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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Aurel A. Astilean

Serial No. 76662718

Myron Amer of Myron Amer, P.C. for Aurel A. Astilean.

Katherine Connolly, Trademark Examining Attorney, Law
Office 101 (Ronald R. Sussman, Managing Attorney).

Before Bucher, Grendel and Drost, Administrative Trademark
Judges.

Opinion by Grendel, Administrative Trademark Judge:

On July 7, 2006, applicant filed an application to
register the mark **FITNESS SCORE** (in standard character
form) for Class 41 services identified in the application
as "exercise instruction and fitness training."¹

¹ Serial No. 76662718. The application is based on use in
commerce under Trademark Act Section 1(a), 15 U.S.C. §1051(a).

At issue in this appeal are (1) the Trademark Examining Attorney's final rejection of applicant's proposed amendment to the identification of services; (2) the Trademark Examining Attorney's final refusal of registration based on applicant's failure to submit a specimen which demonstrates use of the mark in connection with the recited services; and (3) the Trademark Examining Attorney's final refusal of registration based on applicant's failure to submit a specimen of use upon which the mark depicted is a substantially exact representation of the mark as it appears on the application drawing page.

The appeal is fully briefed. We affirm the refusals to register.

Applicant's proposed amendment to the identification of services is impermissible.

In the application as originally filed, the identification of services was "exercise instruction and fitness training," in Class 41. Applicant seeks to amend the identification from these Class 41 services to Class 16 goods identified as "an exercise reference chart used by an individual during an exercising routine."

Trademark Rule 2.71(a) provides that "[t]he applicant may amend the application to clarify or limit, but not to

broaden, the identification of goods and/or services." We agree with the Trademark Examining Attorney that applicant's proposed amended identification does not merely clarify or limit the original identification of services, but rather impermissibly broadens it. That is, the goods identified in the proposed amended identification are beyond the scope of the services as originally identified in the application.

Applicant is correct in noting that there is no per se rule forbidding amendment of an identification from goods to services or vice versa. However, TMEP §1402.07(b) clearly provides:

The applicant should only be permitted to amend from goods to services, or vice versa, when the existing identification of goods and services fails to specify a definite type of goods or services and when the existing identification provides reasonable notice to third parties that the applicant may be providing either goods or services within the scope of the existing identification.

In this case, the Trademark Examining Attorney is not seeking to apply any per se rule that goods cannot be amended to services, or vice versa. Instead, she correctly contends that the exception to the rule as set forth in TMEP §1402.07(b) is not applicable in this case. Applicant's original identification of services is not ambiguous as to whether it identifies goods versus

services. The original identification clearly and definitely sets forth Class 41 services; it cannot be read as potentially or ambiguously identifying Class 16 goods as well. Therefore, applicant may not amend the identification from Class 41 services to Class 16 goods.

For these reasons, we find that the Trademark Examining Attorney's rejection of the proposed amendment to the identification of services is proper, because the proposed amendment impermissibly broadens the scope of the original identification of services. Trademark Rule 2.71(a). The original identification of services, i.e., "exercise instruction and fitness training," is the operative identification of services in this case.²

Applicant's specimens do not demonstrate use of the mark in association with the identified services.

An applicant for registration must submit a specimen showing the mark as used in commerce. Trademark Act Section 1(a), 15 U.S.C. §1051(a); Trademark Rule 2.34(a)(1)(iv), 37 C.F.R. §2.34(a)(1)(iv). A service mark specimen "must show the mark as actually used in the sale

² The proposed amendment of the identification of goods was entered into the into the application record. In view of our decision rejecting the proposed amendment, the application record shall be changed back to reflect the original identification of services as the operative identification.

or advertising of the services." Trademark Rule 2.56(b)(2), 37 C.F.R. §2.56(b)(2). A service mark specimen must show an association between the mark and the services for which registration is sought. *In re Adair*, 45 USPQ2d 1211 (TTAB 1997); TMEP §1301.04(b).

Applicant's original specimen is a chart, aptly described in applicant's proposed (and rejected) identification of goods as "an exercise reference chart used by an individual during an exercising routine." At the top of the chart is the heading "VIRTUAL COACH MATRIX" and the subheading "FITNESS SCORE INDEX." Nowhere on this specimen is there any reference to the services recited in the application, i.e., "exercise instruction and fitness training." The specimen displays the three words FITNESS SCORE INDEX only as a subheading on the exercise chart. It does not demonstrate use of this term in association with the recited services. Therefore, the specimen is unacceptable as a service mark specimen.

Applicant's substitute specimen consists of merely a sheet of paper upon which the words FITNESS SCORE INDEX are stamped. Again, there is no reference at all to the recited services, and no association between the alleged mark and the recited services. The substitute specimen is not an acceptable specimen of service mark use.

Because neither of the specimens submitted by applicant is an acceptable service mark specimen, the Trademark Examining Attorney's final refusal of registration on the ground that applicant has failed to submit an acceptable specimen is proper.

The mark appearing on the drawing is not a substantially exact representation of the mark appearing on the specimens.

In a service mark application under §1(a) of the Act, the drawing of the mark must be a substantially exact representation of the mark as used in the sale or advertising of the services, as depicted on the specimen. Trademark Rule 2.51(b)(1), 37 C.F.R. §2.51(b)(1); TMEP §807.12(a). In this case, the mark appearing on the application drawing is FITNESS SCORE. On both applicant's original specimen and the substitute specimen, the mark is depicted as FITNESS SCORE INDEX. We find that the word INDEX is a material part of the designation FITNESS SCORE INDEX; together, the words make up a phrase consisting of the noun INDEX directly modified by the adjectival phrase FITNESS SCORE. The absence of the noun INDEX from the mark depicted on the drawing page materially alters the mark. Therefore, the designation FITNESS SCORE INDEX appearing on the specimens is not a substantially exact representation

of the asserted mark appearing on the drawing, FITNESS SCORE. The Trademark Examining Attorney's refusal on this basis is proper.

In summary, we find that the Trademark Examining Attorney's rejection of applicant's proposed amendment to the identification of services on the ground that the amendment impermissibly broadens the scope of the original identification of services is proper. The original identification of services remains operative. We also find that neither of applicant's specimens shows use of the mark sought to be registered in association with the recited services. The Trademark Examining Attorney's refusal of registration on this basis is affirmed. Finally, we find that the mark as depicted on applicant's specimens is not a substantially exact representation of the mark as it appears on the drawing page. The Trademark Examining Attorney's refusal of registration on this basis is affirmed.

Decision: The refusals to register are affirmed.