

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: August 27, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Titus Sports Academy, LLC
—

Serial No. 88494655
—

Gail Podolsky of Carlton Fields, PA,
for Titus Sports Academy, LLC.

Adetayo J. Adeyiga, Trademark Examining Attorney, Law Office 114,
Laurie Kaufman, Managing Attorney.

—
Before Zervas, Taylor and Lykos,
Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Titus Sports Academy, LLC (“Applicant”) seeks registration on the Principal Register of the composite mark SPRY SENIOR FITNESS and design (shown below)



for, as last amended:

Providing information regarding physical fitness and physical fitness consultation directed towards older adults to help them make physical fitness, strength, conditioning, and exercise improvement in their daily living; consulting

services in the fields of physical fitness; counseling services in the fields of physical fitness, exercise, and injury prevention, namely, educational programs for improving quality of life through exercise physiology, nutrition, and pre-habilitation, and human performance, namely, educational programs to promote enhanced states of physical well-being and prevent physical deterioration; human performance assessment services, namely, assessment of physical fitness, strength, conditioning, and injury prevention; all of which do not include fitness training services in the field of yoga, in International Class 41; and

Human performance assessment services, namely, assessment of exercise physiology and physical fitness for medical purposes, in International Class 44.¹

At the request of the Examining Attorney, Applicant disclaimed the wording “SENIOR FITNESS.” The application also includes the following description: “The mark consists of an animated individual standing on top of two crescent moons with the word ‘spry’ immediately to the right and ‘senior fitness’ below the ‘ry’ in ‘spry.’” Color is not claimed as a feature of the mark.

The Trademark Examining Attorney finally refused registration of Applicant’s mark for both classes of services on the ground that Applicant’s mark so resembles the standard character marks SPRY² and SPRY YOGA³ (Yoga disclaimed), both for “Providing fitness training services in the field of [y]oga,” in International Class 41,

¹ Application Serial No. 88494655 was filed on June 29, 2019, based upon Applicant’s claim of first use of the mark anywhere and in commerce in connection with the Class 41 services since at least as early as April 21, 2009 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), and on Applicant’s claim of a bona fide intention to use the mark in commerce in connection with the Class 44 services under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

² Registration No. 5816589 was issued on June 30, 2019.

³ Registration No. 5520151 was issued on July 17, 2018.

as to be likely to cause confusion, mistake, or to deceive under Trademark Action Section 2(d), 15 U.S.C. § 1052(d). The Examining Attorney also issued a requirement for an identification of services in both Classes 41 and 44, which, in part, is not indefinite, overly broad, and does not exceed the scope of the original or last acceptable identification. *See* Trademark Rules 2.32(a)(6), 2.71(a), 37 C.F.R. §§2.32(a)(6), 2.71(a). *See also* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) §§805, 1402.06 *et seq.*, 1402.07 (July 2021).

When the refusals were made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusals to register.⁴

I. Evidentiary Issue

Before proceeding to the merits of the refusals, we address an evidentiary matter. The Examining Attorney has objected to new evidence attached to Applicant's appeal brief that she asserts is "substantially duplicative" of evidence previously submitted. She argues that "[b]ecause applicant's potentially new evidence was untimely submitted during an appeal ... the Board [should] disregard it."⁵ Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), provides that "[t]he record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will

⁴ Page references herein to the application record refer to the online database of the USPTO's Trademark Status & Document Retrieval ("TSDR") system. All citations to documents contained in the TSDR database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. References to the briefs on appeal refer to the Board's TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable.

⁵ 11 TTABVUE 5.

ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed.” Therefore, Applicant’s objection is sustained to the extent that the evidence attached to Applicant’s appeal brief that was not previously submitted and hence not timely, will be given no further consideration.⁶ See *In re Michalko*, 110 USPQ2d 1949, 1950 (TTAB 2014) (rejecting untimely evidence attached to a brief and noting that parties should avoid the practice because even if such evidence already is in the record, attaching it to the brief increases the burden on the Board to review and attempt to locate the same evidence in the prosecution record).

II. Identification Requirement

We first address the Examining Attorney’s requirement respecting Applicant’s identification of services, because the likelihood of confusion analysis requires consideration of the identified services. A review of the prosecution history on this issue is helpful.

A. Background

Applicant’s original recitation of services reads as follows:

Providing information regarding physical fitness and physical fitness consultation directed towards older adults to help them make physical fitness, strength, conditioning, and exercise improvement in their daily living; consulting services in the fields of fitness, exercise, injury prevention,

⁶ While the Board ordinarily will take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions, see *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016), the definition of the word “spry” attached to Applicant’s brief was previously submitted as Exhibit B to Applicant’s March 30, 2020 Response at TSDR 31. As such, it is duplicative of evidence already of record and need not be made of record twice.

and human performance; counseling services in the fields of fitness, exercise, injury prevention, and human performance; human performance assessment services, in International Class 41.

This identification was deemed indefinite, and the Examining Attorney advised Applicant that it could clarify or limit the identification by inserting clarifying language or deleting items to result in a more definite identification, but could not expand the identification beyond the services originally itemized in the application or as acceptably amended.⁷ Applicant's March 20, 2020 Response proposed the following amendment:

Providing information regarding physical fitness and physical fitness consultation directed towards older adults to help them make physical fitness, strength, conditioning, and exercise improvement in their daily living; consulting services in the fields of physical fitness, disease prevention, habilitation, exercise physiology, nutrition, physical energy preservation, and well-being; fitness exercise, injury prevention, namely, pre-habilitation; and human performance, namely strength and vitality preservation; counseling services in the fields of fitness, exercise, injury prevention, namely, programs for improving quality of life through exercise physiology, nutrition, and pre-habilitation, and human performance, namely, programs to promote enhanced state of physical well-being and prevent physical deterioration; human performance assessment services, namely assessment of physiology and physical fitness, in International Class 41.

The Examining Attorney did not accept the proffered amendment in total, arguing that some of the services remain indefinite and that portions (as specified below) of

⁷ September 20, 2019 Office Action, TSDR 4.

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