

THIS OPINION IS NOT A
PRECEDENT OF THE T.T.A.B.

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United States Patent and Trademark Office
Trademark Trial and Appeal Board

In re Apple Inc.

Serial No. 77616247
Serial No. 77844718
Serial No. 77844736

Glenn A. Gundersen of Dechert LLP for Apple Inc.
Michael Webster, Trademark Examining Attorney, Law Office 102 (Karen
Stryz, Managing Attorney).

Before Holtzman, Bergsman and Shaw, Administrative Trademark Judges.¹
Opinion by Bergsman, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register for the
mark OpenCL, in standard character form,² and for the two marks
OpenCL and design, shown below, all for the following goods, as
amended, “application programming interface computer software for
use in developing applications for execution on central processing units

¹ Judge Wolfson sat on the panel at the oral argument but has subsequently recused herself. Judge Shaw has been substituted for Judge Wolfson on this decision. The change in composition of the panel does not necessitate a rehearing of the oral argument. *Hunt Control Systems Inc. v. Koninklijke Philips Electronics N.V.*, 98 USPQ2d 1558, 1560 (TTAB 2011); *see also, In re Bose*, 772 F.2d 866, 227 USPQ 1, 4 (Fed. Cir. 1985).

² Application Serial No. 77616247 was filed on November 17, 2008.

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(CPU) or graphic processor units (GPU), sold as an integral component of computer operating software,” in Class 9

3



OpenCL

4



OpenCL

The Trademark Examining Attorney refused registration on the ground that the term OpenCL is merely descriptive for applicant’s goods pursuant to Section 2(e)(1) of the Trademark Act of 1946, 15 U.S.C. § 1052(e)(1), and that applicant is required to disclaim the exclusive right to use the term OpenCL in the design mark applications. In addition, the Trademark Examining Attorney refused to register applicant’s marks on the ground that the term OpenCL as used on the specimens of record does not identify application programming interface software. The appeals have been consolidated and references to the record are to the application for the standard character mark.

³ Application Serial No. 77844718 was filed on October 8, 2009.

⁴ Application Serial No. 77844736 was filed on October 8, 2009.

Whether OpenCL is merely descriptive?

According to the Trademark Examining Attorney, the term OpenCL is merely descriptive “because OPENCL immediately identifies the common or generic name of an industry standard language and application programming interface”⁵ and, therefore, “it cannot also indicate the source of Applicant’s goods.”⁶ In other words, because OpenCL is the name of a computing language, it is merely descriptive of applications programming interface software that permits software developers to use the language.⁷

Applicant argues that it “has developed a computer language and software that implements that language, and is attempting to register the name that refers to both the language and the software as a trademark *for software* that implements the language. Thus, the question of descriptiveness hinges not on whether OPENCL identifies a programming language, but on whether the evidence shows that OPENCL is regarded as a descriptive term among prospective purchasers of [applicant’s] goods.”⁸ Applicant concludes that “the fact that OPENCL identifies a programming language does not preclude

⁵ Trademark Examining Attorney’s Brief, p. 3 (unnumbered).

⁶ Trademark Examining Attorney’s Brief, p. 7 (unnumbered).

⁷ Whether a programming language comprises “goods in trade” which may be registered is not an issue before us. The Trademark Examining Attorney initially refused registration on the ground that applicant’s marks identify a programming language which does not constitute goods in trade for which a mark may be registered. (December 7, 2009 Office action). Although it was not expressly withdrawn, neither applicant nor the Trademark Examining Attorney argued that the issue on appeal is whether a programming language comprises “goods in trade” which may be the subject of a trademark registration.

⁸ Applicant’s Brief, p. 8.

recognition of OPENCL as a trademark for software that implements that language.”⁹

Applicant provides the following background information:

OPENCL is a technical framework that [applicant] created in order to allow computer programmers to write software for devices with multiple types of processors. In order to popularize this framework, [applicant] began working with the Khronos Group (“Khronos”), an industry consortium of leading technology companies, to develop this framework into an open standard for use in the computing industry. [Applicant] granted Khronos a license to use the mark OPENCL and the OPENCL logo in connection with the ongoing development of the technical specifications for the standard. These specifications are not determined by general consensus or common usage, but solely by Khronos. Members of Khronos are licensed to use the mark OPENCL in connection with implementations of the standard that conform to the specifications, as determined by Khronos. **[Applicant] itself uses OPENCL as a mark for its own implementation of the standard – an application program interface (API) software feature of the Mac OS X operating system that is the subject of these applications.**¹⁰ (Emphasis added).

