This Opinion is Not a
Precedent of the TTAB

Mailed: November 9, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re i1 Sensortech, Inc.

Serial No. 87249539

Matthew Moersfelder of Davis Wright Tremaine LLP,
for i1 Sensortech, Inc.

Andrew Leaser, Trademark Examining Attorney, Law Office 117,
Travis Wheatley, Managing Attorney.

Before Wellington, Ritchie and Lykos,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

i1 Sensortech, Inc. ("Applicant") has filed an application to register the mark ATHLETE INTELLIGENCE in standard characters on the Principal Register for goods ultimately identified as:

> Monitoring device and system, worn by a person for non-medical purposes, namely, a wearable device comprised of electronic sensors for measuring the magnitude and effects of physical impacts, biometric data, positioning and speed data, and general physiological data; software for measuring the magnitude and effects of physical impacts and general physiological data; data analytic software; in International Class 9, and

> Monitoring device and system, worn by a person for medical purposes, namely, a wearable device comprised of electronic sensors for measuring the magnitude and effects of physical impacts, biometric data, positioning and speed data, and general physiological data, in International Class 10.[1]

The Trademark Examining Attorney has refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the mark is merely descriptive of Applicant's identified goods in both classes. When the refusal was made final, Applicant appealed and filed a request for reconsideration, which was denied. The appeal is now fully briefed.

For the reasons set forth below, we affirm the refusal to register as to both classes.

I. Evidentiary Issues

Before discussing the merits of the refusal, we address the following evidentiary matters.

A. Applicant's Request for Judicial Notice

In its reply brief, Applicant requests that the Board take judicial notice of Certificate of Registration No. 016520471 issued by the European Union Intellectual Property Office ("EUIPO") for the same mark and identical goods in International Class 9 to Applicant. It is the Board's practice not to take judicial notice of third-party registrations, whether issued in the United States or by foreign countries or their agencies, such as EUIPO. *See In re Wada*, 48 USPQ2d 1689, 1689 n.2 (TTAB 1998) (request in reply brief that Board take judicial notice of "thousands of registered

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[1] Application Serial No. 87249539, filed November 28, 2016, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a bona fide intent to use the mark in commerce.

marks incorporating the term NEW YORK for products and services that do not originate in New York state or city" denied), *aff'd*, 194 F.3d 1297, 52 USPQ2d 1539 (Fed. Cir. 1999). *Cf. In re House Beer, LLC*, 114 USPQ2d 1073, 1075 (TTAB 2015) (Board does not take judicial notice of files of applications or registrations residing in the Office, including entries in file of cited registration). While the registration in question is not owned by a third-party but by Applicant, the same underlying rationale applies – "to encourage applicants (and examining attorneys) to fully raise their arguments during prosecution, where they can be more efficiently resolved, and to avoid unnecessary or inefficient appeals." TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 1208.04 (2018) ("Judicial Notice"). In view of the foregoing, Applicant's request is denied.[2]

B. Examining Attorney's Objection to Hyperlinks to News Articles

Next we address the Examining Attorney's objection to Applicant's inclusion of hyperlinks to news articles in its appeal brief[3] on the ground of untimeliness. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), provides in relevant part "[t]he record in the 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." While technically not "filed" with the Board, the hyperlinks constitute an improper attempt to augment the record. As such, the objection is sustained; the hyperlinks to the articles have been given no consideration. *See, e.g., In re Fiat Grp. Mktg. & Corporate Commc'ns S.p.A.*,

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[2] Even if we had granted Applicant's request, the outcome of this case would have remained the same.

[3] Applicant's Brief, p. 17, 7 TTABVUE 18.

109 USPQ2d 1593, 1596 (TTAB 2014); *In re Pedersen*, 109 USPQ2d 1185, 1188 (TTAB 2013).[4]

II. Descriptiveness Refusal

We now turn to the substantive refusal before us. In the absence of acquired distinctiveness, Section 2(e)(1) of the Trademark Act prohibits registration of a mark on the Principal Register that, when used in connection with an applicant's goods, is merely descriptive of them. 15 U.S.C. § 1052(e)(1). "A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *In re Chamber of Commerce of the U.S.,* 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). *See also In re TriVita, Inc.,* 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015). By contrast, a mark is suggestive if it "requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods." *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). Suggestive marks, unlike merely descriptive terms, are registrable on the Principal Register without proof of secondary meaning. *See Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004).

