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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Jeff L. Kaplan

Serial No. 74/671,277

Jeff L. Kaplan for applicant.

Ronald R. Sussman, Senior Trademark Attorney, Law Office 108, (David Shallant, Managing Attorney).

Before Hohein, Walters and Wendel, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

An application has been filed by Jeff L. Kaplan to register the designation "BALLISTIC NYLON" as a trademark for goods originally identified as "luggage, bags and related items".[1]

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that the designation "BALLISTIC NYLON," when applied to applicant's goods, so resembles the mark "BALLISTIC LITE," which is

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[1] Ser. No. 74/671,277, filed on May 8, 1995, which alleges dates of first use of March 3, 1991. The term "NYLON" is disclaimed.

registered for "luggage,"[2] as to be likely to cause confusion, mistake or deception. Registration also has been finally refused under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §2(e)(1), on the basis that, when used in connection with applicant's goods, the designation "BALLISTIC NYLON" is at least a merely descriptive, if not a generic, term for such goods.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusals to register.

As a preliminary matter, however, there is an issue as to what goods are properly the subject of the application. In the first Office Action, applicant was advised with respect to the original identification of his goods that "[t]he phrase 'bags and related items' in the identification of goods clause is unacceptable as indefinite" and that applicant "must amend the identification to replace this phrase with the generic names of the goods on which the mark is used, e.g. tote bags, garment bags for travel." Applicant, in response, requested amendment of the identification of his goods to "tote bags, garment bags and luggage".

The Examining Attorney,[3] in view of applicant's failure to specify the type(s) of garment bags, indicated in the second

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[2] Reg. No. 1,784,138, issued on July 27, 1993, which sets forth dates of first use of March 31, 1992. The term "LITE" is disclaimed.

[3] Although the Trademark Examining Attorney initially in charge of this case subsequently left the Patent and Trademark Office and the case, commencing with the issuance of the Office Action which finally refused registration, has since been handled by the Senior Trademark

Office Action that "the term ’garment bags’ is unacceptable as indefinite" since such goods "are properly classified in Class 18 if they are ’garment bags for travel’ and in Class 22 if they are ’garment bags for storage.’" As a consequence thereof, the Examining Attorney suggested, inter alia, that (**emphasis added**):

> If any acceptable substitute specimens that applicant may submit in response to this Office Action evidence that the mark is used to identify **finished goods**, applicant may amend the identification to adopt either or both of the following:
>
> tote bags, garment bag for travel and luggage (Class 18); [and/or]
>
> garment bags for storage (Class 22).

However, besides noting that adoption of both of the suggested identifications of goods would require compliance with the requirements for a combined application, the Examining Attorney also pointed out that (**emphasis added**):

> Applicant is advised that its recently submitted unacceptable substitute specimens evidence that the mark identifies the **fabric of finished goods** rather than the **finished goods**. Applicant is advised that its specimens must conform with the identification of goods clause. Therefore, depending upon the nature of any acceptable substitute specimens that applicant may submit in response to this Office Action, it may be necessary that applicant amend the identification of goods clause to indicate that the mark identifies a **textile fabric** from which applicant’s **finished goods** are made. ....

We note, however, that amending applicant’s goods so as to identify them as a textile fabric from which certain finished

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Attorney noted above, the term "Examining Attorney" will be used for ease of reference to each.

goods are made would appear to be impermissible in this case inasmuch as a textile fabric is clearly beyond the scope of both the "luggage, bags and related items" set forth in the original identification and such finished products as the "tote bags, garment bags and luggage" listed in the first amended identification.

Trademark Rule 2.71(b) provides in this regard that "[t]he identification of goods ... may be amended to clarify or limit the identification, but additions will not be permitted." Such rule, moreover, has been strictly interpreted. See, e.g., In re M. V Et Associes, 21 USPQ2d 1629, 1630 (Comm'r Pats. 1991) and In re Swen Sonic Corp., 21 USPQ2d 1794, 1795 (Comm'r Pats. 1991). Nevertheless, contrary thereto, the Examining Attorney offered the further suggestion that (**emphasis added**):

> If any acceptable substitute specimens that applicant may submit in response to this Office Action evidence that the mark is used to identify the **textile fabric** from which applicant's **finished goods** are made, applicant may amend the identification to adopt either or both of the following:
>
> textile fabric sold as a component part of tote bags, garment bag for travel and luggage (Class 18); [and/or]
>
> textile fabric sold as a component part of garment bags for storage (Class 22).