At the outset, definitions of the relevant terms are helpful for determining whether the mark is merely descriptive.

1. An application programming interface (“API”) is “a set of routines used by an application program to direct the performance of proce-

⁹ Applicant’s Brief, p. 9.

¹⁰ Applicant’s Brief, p. 6.

dures by the computer's operating system.”¹¹ In other words, it is “the interface through which one program can communicate with another. Different database or systems programs may be interchangeable on your computer if they share the same API.”¹² “An API ensures that all applications are consistent with the operating system and have a similar user interface.”¹³

2. A computer language is a “system of words and rules used to program a computer. Most computers work using the binary system language (using 1s and 0s) called machine code. Rather than using a machine code, a language consisting of words and symbols that relate more directly to normal language can be used to instruct a computer. A compiler, assembler or other such program then translates this into machine code. Several kinds of programming language have been designed for different purposes. Fortran is for scientific and mathematical use, COBOL is for business programs, ALGOL is for mathematical applications, and BASIC and Pascal were originally for use by learners. Today, the majority of applications for personal computers

¹¹ **MICROSOFT COMPUTER DICTIONARY**, p. 33 (5th ed. 2002). The Board may take judicial notice of dictionary evidence. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

¹² **DICTIONARY OF COMPUTER AND INTERNET WORDS** (2001).

¹³ **CONCISE DICTIONARY OF SCIENCE & COMPUTERS** (2004). *See also* the Wikipedia entry for “Application Programming Interface” attached to the February 24, 2011 Office action.

are written in a language called C or derivatives of it.¹⁴ *See also* Assembly Language; Computer Programming.”¹⁵ The terms computer language and programming language are synonyms.

3. An “open standard” is “a standard that allows computers and similar pieces of equipment made by different manufacturers to operate with each other.”¹⁶

A set of rules and specifications that describes the design or operating characteristics of a program or device, published and made freely available to the technical community and (ideally) standardized by an independent international standards body. Open standards may contribute to rapid market growth if they encourage interoperability (the capability of a device made by one manufacturer to work with a device made by a different manufacturer) and cross-platform computing (use in a network with computers made by several different vendors and running different operating systems). The opposite of an open standard is a proprietary standard, which a company pushes in the hope that its standard, and no others, will come to dominate the market.¹⁷

¹⁴ According to applicant’s original specimen, OpenCL is “a C-based programming language with a structure that will be familiar to programmers, who can simply use Xcode developer tools to adapt their programs to work with OpenCL.”

¹⁵ **SCIENCE & TECHNOLOGY ENCYCLOPEDIA** (2000). The Board may take judicial notice of information from encyclopedias. *Productos Lacteos Tocumbo S.A. de C.V. v. Paeteria La Michoacana Inc.*, 98 USPQ2d 1921, 1934 n.6 (TTAB 2011). *See also* the Webopedia.com and Wikipedia entries for “programming language” attached to the February 24, 2011 Office action.

¹⁶ **DICTIONARY OF BUSINESS** (2006).

¹⁷ **WEBSTER’S NEW WORLD COMPUTER DICTIONARY** (2003). *See also* the definition in thefreedictionary.com derived from the **COMPUTER DESKTOP ENCYCLOPEDIA** (2009) attached to the February 24, 2011 Office action.

Applicant submitted the declaration of Neil Trevett, “the President of the Khronos Group, Inc., a not-for-profit industry consortium that manages open standards for the authoring and acceleration of parallel computing, graphic, and dynamic media on a wide variety of computing platforms and devices.”¹⁸ According to Mr. Trevett, OpenCL is a standard originally developed by applicant that is “used as a framework for writing programs that execute across heterogeneous devices consisting of CPU’s, GPU’s, and other processors.”¹⁹ Khronos manages the ongoing development of the OpenCL standard and administers a conformance program for the standard.²⁰ “The members of Khronos – namely, companies such as NVIDIA, IBM, AMD and INTEL – are licensed to use the mark OPENCL in connection with their own conforming implementations of the standard through the conformance program.”²¹

As we understand the facts, applicant developed a standard, framework or programming language to allow computer programmers to write software for devices with multiple types of processors and called that standard, framework or programming language OpenCL. Applicant also developed an application programming interface to utilize the OpenCL process and called it OpenCL.