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[4] In addition, as the Examining Attorney correctly points out, the provision of a hyperlink is not a proper way to make the "linked" materials of record. *See, e.g., In re Olin*, 124 USPQ2d 1327, 1331 n.15 (TTAB 2017); *In re HSB Solomon Assocs., LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012)). For instructions on how to properly introduce Internet articles and other types of Internet evidence into the record, see TBMP § 1208.03 and TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") § 710.01(b) (Oct. 2018).

The determination of whether a mark is merely descriptive must be made in relation to the goods for which registration is sought, not in the abstract. *In re Chamber of Commerce*, 102 USPQ2d at 1219; *In re Bayer*, 82 USPQ2d at 1831. This requires consideration of the context in which the mark is used or intended to be used in connection with those goods, and the possible significance that the mark would have to the average purchaser of the goods in the marketplace. *In re Chamber of Commerce*, 102 USPQ2d at 1219; *In re Bayer*, 82 USPQ2d at 1831; *In re Omaha Nat'l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987). In other words, the question is not whether someone presented only with the mark could guess the goods listed in the identification. Rather, the question is whether someone who knows what the goods are will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.,* 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (quoting *In re Tower Tech, Inc.,* 64 USPQ2d 1314, 1316-17 (TTAB 2002)).

Evidence that a term is merely descriptive to the relevant purchasing public "may be obtained from any competent source, such as dictionaries, newspapers, or surveys," *In re Bayer*, 82 USPQ2d at 1831, as well as "labels, packages, or in advertising material directed to the goods." *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978). It may also be obtained from websites and publications, and, in the case of a use-based application, an applicant's own specimen of use and any explanatory text included therein. *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017); *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564,

1565 (Fed. Cir. 2001). In this particular case, the involved application has been filed under the intent-to-use provisions pursuant to Trademark Act Section 1(b). Nonetheless, the Examining Attorney is not precluded from introducing excerpts from Applicant's own website as evidence of public perception of the mark. *See In re Promo Ink*, 78 USPQ2d 1301, 1303 (TTAB 2006) (examining attorney may introduce evidence that applicant's own literature supports descriptiveness of term despite the fact that application based on intent-to-use; fact that applicant has filed an intent-to-use application does not limit the examining attorney's evidentiary options or shield an applicant from producing evidence that it may have in its possession).

In support of the refusal, the Examining Attorney made of record the following dictionary definitions:

> **athlete**
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> a person trained in exercises, games, or contests requiring physical strength, skill stamina, speed, etc.[5]
>
> **intelligence**
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> 2. news or information[6]

As noted above, one of the dictionary definitions of "intelligence" is "information." The record also contains evidence that competitors in the field use the term "intelligence" to describe biometric data or information collection products for athletes:

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[5] WEBSTER'S NEW WORLD COLLEGE DICTIONARY (2010) accessed via YourDictionary.com at http://www.yourdictionary.com/ and attached to March 7, 2017 Office Action, p. 6. Citations to the prosecution history in the USPTO's TSDR database are to the downloadable .pdf version. *See, e.g., In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 n.4 (TTAB 2018).

[6] *Id*. at 7.

> The results of NeuroTracker tests represent a vanguard for cognitive assessment of athletes, as the data provides a direct indicator of perceptual-cognitive performance capabilities. This new form of intelligence on athletes can complement other assessments for a fuller understanding of each player's overall skill-set.[7]
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> "We are extremely excited to be NC State's chosen technology partner for their athletic department," said Kinduct's CEO, Travis McDonough. "Our software platform is the perfect option for NCAA schools looking to gain intelligence on athletes across multiple varsity teams. Our Athlete Management System is highly versatile, ensures consistency of data management, and can enhance the institution's workflows."[8]

Within the context of Applicant's Class 9 and Class 10 goods, purchasers will immediately recognize that the word ATHLETE in Applicant's mark designates the person wearing Applicant's "monitoring device and system … comprised of electronic sensors", and that INTELLIGENCE refers to the gathering of information measuring an individual athlete's biometrics, positioning and speed, physiology as well as the magnitude and effects of any physical impacts. Taken together, this evidence shows that Applicant's mark ATHELTE INTELLIGENCE, when considered as a whole, immediately conveys a feature and purpose of the identified goods, namely that Applicant's wearable devices and software are designed to collect intelligence from athletes, such as information and data, regarding the performance, health and

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[7] *Invaluable Intelligence*, COGNISENS ATHLETICS, https://www.slideshare.net/zoneperformance/cogni-sens-athletics-neurotracker-introduction attached to March 29, 2018 Denial of Request for Reconsideration, pp. 5-6.