Applicant, in attempting to follow the Examining Attorney's guidance, requested the following further amendment in reply (**emphasis added**):

> Please amend the identification to: **textile fabrics** sold as a component part of tote bags, garment bags for travel and luggage. Please amend the identification of

> **finished goods** to: tote bags, garment bags for travel and luggage.

Although the Examining Attorney advised applicant in the third Office Action that, among other things, "[a]pplicant's [further] amendment to the identification of goods clause and substitute specimens are acceptable," a review of the file shows that, for reason(s) unknown and without informing applicant, the Patent and Trademark Office actually amended applicant's goods to read: "textile fabric sold as a component part of tote bags, garment bags for travel and luggage". As noted above, such an identification is impermissible and it is clear that, while applicant desires to obtain a registration covering tote bags, garment bags for travel, luggage, and the textile fabric which is sold as a component part of the former items, the latter product is beyond the scope of applicant's goods as originally identified and as thereafter twice amended. Applicant's goods consequently must be regarded for purposes of this appeal as being limited to tote bags, garment bags for travel and luggage. We hasten to point out, however, that irrespective of whether applicant's goods were instead to be treated as limited to or including textile fabric sold as a component part of tote bags, garment bags for travel and luggage, our decision with respect to the grounds for refusal would still be that the designation "BALLISTIC NYLON" is not registrable in light of both Sections 2(d) and 2(e)(1) of the statute.

Turning now to consideration of the refusal under Section 2(d), applicant asserts that "[c]onsumers of luggage are

'specialized and very discriminating'" since "[t]he average cost of a piece of quality luggage which Appellant sells is well over $200.00." Applicant argues, in essence, that in view thereof, confusion is not likely from contemporaneous use of his "BALLISTIC NYLON" mark for tote bags, garment bags for travel and luggage and registrant's use of its "BALLISTIC LITE" mark for luggage because (underlining in original):

> The Appellant[']s mark, "BALLISTIC NYLON[,]" is a unitary term and it is the unit which creates the commercial impression upon the customer. The Appellant agrees that the only difference between the cited registration, "BALLISTIC LITE[,]" and the Appellant[']s mark are the words LITE and NYLON, BUT it is these two words that create the source indicator.
>
> The cited registrant sells a product which uses the term Ballistic Lite. This simply informs the customer that their product is very light-weight. It takes a very careful inspection of the product to determine what it is made of. It could be manufactured from: wool, rayon, leather, polyester, plastic, vinyl, aluminum, cellulose, ripstock, scotch-guard or polyurethane.
>
> Appellant[']s mark is a source indicator. It tells the smart and informative customer that the product is manufactured from nylon. The added term, Ballistic, indicates a high-tech, strong, and durable piece of luggage. This mark, Ballistic Nylon, coined and originated in 1991 differentiates us from our competitors.

Accordingly, applicant urges that because "[t]he Examining Attorney has not considered the marks in their entireties in determining whether there is a likelihood of confusion," the Section 2(d) refusal must be reversed. Nevertheless, applicant additionally maintains, in light of the

information which he has furnished concerning a variety of third-party registrations for marks consisting of or containing the word "BALLISTIC,"[4] that:

> The word Ballistic by itself is very descriptive and is a common word .... The common word should be excluded from the comparison of the similarity between the two marks. In doing so, ... the remaining portion of the two marks will determine the difference between the marks. ....