¹⁸ Trevett Dec. ¶1.

¹⁹ Trevett Dec. ¶4.

²⁰ Trevett Dec. ¶5.

²¹ Trevett Dec. ¶5.

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The open standard-application programming interface software dichotomy is analogous to the process-service dichotomy. A term that only identifies a process, style, method, system, or the like (*e.g.*, a computer or programming language or an industry standard) is not registrable as a service mark (or trademark). A system or process (*e.g.*, a programming language or industry standard) is only a way of doing something, not a service (or a product). The name of a system or process (or industry standard) does not become a service mark (or trademark), unless it is also used to identify and distinguish the service (*e.g.*, application programming interface software). *In re Universal Oil Products Co.*, 476 F.2d 653, 177 USPQ 456 (C.C.P.A. 1973) (term not registrable as service mark where the specimen shows use of the term only as the name of a process, even though applicant is in the business of rendering services generally and the services are advertised in the same specimen brochure in which the name of the process is used); *In re Hughes Aircraft Co.*, 222 USPQ 263 (TTAB 1984) (term does not function as service mark where it only identifies a photochemical process used in rendering service); *In re Vsesoyuzny Ordena Trudovogo Krasnogo Znameni Nauchnoissledovatel'sky Gorno-Metallurgichesky Institut Tsvetnykh Metallov "Vnitsvetmet"*, 219 USPQ 69 (TTAB 1983) (KIVCET identifies only a process and plant configuration, not engineering services). However, if the term is used to identify *the* system or process (*e.g.*, the computer or programming language or industry standard) *and* the services rendered by means of the system or process (*e.g.*, application

programming interface software), the designation may be registrable as a service mark (or trademark). *See Liqwacon Corp. v. Browning-Ferris Industries, Inc.*, 203 USPQ 305 (TTAB 1979), in which the Board found that the mark LIQWACON identified both a waste treatment and disposal service and a chemical solidification process. Accordingly, the issue is not whether OpenCL is the name of a computer or programming language or industry standard that allows computer applications to run on multiple devices; the issue is whether the term OpenCL merely describes a computer or programming language or process or industry standard and, more specifically in this case, the program that implements the computer language or process.

“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 Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). Whether a particular term is merely descriptive is determined in relation to the goods or services for which registration is sought and the context in which the term is used, not in the abstract or on the basis of guesswork. *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Remacle*, 66 USPQ2d 1222, 1224 (TTAB 2002). In other words, the question is not whether someone presented only with the mark could guess the products listed in the description of goods. Rather, the question is whether someone who knows what the products are will understand the mark to convey information about them. *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-

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1317 (TTAB 2002); *In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998); *In re Home Builders Association of Greenville*, 18 USPQ2d 1313, 1317 (TTAB 1990); *In re American Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985).

OpenCL is a combination of the word “Open” and the letters “CL.” A word, term, or letters that are a recognized abbreviation for the goods and services in the application is merely descriptive. *Foremost Dairies, Inc. v. The Borden Company*, 156 USPQ 153, 154 (TTAB 1967); *Calgon Corporation v. Hooker Chemical Corporation*, 151 USPQ 359, 360 (TTAB 1966). “The question to be answered is whether the initials for generic or merely descriptive terms, or a combination thereof, are also generally recognized and used as an accepted abbreviation for the term itself,” *Capital Project Management Inc. v. IMDISI Inc.*, 70 USPQ2d 1172, 1179 (TTAB 2003) (whether initials for generic term create another generic term is separate but related issue to finding underlying term generic); *Racine Indus. Inc. v. Bane-Clene Corp.*, 35 USPQ2d 1832, 1838 (TTAB 1994) (finding acronym made up of descriptive terms not descriptive for name of organization where no evidence to show relevant public generally recognized acronym as descriptive for similar organization).

