitness Academy** and the mark in the cited registration is F2 FREESTYLE FITNESS and design shown below:



The marks are similar because they share the descriptive or highly suggestive phrase “Freestyle Fitness.” The word “Freestyle” is defined, *inter alia*, as “using

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<sup>7</sup> 7 TTABVUE 2.

whatever style or method you want to.”<sup>8</sup> The word “Fitness” is defined as “the quality or state of being fit.”<sup>9</sup> “Fit” is defined, *inter alia*, as “physically healthy and strong.”<sup>10</sup> Thus, the phrase “Freestyle Fitness” as applied to the services at issue means free form fitness training.

In this regard, Applicant uses the word “freestyle” to describe a free form fitness training regime in its specimen (*i.e.*, “The FreeStyle Fitness Academy offers programs to train individuals who wish to design, format, and teach freestyle group fitness classes.”). *See also* excerpts from Applicant’s website submitted by Applicant in its June 23, 2015 Response:

... FSA offers programs to train freestyle instructors who wish to design, format, and teach freestyle group fitness classes.

\* \* \*

Embrace becoming a freestyle instructor now and learn the skills to be able to teach any freestyle format or class.

Each trainee will learn the philosophy, exercise, and progression of the different formats offered at the FreeStyle Fitness Academy that will prepare them to format their own FreeStyle classes with confidence and creativity.

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<sup>8</sup> **Macmillan Dictionary** (macmillandictionary.com) attached to the April 13, 2015 Office Action. See also, **Webster’s New World College Dictionary** (yourdictionary.com), **The American Heritage Dictionary of the English Language** (yourdictionary.com) attached to the April 13, 2015 Office Action, and the **Oxford Advanced Learner’s Dictionary** attached to Applicant’s Brief (4 TTABVUE 7).

<sup>9</sup> **Merriam-Webster** (merriam-webster.com). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d* \_\_\_ F.3d \_\_\_, \_\_\_ USPQ2d \_\_\_ (Fed. Cir. 2016); *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010).

<sup>10</sup> *Id.*

Thus, Applicant uses the term “Freestyle Fitness” to mean free form fitness training.

Consumers are unlikely to focus on the descriptive or highly suggestive phrase “Freestyle Fitness” as a source indicator.

It is well established that the scope of protection afforded a descriptive or even a highly suggestive term is less than that accorded an arbitrary or coined mark. As we stated in *In re Hunke & Jochheim*, 185 USPQ 188 (TTAB 1975), the scope of protection to those marks categorized as “weak” marks has often been limited to the substantially identical notation and/or to the subsequent use and registration thereof for substantially similar goods. Therefore, the addition of other matter to a highly suggestive or descriptive designation, whether such matter is equally suggestive or even descriptive, may be sufficient to avoid confusion. See also *Northwestern Golf Co. v. Acushnet Co.*, 226 USPQ 240 (TTAB 1985).

*The Wooster Brush Co. v. Prager Brush Co.*, 231 USPQ 316, 318 (TTAB 1986).

It seems both logical and obvious to us that where a party chooses a trademark which is inherently weak, he will not enjoy the wide latitude of protection afforded the owners of strong trademarks. Where a party uses a weak mark, his competitors may come closer to his mark than would be the case with a strong mark without violating his rights. The essence of all we have said is that in the former case there is not the possibility of confusion that exists in the latter case.

*Sure-Fit Products Company v. Saltzson Drapery Company*, 254 F.2d 158, 117 USPQ 295, 297 (CCPA 1958). We find that to be the situation presented in this appeal. The additional matter in Applicant’s mark (*i.e.*, the word “Academy”) and Registrant’s mark (*i.e.*, the designation F2 and design element) distinguish the two marks.

The precedential decisions which have stated that a descriptive component of a mark may be given little weight in reaching a conclusion on likelihood of confusion reflect the reality of the market place. Where consumers are faced with various usages of descriptive words, our experience

tells us that we and other consumers distinguish between these usages. Some usages will be recognized as ordinary descriptive speech. Where a descriptive term forms part of two or more marks for related products, as in some of the cited cases, the decisions recognize that the purchasing public has become conditioned to this frequent marketing situation and will not be diverted from selecting what is wanted unless the overall combinations have other commonality. In a sense, the public can be said to rely more on the non-descriptive portion of each mark. On the other hand, this does not mean that the public looks only at the differences, or that the descriptive words play no role in creating confusion.

*In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985). In other words, “[t]he marks must be considered as the public views them, that is, in their entirety,” *Id.*, and, thus, we find that the marks are not similar.

D. Balancing the factors.

Despite the fact that the services are related and move in the same channels of trade, the marks are not similar and not likely to cause confusion because the common portions of the marks are descriptive or highly suggestive and consumers will focus on the marks in their entirety and not just on the phrase “Freestyle Fitness.” We find, therefore, that Applicant’s use of the mark **FreeStyle Fitness Academy** for “training of fitness instructors; educational services, namely, providing training of instructors for certification in the field of fitness and exercise; educational services, namely providing classes, workshops and instruction in the fields of fitness and exercise to fitness instructors” is not likely to cause confusion with the registered mark  for fitness training services, *etc.*

**Decision:** The refusal to register Applicant’s mark is reversed.