We agree with the Examining Attorney, however, that confusion is likely. While the respective marks must be compared in their entireties, it is nevertheless the case that, in articulating reasons for reaching a conclusion on the issue of

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[4] The information regarding such registrations, we note, was originally mentioned in a list which was set forth in applicant's response to the second Office Action and was reiterated in applicant's main brief. The Examining Attorney, in his brief, has objected to such information, contending that "the registrations were not properly made of record and should not be considered." As a general proposition, it is pointed out that a mere listing of information concerning third-party registrations is insufficient to make the registrations of record inasmuch as the Board does not take judicial notice of registrations which reside in the Patent and Trademark Office. See, e.g., In re Duofold Inc., 184 USPQ 638, 640 (TTAB 1974). The proper procedure for making of record information relating to third-party registrations is, instead, to submit either a copy of the actual registrations or the electronic equivalent thereof, i.e., a printout of each of the registrations which has been taken from the Patent and Trademark Office's own computerized database. See, e.g., In re Consolidated Cigar Corp., 35 USPQ2d 1290, 1292 (TTAB 1995) at n. 3; In re Smith & Mehaffey, 31 USPQ2d 1531, 1532 (TTAB 1994) at n. 3; and In re Melville Corp., 18 USPQ2d 1386, 1388-89 (TTAB 1991) at n. 2. Nevertheless, inasmuch as no objection to the information furnished by applicant was raised until the Examining Attorney filed his appeal brief, the objection is considered to have been waived and we have treated such information as being of record. However, because none of the third-party registrations (which cover separate registrations of the mark "BALLISTIC" for "golf clubs," "sportswear," "video games" and "sunglasses" and registrations of the marks "BALLISTIC BLAST" for "fireworks" and "BALLISTIC TIPS" for "bullets") is for the goods which are the same as or closely related to those at issue in this case, the third-party registrations are of no probative value with respect to the question of likelihood of confusion other than to show that the cited registrant's "BALLISTIC LITE" mark is entitled to a broad scope of protection since it is the only "BALLISTIC"-formative mark which is

likelihood of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entireties." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, "that a particular feature is descriptive or generic with respect to the involved goods ... is one commonly accepted rationale for giving less weight to a portion of a mark ...." 224 USPQ at 751.

Here, as applicant concedes, the disclaimed term "LITE" in registrant's "BALLISTIC LITE" is descriptive of luggage which is light-weight, while the disclaimed word "NYLON" in applicant's "BALLISTIC NYLON" mark, as applicant also admits and the evidence of record confirms,[5] is a generic term for the strong and durable fabric from which tote bags, garment bags for travel and luggage may be made and thus is descriptive of such goods. We concur,

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registered in the field of luggage, tote bags and garment bags for travel.

[5] In addition, we judicially notice that The Random House Dictionary of the English Language (2d ed. 1987) at 1333 defines "nylon" as "any of a class of thermoplastic polyamides capable of extrusion when molten into fibers, sheets, etc., of extreme toughness, strength, and elasticity, synthesized by the interaction of a dicarboxylic acid with a diamine: used esp. for yarn, fabrics, and bristles, as for brushes. .... [1938; coined as a generic by the du Pont Chemical Co. as distinct from known words and having no prior meaning or use ....]" Similarly, The American Heritage Dictionary of the English Language (3d ed. 1992) at 1244 defines "nylon" as "**1.a.** any of a family of high-strength, resilient synthetic polymers, the molecules of which contain the recurring amide group CONH. **b.** Cloth or yarn made from one of these synthetic materials. .... [Coined by its inventors, E.I. Du Pont de Nemours and Co., Inc.]" It is settled that the Board may properly take judicial notice of dictionary definitions. See, e.g., Hancock v. American Steel & Wire Co. of New Jersey, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953) and University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc., 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

therefore, with the Examining Attorney that, in light of the clearly descriptive significance of the words "LITE" and "NYLON," it is the term "BALLISTIC" which principally serves as the dominant element in each of the respective marks when such marks are considered in their entireties. Clearly, as respectively used in connection with luggage and goods which are so closely related thereto as tote bags and garment bags for travel, the marks "BALLISTIC LITE" and "BALLISTIC NYLON" project substantially the same overall commercial impression. Thus, even if purchasers and prospective customers were to notice the differences in the marks, it would still be reasonable for them to believe mistakenly that applicant's "BALLISTIC NYLON" luggage, tote bags and garment bags for travel constitute a more durable or stronger line of products which emanate from or are affiliated with or sponsored by the same source as registrant's light-weight "BALLISTIC LITE" luggage.