Not all abbreviations are necessarily merely descriptive.

While each case must be decided on the basis of the particular facts involved, it would seem that, as a general rule, initials cannot be considered descriptive unless they have become so generally understood as representing descriptive words as to be accepted as substantially synonymous therewith.

Modern Optics, Inc. v. Univis Lens Co., 234 F.2d 504, 110 USPQ 293, 295 (CCPA 1956). *See also Southwire Co. v. Kaiser Aluminum & Chemical Corp.*, 196 USPQ 566, 573 (TTAB 1977). Accordingly, for OpenCL to be merely descriptive of applicant's application programming interface software, we have to find the following:

1. OpenCL is an abbreviation for "Open Computing Language";
2. "Open Computing Language" is merely descriptive of the products in the application; and
3. A relevant consumer viewing OpenCL in connection with applicant's products would recognize it as an abbreviation of the term "Open Computing Language."

In re Harco Corp., 220 USPQ 1075, 1076 (TTAB 1984).

A. Whether "OpenCL" is an abbreviation for "Open Computing Language"?

Applicant's original specimen of record states that "OpenCL stands for Open Computing Language. It's a C-based programming language with a structure that will be familiar to programmers." Accordingly, we find that "OpenCL" is an abbreviation for "Open Computing Language."

B. Whether "Open Computing Language" is descriptive of the products in applicant's application?

As indicated above, applicant's original specimen of record provides the following information:

OpenCL stands for Open Computing Language.
It's a C-based programming language with a struc-

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ture that will be familiar to programmers, who can simply use Xcode developer tools to adapt their programs to work with OpenCL. ... Best of all, OpenCL is an open standard that's supported by the biggest names in the industry, including AMD, Intel and NVIDIA.

The AMD website reads as follows:

OpenCL™: The Open Standard for Parallel Programming of GPUs and Multi-Core CPUs

OpenCL™ (Open Computing Language) is the first truly open and royalty-free programming standard for general-use computations on heterogeneous systems. OpenCL allows programmers to preserve their expensive source code investment and easily target both multi-core CPUs and the latest GPUs, such as those from AMD.²²

In a presentation by Aaftab Munshi at SIGGRAPH 2008 entitled "OpenCL Parallel Computing on the GPU and CPU, Mr. Munshi introduced OpenCL as follows:

Introducing OpenCL

- OpenCL – Open Computing Language
- Approachable language for accessing heterogeneous computational resources
- Supports parallel execution on single or multiple processors
- GPU, CPU, GPU + CPU or multiple GPUs
- Desktop and Handheld Profiles

²² August 2, 2010 Office action.

- Designed to work with graphics APIs such as OpenGL²³

When used in the context of an application programming interface to implement an open standard computer or programming language, we find that the term “Open Computing Language” directly describes a feature or characteristic of the software.

C. Whether relevant consumers will recognize OpenCL as an abbreviation for “Open Computing Language”?

The *Wikipedia* entry for OpenCL reads as follows:

OpenCL (Open Computing Language) is a framework for writing programs that execute across heterogeneous platforms consisting of CPUs, GPUs, and other processors²⁴.

See also the websites of the Khronos Group (khronos.org) and its members NVIDIA (nvidia.com) and AMD (amd.com) that also identify OpenCL followed by “(Open Computing Language)”²⁵ The IBM website (ibm.com) provides that “Open Computing Language (OpenCL) greatly improves speed and responsiveness for a wide spectrum of applications.”²⁶

The macnn.com website posted an article about this application quoting applicant’s website regarding OpenCL:

OpenCL (Open Computing Language) makes it possible for developers to efficiently tap the vast gi-

²³ August 2, 2010 Office action.

²⁴ August 2, 2010 Office action.

²⁵ *Id.* The AMD website advertising an OpenCL coding contest references OpenCL as (Open Computing Language). (September 14, 2011 Office action).

²⁶ August 2, 2010 Office action.

