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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re The University of British Columbia

Serial No. 78700787

Peter K. Hahn of Luce, Forward, Hamilton & Scripps LLP for
The University of British Columbia.

Jason Paul Blair, Trademark Examining Attorney, Law Office
104 (Chris Doninger, Managing Attorney).

Before Walters, Drost, and Wellington, Administrative
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On August 25, 2005, applicant, The University of
British Columbia, applied to register the mark AUTOSTITCH,
in standard character form, on the Principal Register for
goods and services ultimately identified as:

Computer software for creating, editing and
manipulating images; computer software for
photographic and digital image processing; computer
software for joining, viewing, manipulating, editing,
managing, sorting, storing, transferring, and
exchanging digital photographs, digital and graphic
images, data, video, multimedia and interactive

documents and works, and recorded information; file management software for opening and converting photographic, digital, and graphic images, data, video, and recorded information in Class 9

Photographic processing; digital processing, restoration and enhancement of photograph and digital images in Class 40.

Serial No. 78700787 is based on use in commerce for the goods in Class 9 (dates of use anywhere and in commerce of February 21, 2005) and an intention to use the mark in commerce for the services in Class 40.

The examining attorney refused to register the mark on the ground that the mark is merely descriptive of applicant's goods and services under 15 U.S.C.

§ 1052(e)(1). The examining attorney argues that "consumers would immediately recognize that the term 'AUTOSTITCH' means 'to fasten or join as if with stitches, and as if by a machine.' Because the Applicant's computer software and photograph processing services join multiple photos with a computer, the combined term 'AUTOSTITCH' is merely descriptive of the Applicant's goods and services." Brief at unnumbered p. 7.

Applicant argues that "AUTOSTITCH suggests that something like stitching will happen automatically. In reality, human involvement, albeit minimal, is required,

and nothing like stitching (in the sewing sense) occurs." Brief at 6.

When the examining attorney made the refusal to register final, a request for reconsideration and this appeal followed.

To be merely descriptive, a mark must immediately convey "knowledge of a quality, feature, function, or characteristic of the goods or services." *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007). See also *In re Quik-Print Copy Shops, Inc.*, 616 F.2d 523, 205 USPQ 505, 507 (CCPA 1980). Also, a merely descriptive term need only describe a single significant quality, property, or characteristic of the goods or services. *Gyulay*, 3 USPQ2d at 1009; *Meehanite Metal Corp. v. International Nickel Co.*, 262 F.2d 806, 120 USPQ 293, 294 (CCPA 1959). Mere descriptiveness is not determined in the abstract but rather in relation to the relevant goods or services. *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978).

To support his refusal, the examining attorney submitted printouts (some of which are set out below with emphasis added) from numerous websites to show that the term "stitch" is used to describe the process of merging several photographs together to form a large image.

Producing Panoramas

A single shot completely fails to capture the wide field of view of a sweeping panorama...

The idea of **stitching** photographs together on your computer sounds simple, but the practice is actually pretty demanding...

Manual stitching

Now that we've got the best possible material it's time to see what computer manipulation can do... Next we have to sort out the seams where the images overlap...

Automatic Stitching

Obviously we could do with a bit more help, and a number of packages now offer dedicated panorama features. In most cases though this boils down to nothing more than automatically creating a suitably wide canvas and evenly spacing the component images. Recently though my eyes were opened by the new **stitching** feature in PhotoSuiteIII. This worked like magic, producing much better results than you can hope to achieve manually and in a fraction of the time... It is also unique in that it enables both vertical and horizontal **stitching** simultaneously, up to six images wide and four high, which is ideal if you're primarily looking to boost an aging camera's image resolution/quality.

www.designer-info.com

Panorama Factory v3.3

Panorama Factory, from Smoky City Design, LLC started life as a simple free image **stitching** program...

- High quality panorama **stitching**

<http://photography.about.com>

PanaVue

ImageAssembler is a powerful digital image **stitching** software. It assembles a set of photos into a single 360 degree panorama. It seamlessly **stitches** together images from a scanner into a large mosaic

New PM Stitch Creator 3.0

Software to convert photo to cross **stitch** pattern

<http://quality-shareware.com>

TURBOSCAN

If you are really wanting something fast then nothing can beat the turboscan option. This facility hugely

accelerates the image capture and image **stitching** process.