Turning next to the refusal under Section 2(e)(1), applicant contends that he "originated and coined the term, 'BALLISTIC NYLON'." In particular, applicant insists that (<u>underlining in original</u>):

> The Examining Attorney has based his decision only on a Lexis/Nexis database and by the introduction of various catalogs and advertisements as shown in the Office Actions. While there have been some uses of Ballistic Nylon in ads and articles, the great majority of those ads and articles are mentioning a product that was <u>coined</u> and <u>originated</u> by the Appellant, and the fact that Appellant originated a new industry. Largely, it appears that the media and various companies have misused or are making a play on Appellant[']s mark. .... Appellant has sent letters to various

> companies informing them of our use of our mark. The Appellant also points out that none of the companies that have received this letter have ever filed for a trademark registration under the Ballistic Nylon mark.

Applicant, however, has submitted only a single, dated sample of his asserted attempts to police his claim of rights in the designation "BALLISTIC NYLON".[6] Moreover, while applicant, in an attempt to counter the Examining Attorney's evidence, has furnished excerpts from several publications to support his argument that "there is no such type of manufactured nylon called Ballistic Nylon," the excerpts are lacking in probative value inasmuch as all but one is undated and the one which is dated fails to provide any pertinent information.[7]

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[6] Such example consists of a June 3, 1992 letter, signed by applicant as "Pres." of "Travel-Wear Inc.," which is addressed to "Samsonite Corporation" and states, in relevant part, that:

> Please be advised that the mark, "BALLISTIC NYLON[,]" is the trademark used by our company to describe our line of luggage and bags.
>
> This mark has been in use since May of 1991 ....
>
> Please advice [sic] your advertising department as well as corporate officers of our claim.

[7] Specifically, while the designation is not listed in what applicant claims are excerpts from such publications as "The Modern Textile Dictionary," "Encyclopedia Americana--Deluxe Library Edition," "FairChild's Dictionary of Textiles" and "Introductory Textile Science," no copyright page or other source of information has been provided to support applicant's contention that the evidence constitutes "a recent glossary of all names used in the textile industry" (underlining in original) or is otherwise reasonably current. The sole excerpt for which a date of publication can be found, namely, pages from the Consumers' Guide to PRODUCT GRADES and TERMS (1993), does not include any page(s) on which a listing of the designation "BALLISTIC NYLON" would be expected to be found and, in any event, contains the following "disclaimer": "While every effort has been made to ensure the reliability of the information presented in this publication, Gale Research Inc. does not guarantee the accuracy of the data contained herein."

Applicant additionally maintains that, while he "agrees that the two word[s], ’BALLISTIC’ and ’NYLON[,]’ by themselves are descriptive," the "composite term, ’BALLISTIC NYLON[,]’ is ... a highly suggestive term." According to applicant, "[s]imply because a mark imparts information about the physical characteristics of the goods does not render it incapable of function[ing] as a trademark" and that any doubt on the issue of mere descriptiveness should be resolved, in accordance with the Board’s practice, in applicant’s favor.

The Examining Attorney, on the other hand, correctly notes that "[a] term which describes a characteristic ... or feature of a product is considered merely descriptive of the product itself." In the present case, the Examining Attorney maintains that "[t]he evidence of record indicates that ’ballistic nylon’ is a common descriptive term for a particular type of fabric which is used in the manufacture of luggage." Inasmuch as the specimens of use furnished by applicant "clearly show that applicant’s goods are made of ballistic nylon," the Examining Attorney concludes that the designation "BALLISTIC NYLON" merely describes a characteristic or feature thereof, namely, the fabric or material from which applicant’s tote bags, garment bags for travel and luggage are made.

Specifically, the Examining Attorney points out that one of the hang tags submitted by applicant touts "BALLISTIC NYLON" as one of the listed features of applicant’s luggage.[8]

[8] Such features also include: "HEAVY DUTY WATERPROOF," "EXPANDIBLE CAPACITY," "LARGE ORGANIZER POCKET," "KEY KEEPER," "LEATHER CARRY

The Examining Attorney also accurately observes that "the same is true for the three-fold tag for the ’Portfolio Collection’ ..., which uses ’BALLISTIC NYLON’ in a generic manner on the first inside page," and "in the same type style and font," as such other generically described features or characteristics as "Top Grain Leather" and "Heavy Nylon Zipper".