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gaflops of computing power currently locked upon the graphics processing unit (GPU).²⁷

The Hardocp.com website introduces OpenCL in the following manner:

Geeking Out with AMD and OpenCL

* * *

Introduction

If you are a gamer that likes video card tech, it is doubtful that you have not heard the term “OpenCL” thrown around a bit. OpenCL stands for “Open Computing Language” and represents a way to program that gives its users a “heterogeneous” environment. What this means is that this code can be executed on an [sic] GPU, CPU, or other processing unit.²⁸

Nine of the 25 articles derived from the LexisNexis database and submitted by the Trademark Examining Attorney in the February 24, 2011 Office action reference OpenCl as “Open CL (Open Computing Language)” or a variation thereof.

The above-noted evidence indicates that these companies and authors believed that they needed to spell out the connection between OpenCL and “Open Computing Language” because the readers would not immediately understand that the mark OpenCL means “Open Computing Language.” Although other consumers might figure that OpenCL was derived from the term “Open Computing Language, the process of recognizing that derivation requires some thought, and that is the essence of a suggestive mark.

²⁷ August 2, 2010 Office action.

²⁸ August 2, 2010 Office action.

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In view thereof, we find that the mark OpenCL is not merely descriptive.

Whether the specimens show OpenCL used to identify applications programming interface software?

The original specimen submitted by applicant as part of its Statement of Use is an excerpt from applicant's website advertising the release of its SNOW LEOPARD operating system in which applicant describes the features and components of the operating system, including OpenCL. The web page features a "Buy Now" button through which the reader may purchase the SNOW LEOPARD operating system, including OpenCL.

In the specimen, applicant describes OpenCL as follows:

OpenCL in Snow Leopard is a technology that makes it possible for developers to tap the vast gigaflops of computing power currently in the graphics processor and use it for any application. Now a new technology in Mac OS X Snow Leopard called OpenCL takes the power of graphics processors and makes it available for general-purpose computing. ... [O]nce developers begin to use OpenCL in their applications, you'll experience greatly improved speed in a wide spectrum of applications. ...

Familiar, C-based language with industry support.

OpenCL stands for Open Computing Language. It's a C-based programming language with a structure that will be familiar to programmers, who can simply use Xcode developer tools to adapt their programs to work with OpenCL. ... Best of all, OpenCL is an open standard that's supported by the biggest names in the industry, including AMD, Intel and NVIDIA.

Quoting the above-noted language, the Trademark Examining Attorney argues that the specimen does not show use of the mark OpenCL in connection with a programming language, not application programming interface software. Applicant argues to the contrary and asserts that “just as there is no rule that the name of a programming language cannot also function as a trademark for computer software, there is no rule that a specimen for computer software must specifically show the word ‘software’ next to the mark. Rather, the question is whether the mark appears on a display associated with the goods.”²⁹

The Trademark Examining Attorney did not reject the specimen because it was not a display associated with the goods. The Trademark Examining Attorney rejected the specimen because it does not show use of the mark in connection with application programming interface software. In that regard, applicant is correct in its assertion that the specimen does not have to “specifically show the word ‘software’ next to the mark.” However, somewhere on the specimen, the reader should be able to identify the nature of the goods especially when the specimen identifies the product as a programming language instead of goods listed in the application. The clear import of the specimen is that the Snow Leopard operating system contains the OpenCL C-based programming language. There is nothing supporting applicant’s claim

²⁹ Applicant’s Brief, p. 13.