- Moves, scans and **stitches** 26 frames per sec.

www.gt.vision.com

Create a perfect panorama

In recent years, shooting multiple pictures of a scene and then **stitching** them to form a panoramic picture has become a popular project with digital photographers...

To ensure accurate **stitching**, successive images need to be shot with a consistent overlap of between 15 and 30%...

The Advanced Blending option will try to smooth out uneven exposure or total differences between **stitched** pictures...

Solutions to common **stitching** problems

<http://studio.adobe.com>

Image **Stitching**

Want to grab a very high resolution image, but you can't get everything in your field of view. With PAX-it, that is not a problem. The image **stitching** routine will allow you to grab adjacent images and have PAX-it **automatically stitch** them together into a low-power, high resolution image.

Very little user interaction is required, no need to manually position images in a tedious process, PAX-it will analyze the images and determine where they need to go.

www.paxit.com

The Wonderful World of Image **Stitching**

There are a number of reasons why a photographer would want to **stitch** multiple images together. The most obvious is to create panoramic panels...

www.luminous-landscape.com

Photo **Stitching** Software

...The software also enables users to scan large documents (with a standard personal scanner) in several stages (up to 3 x 3), and then **stitch** them seamlessly back together.

www.realvix.com

Pixtra PanoStitcher in action:

A row of overlapping photos are [sic] taken around a fixed viewing point, with or without a tripod. The photos are **automatically stitched** into a panorama.

www.pixtra.com

Image **Stitching**

Image **stitching** or photo **stitching** is the process of combining multiple images to produce a panorama or larger image. Computer software is often used to interpolate the final image where the component images are not in precise alignment.

http://en.wikipedia.org¹

Applicant criticizes the www.luminous-landscape.com site because it is "a tutorial by an individual. The site appears to be directed to promote other products offered by this individual." Brief at 3. Applicant also argues against the www.designer-info.com site because it "appears to be from someone in the design industry." Brief at 4. However, these sites are relevant to the extent that they show that the term "stitch" has been used by others to refer to a process of combining photographs to make a larger image.

¹ While applicant criticizes the Wikipedia evidence, the board has recently explained that evidence from Wikipedia is not inherently unreliable and it will be considered if applicant had an opportunity to submit evidence in rebuttal. *In re IP Carrier Consulting Group*, Serial No. 78542726, slip op. at 4 (TTAB June 18, 2007) (The "Board will consider evidence taken from Wikipedia so long as the non-offering party has an opportunity to rebut that evidence by submitting other evidence that may call into question the accuracy of the particular Wikipedia information"). Applicant had such an opportunity in this case, and inasmuch as the Wikipedia evidence has not been rebutted, we will consider it.

In addition, the examining attorney has submitted a definition of "auto" as "automatic." See Final Office Action, attachment. The examining attorney also asks that we take judicial notice of "automatic" as "acting or operating in a manner essentially independent of external influence or control; acting or done as if by machine; mechanical." *The American Heritage Dictionary of the English Language*, (4th ed. 2000) (Brief at unnumbered p. 3). We grant applicant's request as well as his other request that we take judicial notice of the definition of "Auto," which is the same as the definition already of record.

Applicant's evidence consists of the first one hundred hits from a Google search for the term "autostitch" that apparently refer to applicant.

We begin our analysis by noting that evidence from the internet is relevant to support the examining attorney's argument that a term is merely descriptive.

Material obtained through the Internet or from websites is acceptable as evidence in ex parte proceedings. Because website contents and search engine results are accessible by the consuming public (although search engine results may be retrieved only if members of the public enter the identical search strategy), they constitute evidence of potential public exposure.

TBMP § 1208.03 (2d ed. rev. 2004) (footnote omitted). See also *In re Fitch IBCA, Inc.*, 64 USPQ2d 1058, 1060 (TTAB 2002).