Furthermore, while conceding that "applicant cannot control the media’s use of the term ’ballistic nylon,’" the Examining Attorney nevertheless contends that "the media’s use of a term is evidence of the meaning of that term as understood by its readers." The Examining Attorney, in particular, notes that the record contains evidence extracted from the "LEXIS/NEXIS" database, a catalog, and Internet website advertisements which "clearly shows that not only is ’ballistic nylon’ understood in the trade as a generic term for a type of fabric commonly used in the manufacture of luggage, but [it is so] ... understood by consumers of luggage as well since manufacturers tout the fact that their goods are made from ballistic nylon" and "would be unlikely to do this if they believed consumers were unaware of the meaning of the term."

In this regard, the following "LEXIS/NEXIS" excerpts are representative and plainly demonstrate, with but one possible exception in which the term "ballistic" is initially capitalized, that the designation "BALLISTIC NYLON" is used to signify a

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HANDLE," "PADDED SHOULDER STRAP," "LARGE FRONT POCKET," "LARGE REAR POCKET" and "SELF HEALING ZIPPER".

category, class or type of fabric from which luggage, tote bags and travel garment bags are made (**emphasis added**):

> "Then there's DKNY's ankle boot made out of **ballistic nylon (the nylon used in luggage)** for $98." -- San Francisco Examiner, December 14, 1995, Style, at B-3;
>
> "Tumi's new Wheel-A-Way **suitcases** are full-size soft-sided **ballistic nylon luggage** ...." -- Chicago Tribune, October 25, 1995, Travel, at 12;
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> "Size is critical if you want to carry your **garment bag** on the plane. Four-suiters can be as bulky as suitcases. The most durable of the bags are made of **ballistic nylon**, once used as a cover for bulletproof vests. Prices for good garment bags range from $150 to $460." -- Chicago Tribune, December 20, 1992, Travel, at 2);
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> "Free-standing **ballistic nylon** and leather **garment bag** (right) that unzips to a hanging three-suiter with wrinkle-reducing interlinings and organizers, $525." -- N.Y. Times, October 25, 1992, §6, at 52, col. 1;
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> "Today's **luggage** may be made of molded plastics and **ballistic nylon**, while yesteryear's was wood and wool, but the questions remain essentially the same: Is hard luggage preferable to soft? ...." -- Houston Chronicle, September 22, 1991, Travel, at 1 (article headlined: "THE LATEST ON LUGGAGE: AN OPEN AND SHUT CASE");
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> "All of the **bags** are made from 1050 denier **Ballistic nylon**, which is one of the strongest **luggage fabrics** available today." -- ASAP, March 1991, at 78; and
>
> "Another durable **luggage material** recommended for frequent travelers is what the luggage trade calls '**ballistic nylon**.' This long-lasting, tightly woven **fabric** used to make bulletproof vests is a good bet ...." -- The Record, January 14, 1990, Travel, at T13.

The catalog excerpt and Internet advertising made of record similarly show that, for the most part, the designation "BALLISTIC NYLON" is used in a generic manner to indicate the fabric or material from which a variety of luggage items are made. Representative examples are reproduced below (**emphasis added**):

> "OUR EXCLUSIVE TRAVELLER'S EDGE3 **BALLISTIC LUGGAGE** was uniquely designed to meet our own rigid specifications and incorporate all the features that we know travellers demand. The first thing you'll notice is their exterior--attractive, of course, but also exceptionally durable. That's because they're made with a 2500 denier **ballistic nylon** that's similar to the material in bullet-proof vests, unlike other luggage brands that use a lower quality polyester/nylon. ...." -- *United Airlines* High Street Emporium, Spring 1996, at 16;
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> "Through innovative design and unequaled quality, Travelpro remains the number one **luggage** of the professional traveler. PLATINUM SERIES .... Great for business or leisure travel. Features a removable suit compartment. Made of **ballistic nylon** with leather padded handles. ...." -- http://-www.innovationluggage.com/p0000025.htm, as of April 17, 1997 (but last modified on January 2, 1997);
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> "... CorduraR and **Ballistic nylon** have revolutionized the **luggage** industry. In the 12 years or so that this luggage has been in existence, I have seen only a very few pieces of this luggage come into our repair center. Why would you insult many of your readers who have bought **ballistic nylon luggage** for its wear, and not for its ability to withstand an attack? The benefits of **ballistic nylon luggage** have clearly proven over the years." -- http://www.llgma.com/consumer/retail.html, as of April 17, 1997 (© 1997; letter to Luggage & Leather Goods Manufacturers of America, Inc. entitled "RETAILER SPEAKOUT:

