

**THIS OPINION IS NOT A  
PRECEDENT OF  
THE TTAB**

Mailed: February 11, 2008  
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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Mack and Astilean

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Serial No. 78652191

Myron Amer of Myron Amer PC for Tami Mack and Aurel A. Astilean.

David A. Hoffman, Trademark Examining Attorney, Law Office 107 (J. Leslie Bishop, Managing Attorney).

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Before Hairston, Walsh and Taylor, Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Tami Mack and Aurel A. Astilean, joint applicants, have filed an application to register the mark IT'S NOT YOUR BODY, IT'S YOUR FITNESS ROUTINE (in standard character form) on the Principal Register for services ultimately identified as "providing classes, seminars and workshops in the field of physical fitness."<sup>1</sup> The application was filed on June 16, 2005, based upon applicants' bona fide

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<sup>1</sup> Serial No. 78652191.

intention to use the mark in commerce. The application was published on March 7, 2006 and a notice of allowance issued on May 30, 2006. Applicants filed their statement of use, accompanied by a specimen of use, on November 30, 2006.<sup>2</sup>

Registration of applicant's mark has been refused under Trademark Act Section 45 on the ground that the specimen of record does not show use of the mark in connection with applicants' services. After the refusal was made final, applicants appealed. Both applicants and the examining attorney filed appeal briefs. For the reasons discussed below, we affirm the refusal to register.

Applicants' specimen of record, which is affixed to treadmills in applicants' fitness centers<sup>3</sup>, is reproduced below:



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<sup>2</sup> Applicants claimed as their date of first use and date of first use in commerce May 15, 1996.

<sup>3</sup> Applicants' March 23, 2007 response, Evidentiary Declaration.

The examining attorney maintains that applicant's mark IT'S NOT YOUR BODY, IT'S YOUR FITNESS ROUTINE is not being used to identify the source of any classes, seminars or workshops in the field of physical fitness because there is no wording on the specimen that would indicate that these services are being offered under the mark. The examining attorney also maintains that the manner of use of the mark on the specimen is such that consumers would not recognize the mark as it appears on the specimen as indicating the source of applicants' services.

Particularly, the examining attorney argues:

... with no reference to the nature of the services anywhere on the specimen, consumers would likely believe that the proposed mark had a connection to the manufacturer of treadmills, since they are placed on the front of these machines in applicants' fitness centers.

Examining attorney's brief at 2.

To be an acceptable specimen of use of the mark in the sale or advertising of the identified services, there must be a direct association between the mark sought to be registered and the services identified in the application, and there must be sufficient reference to the services to create this association. In re Monograms America Inc., 51 USPQ2d 1317 (TTAB 1999). That is, the mark must be used in such a manner that it readily would be perceived as

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identifying the source of such services. In re Advertising & Marketing Development, Inc., 821 F.2d 614, 2 USPQ2d 2010 (Fed. Cir. 1987); In re Adair, 45 USPQ2d 1211 (TTAB 1997). A specimen that shows only the mark, with no reference to the services, does not show service mark usage. See In re Adair, *supra* (tags affixed to decorated Christmas trees that bear the mark TREE ARTS CO. and design and the applicant's location, but make no reference to the services, fail to show use for "design services in the nature of designing handcrafted, permanently decorated Christmas and designer trees"); and In re Johnson Controls, Inc., 33 USPQ2d 1318 (TTAB 1994) (labels affixed to packaging of valves do not show use of mark for custom manufacturing of valves).

The specimen submitted by applicants was submitted without context. Further, the only wording in addition to applicants' mark appearing on the specimen is "RUN TIME/REST TIME MINUTES" and "Stop Jogging! Start Running!." As pointed out by the examining attorney, there is no reference whatsoever to applicants' physical fitness classes, seminars or workshops, and none of this language creates a direct association with applicant's mark such that consumers of applicant's services, when viewing the specimen on the front of the treadmill, would relate the

mark to applicants' services. Put simply, the additional wording does not advertise applicants' classes, seminars and workshops in the physical fitness field. Instead, the wording is likely to be perceived as instructive and/or motivational when using the treadmills. We thus find that applicants' mark as used on the specimen is not source identifying.

The declaration of joint-applicant, Aurel A. Astilean<sup>4</sup> does not compel a different result. This declaration is similar in nature to a declaration that would be submitted

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<sup>4</sup> Mr. Astilean, in his declaration, states in pertinent part:

3. I have filed patent applications for "Self-Propelled Treadmill Leg Exerciser" assigned Serial No. 60/678,700 and "Bungee Cord Exercising Device" assigned Serial No. 60/749,300;

4. the specimen which displays the slogan which is my mark, namely IT'S NOT YOUR BODY, IT (sic) YOUR FITNESS MACHINE, is located on the front of a treadmill used for exercising indoors, usually in a fitness gym, in this case, a fitness gym that I own and operate in East Hampton, New York;

5. based on my reputation of involvement in physical fitness through exercising and my previous participation in sports, it has been my experience that when my clients see the words of the slogan on the treadmill in my fitness gym, they associate it with my business activity and not as mere advertising of the manufacturer of the treadmill[.]

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in support of a claim of acquired distinctiveness. It does not establish that purchasers and users of applicant's identified services would recognize IT'S NOT YOUR BODY, IT'S YOUR FITNESS ROUTINE, as it appears on the specimen of record, as a mark identifying classes, seminars or workshops in the field of physical fitness.

**Decision:** The refusal to register is affirmed.