[8] *The Wolfpack Runs with Kinduct to Improve Team's Performance*, NC STATE UNIV., http://gopack.com/news/2017/9/13/general-the-wolfpack-runs-with-kinduct-to-improve-teams-performance.aspx attached to March 29, 2018 Denial of Request for Reconsideration, pp. 10-11.

medical safety of athletes. Applicant's website touting the features and advantages of its products supports this finding:[9]

> The new Athlete Intelligence platform exposes the invisible data that surrounds every athlete, giving coaches and athletic trainers the ability to translate what happens on the field into a competitive advantage where and when it matters….
>
> The Athlete Intelligence platform goes beyond cryptic data points and isolated measurements. It empowers coaches and athletic trainers to access useful insights that create coachable opportunities, and in turn maximize long term player potential. …
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> The core functionality of the Athlete Intelligence platform pairs with our state of the art Vector™ MouthGuard Cue™ Sport Sensor and ShockBox® Helmet Sensor to deliver a comprehensive solution for more than just hit detection and athlete safety. It helps coaches and athletic trainers build strategies around the tactics that win games. …
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> … Athlete Intelligence is revolutionary in its ability to gather and disseminate highly-accurate intracranial impact data, providing real-time information and actionable insights that coaches and athletes can use.
>
> … Athlete Intelligence doesn't just dump data on coaches. We make it usable. We give you the ability to detect when a player's taken a hit just a little too hard. With our powerful flexible impact system, we can help identify potential safety issues whenever they're on the field.

These excerpts make clear that the purpose of Applicant's wearable monitoring device and systems is to collect information for individual athletes in order to maximize athletic performance (Class 9) and to monitor potential medical issues incurred upon physical impacts (Class 10).

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[9] Excerpts from https://athleteintelligence.com attached to September 15, 2017 Office Action, pp. 6-10.

Applicant counters that its proposed mark ATHLETE INTELLIGENCE is suggestive in relation to the identified goods because the juxtaposition of the two words requires the consumer to engage in multistep reasoning.[10] Applicant proffers various other meanings of its mark such as,

> the mental capacity or ability of a person engaged in athletic activity; measuring, analyzing, or improving the mental capacity or ability of an athlete or their aptitude for a given sport; a product or service related to psychological evaluation and analysis of athletes; a product or service to help improve a person's understanding of how to play a given sport; a product or service for scouting an opposing team, other athletes, or prospects for professional or collegiate sports.[11]

Given that the goods are comprised of wearable electronic sensors designed to collect biometric data, we are skeptical that prospective consumers would attribute any of these meanings to Applicant's mark. "That a term may have other meanings in different contexts is not controlling." *In re Franklin Cnty. Historical Soc'y*, 104 USPQ2d 1085, 1087 (TTAB 2012) (citing *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979)). Again, the question of whether a proposed mark is merely descriptive is not determined by asking whether one can guess, from the mark itself, what the goods are, but rather by asking, when the mark is seen on or in connection with the

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[10] In this regard, Applicant relies on three non-precedential decisions: *In re Driven Innovations*, 674 Fed. Appx. 996 (Fed. Cir. Jan. 4, 2017); *In re Armadahealth, LLC*, Ser. Nos. 86713902 and 86802355 (TTAB June 28, 2017); and *In re Caleb Suresh Motuapalli,* Ser. No. 86573858 (TTAB Oct. 2, 2017). Although parties may cite to non-precedential decisions, they are not binding on the Board. *In re Luxuria s.r.o.,* 100 USPQ2d 1146, 1151 n.7 (TTAB 2011). *See also Corporacion Habanos SA v. Rodriquez*, 99 USPQ2d 1873, 1875 n.5 (TTAB 2011) (although parties may cite to non-precedential cases, the Board does not encourage the practice).