> THE MERITS OF PURCHASING QUALITY LUGGAGE"); and
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> "Be sure to visit our **luggage** store: Excess Baggage for information regarding great deals on luggage ... and our complete line of business briefs and brief cases. Find out why these soft sided **ballistic nylon** and leather computer briefs are a great value." .... -- http://www.baggage.com/, as of April 17, 1997 (© 1996).

It is well settled that a designation is considered to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it immediately describes an ingredient, quality, characteristic or feature thereof or if it directly conveys information regarding the nature, function, purpose or use of the goods or services. See In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). It is not necessary that a designation describe all of the properties or functions of the goods or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the designation describes a significant attribute or idea about them. Moreover, whether a designation is merely descriptive is determined not in the abstract but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services and the possible significance that the designation would have to the average purchaser of the goods or services because of the manner of its use. See In re Bright-Crest, Ltd., 204 USPQ 591, 593 (TTAB 1979). Consequently, "[w]hether consumers could guess what the product [or service] is

from consideration of the mark alone is not the test." In re American Greetings Corp., 226 USPQ 365, 366 (TTAB 1985).

It is also well established that, in the case of a generic designation, the burden is on the Patent and Trademark Office to show the genericness of the designation by "clear evidence" thereof. See, e.g., In re Merrill Lynch, Pierce, Fenner & Smith, Inc., supra at 1143. See also In re Gould Paper Corp., 834 F.2d 1017, 5 USPQ2d 1110, 1111 (Fed. Cir. 1987). As to the standard for evaluating genericness, the Board in In re Leatherman Tool Group Inc., 32 USPQ2d 1443, 1449 (TTAB 1994), stated that:

> The test for determining whether a designation is generic, as applied to the goods [or services] set forth in an application or registration, turns upon how the term is perceived by the relevant public. *See* Magic Wand Inc. v. RDB Inc., 940 F.2d 638, 19 USPQ2d 1551, 1552-53 (Fed. Cir. 1991) and cases cited therein at 1553. Such perception is the primary consideration in a determination of genericness. *See* Loglan Institute Inc. v. Logical Language Group Inc., 962 F.2d 1038, 22 USPQ2d 1531, 1532 (Fed. Cir. 1992). As Section 14(3) of the Trademark Act, 15 U.S.C. §1064(3), makes clear, "[a] ... mark shall not be deemed to be the generic name of goods [or services] solely because such mark is also used as a name to identify a unique product [or service]"; instead, "[t]he primary significance of the ... mark to the relevant public rather than purchaser motivation shall be the test for determining whether the ... mark [is or] has become the generic name of the goods [or service] on or in connection with which it has been used." Consequently, if the designation sought to be registered is understood by the relevant public primarily to refer to the class or genus of goods [or services] at issue, the term is generic. *See* H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc., [728 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986)] ....

> Evidence of the relevant public's understanding of a term may be obtained from any competent source, including newspapers, magazines, dictionaries, catalogs and other publications. *See* In re Northland Aluminum Products, Inc., 777 F.2d 1566, 227 USPQ 961, 963 (Fed. Cir. 1985).