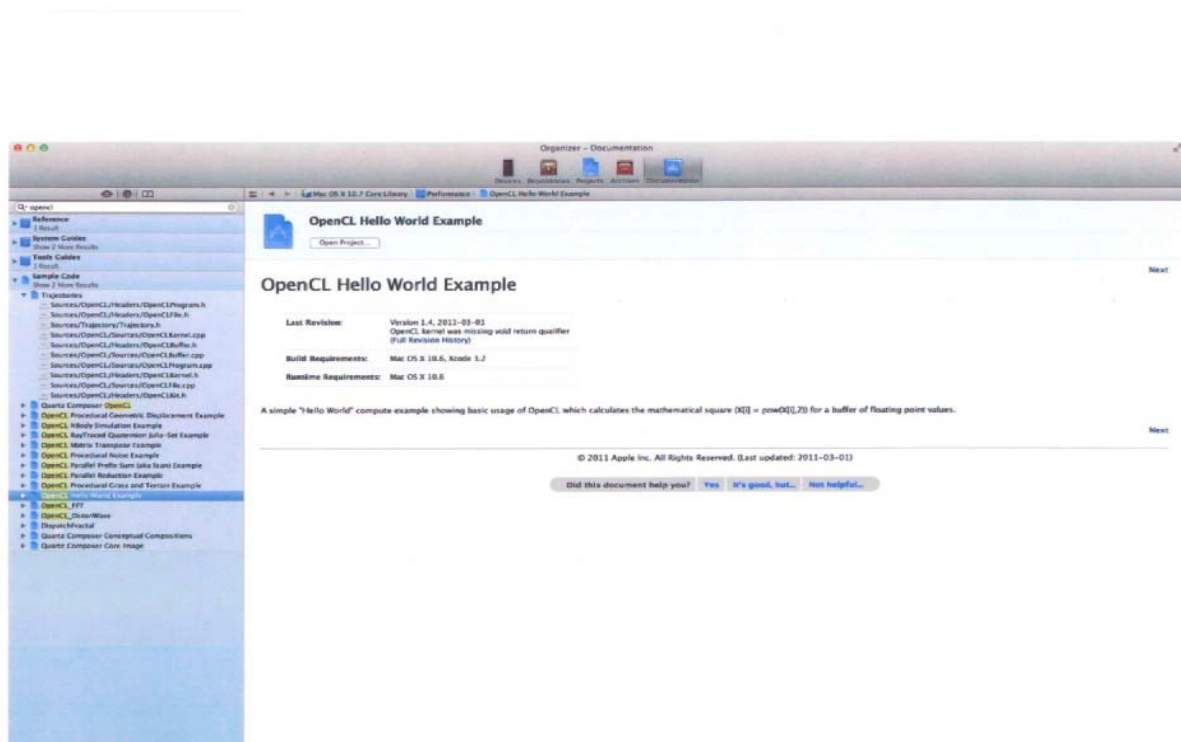
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that the specimen that references OpenCL as application programming interface software.

In the OpenCL, standard character application, applicant submitted a screen shot “depicting an implementation of the OPENCL API.”³⁰ A copy of the screen shot is displayed below.



The Trademark Examining Attorney refused registration on the ground that “the specimen appears to show an ‘example’ of use of the language and does not appear to identify particular software.” We disagree. The specimen appears to show the mark used identify an application programming interface

³⁰ Applicant’s August 24, 2011 response.

as defined earlier in the decision as illustrated by the menu items in on the left-hand side of the screen shot (e.g., references, system guides, tool guides, and sample code).

The Trademark Examining Attorney also argued that an application programming interface is not software.

Moreover, an API is also not software. An API is defined as a “set of routines, protocols and tools for building software applications” or “an interface between the operating system and application programs which includes the way the application programs communicate with the operating system, and the services the operating system makes available to the programs. ... As such, the API is merely a communication interface, or a set of rules and specifications to allow software written in OPENCL to communicate with the operating system and other software or hardware. It is an integral feature of the programming language.”³¹

In its June 7, 2010 response, applicant amended its description of goods to “application programming interface computer software for use in developing applications for execution on central processing units (CPU) or graphic processor units (GPU), sold as an integral component of computer operating software.” The Trademark Examining Attorney did not reference the description of goods in any subsequent Office action or in any way indicate that the description of goods, as amended, was unacceptable. The Trademark Examining Attorney did not assert in his appeal brief that “application programming interface computer software” was not an acceptable description of goods. In

³¹ Trademark Examining Attorney’s Brief, p. 14 (unnumbered).

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essence, the Trademark Examining Attorney is refusing to accept applicant's specimen showing use of its mark on the ground that the description of goods is unacceptable because it does not identify a product for which a registration may be issued despite having accepted the description of goods as acceptable. *See* footnote No. 7.

In view of the foregoing, we find that the substitute specimen submitted by applicant is acceptable.

Decision: In Serial No. 77616247 for the mark OpenCL, in standard character form, the refusals to register are reversed and this application will be forwarded to publication.

In Serial Nos. 77844718 and 77844736 for the marks OpenCL and design, the descriptiveness refusal is reversed but the requirement that applicant failed to submit an acceptable specimen is affirmed and registration is refused.