[11] Applicant's Brief, p. 11, 7 TTABVUE 12.

goods, whether it immediately conveys information about their nature. *In re MBNA America Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003); *In re Tower Tech,* 64 USPQ2d at 1316-17; *In re Patent & Trademark Serv. Inc.,* 49 USPQ2d 1537, 1539 (TTAB 1998). No imagination or thought is required by prospective consumers to discern the nature of Applicant's goods. To the contrary, to purchasers encountering Applicant's Class 9 and 10 goods, Applicant's proposed mark immediately conveys, without conjecture or speculation, an attribute of Applicant's goods.

Applicant, relying on articles discussing degenerative brain disease suffered by athletes who have sustained multiple concussions,[12] also argues that consumers are likely to perceive its mark as a double entendre. As Applicant asserts:

> Given today's sports culture where athlete concussions are at the forefront of news and conversations (especially in contact sports), the phrase ATHLETE INTELLIGENCE could readily be perceived as a reference to or "play" on the idea of preserving the intelligence of an athlete engaged in contact sports. … For example, when a football player suffers a hard hit, Applicant's goods measure and transmit data about the time, place, and significance of that hit and enable "real-time assessments of a player's ability to remain on the field after a collision or hit."[13]

In evaluating whether a mark is a double entendre and therefore not merely descriptive, we note the Board's guidance in *In re The Place Inc*., 76 USPQ2d 1467, 1470 (TTAB 2005):

> "Double entendre" is defined as "ambiguity of meaning arising from language that lends itself to more than one

[12] *See* March 15, 2018 Request for Reconsideration, Ex. B.

[13] Applicant's Brief, p. 14, 7 TTABVUE 15.

> interpretation." *Webster's Third New International Dictionary* (1993) at p. 678. As stated in TMEP § 1213.05(c), "A 'double entendre' is a word or expression capable of more than one interpretation. For trademark purposes, a 'double entendre' is an expression that has a double connotation or significance as applied to the goods or services. … The multiple interpretations that make an expression a 'double entendre' must be associations that the public would make fairly readily."
>
> A mark thus is deemed to be a double entendre only if both meanings are readily apparent *from the mark itself*. If the alleged second meaning of the mark is apparent to purchasers only after they view the mark in the context of the applicant's trade dress, advertising materials or other matter separate from the mark itself, then the mark is not a double entendre. *See In re Wells Fargo & Company*, 231 USPQ 95 (TTAB 1986).
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> …
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> A mark is not a double entendre if the second meaning is grasped by purchasers only when the mark is used with "other indicia," even if that other indicia is itself not merely descriptive.

(Emphasis in original). The record does not support a finding that this alternative meaning of a "play" on an athlete's intelligence is well-known or readily apparent such that this alternative meaning might be called to mind. *Compare In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382, 385 (CCPA 1968) (SUGAR & SPICE not merely descriptive for bakery products; "[t]he immediate impression evoked by the mark may well be to stimulate an association of "sugar and spice" with [the nursery rhyme] "everything nice") *with In re The Place, Inc.*, 76 USPQ2d at 1470 (holding THE GREATEST BAR laudatory and merely descriptive of restaurant and bar services; "[i]f the alleged second meaning of the mark is apparent to purchasers only after they view the mark in the context of the applicant's trade dress, advertising

materials or other matter separate from the mark itself, then the mark is not a double entendre”). Thus, when considered as a whole, the mark does not have a separate non-descriptive meaning.[14]

In sum, upon consideration of the entirety of the record and arguments, including those not specifically discussed in our opinion, we find Applicant’s proposed standard character mark ATHLETE INTELLIGENCE to be merely descriptive of the identified goods in both International Classes 9 and 10 and therefore ineligible for registration on the Principal Register in the absence of a showing of acquired distinctiveness.

Decision: The refusal to register is affirmed.

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[14] We note that Applicant and the Examining Attorney submitted dueling sets of third-party registrations for marks comprised of the word “intelligence” to support their respective position. *See* September 6, 2017 Response to Office Action and September 15, 2017 Final Office Action. While some of Applicant’s third-party registrations showing a disclaimer of INTELLIGENCE are for computer software and computer services, none of the registrations are for goods identical or even similar to the goods at issue here. Also, to be clear, for the same reason, we have not relied on any of the third-party registrations submitted by the Examining Attorney in finding Applicant’s mark merely descriptive.