Upon careful consideration of the entire record, we agree with the Examining Attorney that the designation "BALLISTIC NYLON" is a generic term for a type of textile fabric or material which is used, inter alia, in the manufacture of luggage, tote bags and garment bags for travel. While we are mindful of applicant's contentions that he coined and originated such term, that he created a new industry and that the media and various companies have misused or otherwise made a play on the name, we find that virtually all of the "LEXIS/NEXIS" excerpts clearly demonstrate that the designation "BALLISTIC NYLON" primarily signifies, to those in the luggage, tote bag and travel garment bag field and to customers for such products, a particular kind of fabric or textile material from which the products are principally made. In fact, it is especially notable that, more than one year prior to applicant's claimed date of first use of such designation for his goods, one of "LEXIS/NEXIS" excerpts generically refers to "BALLISTIC NYLON" as the name utilized by "the luggage trade" for a "durable luggage material". The catalog and Internet advertising excerpts likewise show, for the most part, that the designation "BALLISTIC NYLON" primarily signifies a durable fabric or material from which luggage and other travel bags are fabricated. In addition, applicant's own specimens of use plainly utilize the designation "BALLISTIC

NYLON" in a generic fashion to indicate the kind of material from which applicant’s goods are constructed.

On the whole, therefore, it is clear from the evidentiary record that, to members of the relevant public, including producers of luggage and travel bags as well as ordinary consumers of such products, the designation "BALLISTIC NYLON" generically names the fabric or material used in applicant’s tote bags, garment bags for travel and luggage. As such, the designation "BALLISTIC NYLON" immediately describes, without speculation or conjecture, a significant characteristic or feature of applicant’s goods and appears, in fact, to designate a category or class of luggage and related travel bags which are constructed by a variety of manufacturers from the textile fabric or material commonly known as ballistic nylon.

In reaching this conclusion, we have not ignored or disregarded the claimed attempts by applicant to police its asserted rights. The lone letter submitted by applicant as evidence of such efforts, however, makes no demand that the recipient cease and desist from use of the designation "BALLISTIC NYLON," nor does it otherwise seek to assert control over the nature and quality of the goods marketed under the designation by offering to discuss arrangements for acquiring a license from applicant to use such term. Applicant’s assertions of proprietary rights, as demonstrated by single letter which is over five years old, are simply outweighed by the fact that virtually all of the "LEXIS/NEXIS," catalog and Internet advertising excerpts readily and unambiguously demonstrate

generic rather than proprietary usages of the "BALLISTIC NYLON" designation. This case is thus unlike the situation in *Merrill Lynch*, supra at 1143-44, which presented a mixture of uses which our principal reviewing court found to be so indeterminate as to be insufficient proof of genericness. The record herein, instead, satisfactorily establishes that, to the relevant public, the designation "BALLISTIC NYLON" primarily means or signifies a type or kind of textile fabric or material from which luggage, tote bags and garment travel bags are commonly made and thus, at the very least, the designation conveys forthwith a significant feature or characteristic--if not naming a category or class--of such products.

Furthermore, even if, as applicant insists, he was the first person to utilize the "BALLISTIC NYLON" designation in connection with tote bags, garment bags for travel and luggage, such fact is simply not dispositive where, as here, the evidentiary record clearly shows that the designation unequivocally projects a merely descriptive, if not a generic, connotation. See, e.g., In re MBAssociates, 180 USPQ 338, 339 (TTAB 1973). Finally, the fact that none of the reference works cited by applicant lists "BALLISTIC NYLON" as a textile fabric or fiber is not controlling on the issue of descriptiveness where, as here, the Examining Attorney has shown by competent evidence that such designation has a well understood and recognized meaning as both a type or kind of durable material from which luggage, tote bags and garment bags for travel are constructed and a class or category of products made from such material.

See, e.g., In re Gould Paper Corp., supra at 1112 ["SCREENWIPE" for a "premoistened, antistatic cloth for cleaning computer and television screens" found incapable of being registered]; In re Pharmaceutical Innovations, Inc., 217 USPQ 365, 367 (TTAB 1983) ["ULTRA/PHONIC" for "diagnostic ultra sound conductivity or scanning gel" held merely descriptive]; and In re Orleans Wines, Ltd., 196 USPQ 516, 517 (TTAB 1977) ["BREADSPRED" for "jellies and jams" held merely descriptive].

Decision: The refusals under Sections 2(d) and 2(e)(1) are affirmed.

G. D. Hohein

C. E. Walters

H. R. Wendel
Administrative Trademark Judges,
Trademark Trial and Appeal Board