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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re PSI Systems, Inc.

Serial No. 78648563

James W. Geriak of Orrick, Herrington & Sutcliffe LLP for
PSI Systems, Inc.

Jennifer H. Dixon, Trademark Examining Attorney, Law Office
110 (Chris A. F. Pedersen, Managing Attorney).

Before Bucher, Zervas and Cataldo,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

PSI Systems, Inc. has applied to register the mark
iPOSTAGE, in standard character form, on the Principal
Register for the following goods and services, as amended:

"Computer software, namely software for
generating and printing information on documents,
labels, postage and other products, using digital
technology" in International Class 9;

"Conversion and transfer of data from one medium
to another, namely conversion and transfer of
digital data to tangible media" in International
Class 40; and

"Computer services, namely, providing temporary use of non-downloadable computer software for users to convert and transfer data from one medium to another, namely, convert and transfer digital data to tangible media" in International Class 42.¹

The trademark examining attorney refused registration under Section 2(e)(1) of the Trademark Act on the ground that applicant's mark is merely descriptive of a feature or quality of applicant's goods and services. When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs on the issue under appeal.

Evidentiary Matters

Before turning to the substantive ground for refusal, we note that applicant has submitted several exhibits with its brief. These exhibits consist of printouts of various "I" formative third party registrations from the United States Patent and Trademark Office's Trademark Electronic Search System (TESS). We agree with the examining attorney that these exhibits are untimely, and they have not been considered. See Trademark Rule 2.142(d) (the record in the application should be complete prior to the filing of an appeal). We note, however, that had we considered these

¹ Application Serial No. 78648563 was filed June 10, 2005 based upon applicant's assertion of its bona fide intent to use the mark in commerce in connection with the goods and services.

exhibits in our determination of the issue on appeal, the result would be the same.

Refusal to Register Under Section 2(e)(1)

It is well settled that a term is considered to be merely descriptive of goods and/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 and/or services. See Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052. See also *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods and/or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or feature about them. Moreover, whether a term is merely descriptive is determined not in the abstract, but in relation to the goods and/or services for which registration is sought. See *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). Thus, "[w]hether consumers could guess what the product is from consideration of the mark alone is not the test." See *In re American Greetings Corp.*, 226 USPQ 365 (TTAB 1985).

With her Office actions, the examining attorney submitted dictionary definitions of "i" and "postage." Based upon these definitions, "i" may be defined, *inter alia*, as a shorthand for "Internet." "Postage" may be defined as "price for mail delivery: the amount of money paid for the delivery of a piece of mail" or "marks showing payment: the stamps, labels, or other marks on an item of mail showing that the charge has been paid."² The examining attorney further made of record articles retrieved from the Nexis database and Internet web pages. Certain excerpts from the referenced articles and web pages are reproduced below (emphasis added):

With **Internet postage**, customers can print U.S. Postal Service-approved stamps with an inkjet or laser printer.

Besides growth potential, **Internet postage** boasts a quality many mature industries can only dream of: pricing power. (Investor's Business Daily, December 12, 2005);

Fifth, any such **Internet postage** system would never stay cheap. Feature creep and accounting justifications would drive the price from \$0.01 to \$0.10 to \$1 as inevitably as death and taxes.

I could go on with detailed objections but, when it comes down to it, there is simply no way to implement **Internet postage** that would be practical. (Network World, February 9, 2004);

² The examining attorney cites to Acronym Finder (www.acronymfinder.com) and Encarta (www.encarta.msn.com) respectively, for these definitions.

Pitney Bowes Inc., the world's largest maker of postal meters and mailing equipment, and Internet competitor Stamps.com Inc. said they have resolved patent litigation that dates to 1999. The companies have been fighting in the courts since Stamps.com was a 3-year-old upstart and analysts predicted that **Internet postage** would become a real challenge to the U.S. Postal Service. Instead, it's a niche market, with less than 1 percent of the \$21 billion postage meter market. (The Atlanta-Constitution, December 25, 2003);

Internet Postage Providers Add 'Stealth' Feature for Online Sellers

Many eBay buyers object to sellers adding handling charges for their purchases. Sellers who use **Internet postage** services can hide their actual USPS shipping costs, minimizing potential complaints from buyers.

Stamps.com and Endicia.com both offer online sellers the ability to hide USPS postage costs on packages.

Endicia.com has offered its Stealth Postage feature since last summer, and is available to users of its Premium service, with fees of \$15.99/month or \$174.05 for the year. (www.auctionbytes.com).

The examining attorney also submitted the following article and Internet story concerning applicant's d/b/a, Endicia:

Internet postage debuted in the United States in August 1999. When the idea was first announced, many wondered if it might not be one of the next big things.

But the idea was slow to get off the ground. In the interim, companies selling, or trying to sell, **Internet postage**, lost money and moved on

to other ventures, such as shipping services, to make up for lost revenue....

But **Internet postage** is back for three companies offering it in the United States: Neopost, the Hayward, Calif. subsidiary of Paris-based Neopost Group; Stamps.com; and Endicia, the **Internet postage** tradename of Envelope Manager Software. All have returned to focusing on **Internet postage** rather than other ventures....

Endicia is the trade name for PSI Systems' **Internet postage** product, doing business as Envelope Manager Software. PSI Systems, a consulting company, has been in business since 1976. Endicia started offering **Internet postage** in October 2000, said Harry Whitehouse, CEO of the company. Whitehouse is hoping Endicia's products will help the U.S. Postal Service get back in the package trade it lost to United Parcel Service and FedEx....

Endicia allows customer to print labels similar in style and substance to those of UPS and FedEx. With similar labels, customers can compare USPS with FedEx and UPS based on service and cost, he said....

The company also now is offering an express mail form over the Internet, replacing USPS's multipart carbon form.

Whitehouse also is offering his **Internet postage** as an alternative to mail manifesting. With Endicia's solution, users don't need to go to the post office to drop off mail, nor do they need a minimum amount of mail. They also don't need paperwork or a permit, he said. Some of Endicia's higher-volume customers have switched from manifesting to **Internet postage** because it is easier, he said. (Traffic World, August 5, 2002).

Internet Postage

More than five years after the USPS authorized third-party **Internet postage** sales, Endicia

offers **Internet Postage**, the first Mac service that allows you to print postage for all your mail. It was worth the wait.

Signing up for this service online takes only a few minutes-plus a credit card or checking account for buying postage at face value and paying Endicia service fees. Once you receive your account number, returning to Endicia's Web site is optional, as you can handle most of your mailing activities via the SwordfishExpress 2.0 software you download from the Web site when you set up your account.

To create a mailing, you enter the name and address of the recipient, specify the class of service you want...input the weight of your item, and then indicate whether you desire insurance...or delivery and signature confirmation.

Printable shipping labels cost between \$0.05 and \$0.15 each; you can print them with or without postage on a Dymo and Zebra Mac-compatible label printer (also available from Endicia), or on any laser or inkjet printer. A mail log tracks all printed labels, allowing you to check delivery status and seamlessly request refunds for printing errors, although filing insurance claims requires visiting the Endicia Web site. (www.macaddict.com).

It is settled that excerpts from articles taken from the Nexis database are competent evidence of how a mark may be perceived. See *In re Shiva Corp.*, 48 USPQ2d 1957 (TTAB 1998). It is further settled that material obtained from the Internet is acceptable in ex parte proceedings as evidence of potential public exposure to a term. See *In re Fitch IBCA, Inc.*, 64 USPQ2d 1058 (TTAB 2002).

Finally, applicant submitted pages from its Internet website in response to the examining attorney's requirement for information regarding applicant's goods and services. Certain excerpts from the referenced web pages are reproduced below (emphasis added):

Endicia Internet Postage, the first **Internet postage** service to offer Electronic Delivery Confirmation, was launched in 2000. This service also became the first **Internet postage** service to support International Mail in 2001.

Endicia Internet Postage lets you print postage for all your mail. All you need is a PC, an Internet connection, and a laser or inkjet printer. (www.endicia.com).

The above dictionary definitions made of record by the examining attorney and the excerpted material from applicant's own Internet website support a finding that iPOSTAGE is an abbreviation for "Internet postage." We are not persuaded by applicant's argument that because "I" and "postage" have multiple meanings, the combination thereof into iPOSTAGE is ambiguous and not merely descriptive. As noted above, it is settled that descriptiveness must be determined in relation to the goods and services for which registration is sought. *See In re Bright-Crest, Ltd., supra.* The fact that a term may have different meanings in other contexts is not controlling on the question of mere descriptiveness. *See In re Chopper Industries*, 222 USPQ

258 (TTAB 1984); and *In re Champion International Corp.*, 183 USPQ 318 (TTAB 1974). Applicant's own promotional materials indicate that applicant's goods and services are directed toward Internet postage. Further, the above-excerpted evidence of record establishes that Internet postage is a recognized term applied to an alternative to stamps or metered postage. As a result, the possibility that iPOSTAGE may have other meanings in other contexts is not controlling in our determination of likelihood of confusion herein.

Turning to applicant's goods and services, we must determine whether iPOSTAGE or "Internet postage" merely describes a function, feature or characteristic thereof. In this case, the evidence made of record by the examining attorney establishes that, as applied to applicant's Class 9 goods, the term iPOSTAGE would immediately describe, without conjecture or speculation, a significant characteristic or feature of such goods, namely, that they are used to generate and print U.S. Postal Service-approved Internet postage as an alternative to using traditional stamps and metering devices or obtaining postage at a U.S. Post Office. The evidence of record further establishes that iPOSTAGE merely describes a significant characteristic or feature of applicant's Class 40 services, namely, that

the services enable a user thereof to convert or transfer Internet postage from digital data onto tangible media such as shipping labels. Finally, the evidence of record establishes that iPOSTAGE merely describes a significant characteristic or feature of applicant's Class 42 services, namely that the services provide temporary use of non-downloadable software to convert or transfer Internet postage from digital data to shipping labels. In other words, prospective purchasers, upon confronting the term iPOSTAGE used in connection with applicant's goods and services, would immediately perceive that a significant feature or characteristic of its goods and services is to enable users thereof to convert and transfer digital data into tangible media for the generation of Internet postage. Thus, applicant's mark iPOSTAGE merely describes goods and services used to create Internet postage.

We are not persuaded by applicant's speculation regarding possible alternative meanings of iPOSTAGE, e.g., an Internet service that provides information for stamp collectors or information regarding postage. Applicant has provided no evidence that the consuming public would perceive iPOSTAGE as having such meanings in order to counter the examining attorney's evidence that the mark merely describes a significant feature or characteristic of

the recited goods and services. In the absence of any such evidence, applicant's arguments regarding other possible meanings of its mark are mere conjecture, and as such are unavailing.

Finally, applicant argues that the Office's refusal to register its iPOSTAGE mark, when the Office has previously allowed registration of third party "I" formative marks, violates applicant's constitutional rights under the equal protection component of the Due Process Clause of the Fifth Amendment. The Federal Circuit, our primary reviewing court, has specifically rejected this argument:

Boulevard also asserts that the PTO has registered other sexually oriented marks and that it accordingly violates Boulevard's rights under the equal protection component of the Due Process Clause of the Fifth Amendment for the PTO to refuse to register the marks at issue in this case...In any event, the PTO must decide each application on its own merits, and decisions regarding other registrations do not bind either the agency or this court. *In re Nett Designs*, 236 F.3d 1339, 1342, [57 USPQ2d 1564] (Fed. Cir. 2001). Even if the PTO had previously allowed a mark similar to Boulevard's marks to be registered, that would not give Boulevard an equal protection right to have its mark registered unless the agency acted pursuant to some impermissible or arbitrary standard. See *In re Int'l Flavors & Fragrances*, 183 F.3d 1361, 1368 [51 USPQ2d 1513] (Fed. Cir. 1999). The fact that, whether because of administrative error or otherwise, some marks have been registered even though they may be in violation of the governing statutory standard does not mean that the agency must forgo applying that standard in all other

cases. The TTAB's decision in this case therefore does not violate the constitutional principles that Boulevard invokes.

See In re Boulevard Entertainment Inc., 334 F.3d 1336, 67 USPQ2d 1475, 1480 (Fed. Cir. 2003). *See also In re Litehouse, Inc.*, 82 USPQ2d 1471, 1475 (TTAB 2007). Thus, applicant's constitutional argument in this case is unavailing.

Accordingly, we find that applicant's mark is merely descriptive as contemplated by Section 2(e)(1) of the Act.

Decision: The refusal to register is affirmed.