Recently, the Federal Circuit has held that even information "originating on foreign websites or in foreign news publications that are accessible to the United States public may be relevant to discern United States consumer impression of a proposed mark." *Bayer*, 82 USPQ2d at 1835. The internet evidence shows that the term "Stitch" is used to refer to the process of manipulating photographs to create a larger, unitary image. Applicant argues that it "is unaware of any dictionary definition defining 'stitch' as a process relating to photographs" (Brief at 2). However, there is no requirement that a term even be a word that appears in the dictionary before it can be found to be merely descriptive. *In re Orleans Wines, Ltd.*, 196 USPQ 516, 517 (TTAB 1977) (It "is well settled that the fact that a term is not found in the dictionary is not controlling on the question of registrability, where as in the present case such term has a well understood and recognized meaning"). See also *In re Sun Microsystems Inc.*, 59 USPQ2d 1084, 1087 (TTAB 2001). The examining attorney's evidence convinces us that the term "stitch" has a well-recognized meaning in the field of photography.

Applicant's goods and services include computer software for creating, editing and manipulating images and the services of photographic processing; digital processing, restoration and enhancement of photograph and digital images. Applicant's software that manipulates images and its photographic processing services would include goods and services that "stitch" together multiple images of a scene "to form a panoramic picture."

<http://studio.adobe.com>. Thus, the term "stitch" is a term that describes applicant's goods and services.

The other term in applicant's mark is the term "Auto," which can be defined as "automatic." "Automatic Stitching" is a feature of photo stitching software. The website, www.designer-info.com, distinguishes between manual and automatic stitching. Indeed, the site warns that "Manual stitching can be a complex business." The www.pixtra.com site refers to the photos being "automatically stitched into a panorama." The review of the Panorama Factory v3.3 indicates that the software "Automatically adjusts images for barrel distortion and vignetting and 'warps' them for joining." <http://photography.about.com>. The term "auto" would also describe applicant's goods and services to the extent that applicant's identification of goods and

services includes software and services that have features that automate the photo stitching process.

Despite the fact that the terms "auto" and "stitch" describe applicant's goods and services, the question we must address is whether applicant's mark AUTOSTITCH as a whole is merely descriptive because even if the terms are individually descriptive, the combined term may not be. Merely because the individual words may describe a product or service, when the terms are combined, they may be more than merely descriptive. See, e.g., *In re Colonial Stores Incorporated*, 394 F.2d 549, 157 USPQ 382, 385 (CCPA 1968) (SUGAR & SPICE not merely descriptive for bakery products).

Applicant argues that "the mark AUTOSTITCH suggests that something like stitching will happen automatically. In reality, human involvement, albeit minimal, is required, and nothing like stitching (in the sewing sense) occurs. It is this incongruity... which makes the mark interesting." Brief at 6. We fail to see any incongruity in this case. There is no double entendre with the terms "auto" and "stitch." Stitch is a term that is used to describe the process of combining multiple images to produce a panorama or larger image. The word "auto" describes the fact that certain features of the process are automatic as opposed to manual. We add that this is not a case like *In re*

Automatic Radio Mfg. Co., 404 F.2d 1391, 160 USPQ 233 (CCPA 1969) in which the term AUTOMATIC RADIO was held not to be descriptive of radios having an "automatic volume control." Here, the term "automatic stitching" is used to describe photo stitching software that has an automatic stitching feature.

We add that, while applicant has submitted Google printouts to show that the references in the search to "Autostitch" are to applicant, the fact that applicant is "the first and/or only entity using the [the term] is not dispositive where, as here, the term unequivocally projects a merely descriptive connotation." *Sun Microsystems*, 59 USPQ2d at 1087. Moreover, it is not necessary that the term be in common usage in the particular industry before it can be found merely descriptive. *See In re National Shooting Sports Foundation, Inc.*, 219 USPQ 1018, 1020 (TTAB 1983) ("The fact that applicant may be the first and only user of this highly descriptive or generic designation does not justify registration if the term projects only merely descriptive significance").

Therefore, we conclude that the term AUTOSTITCH for computer software and services is merely descriptive of these goods and services that manipulate photos and use

automatic features to stitch the photos into a panorama or a larger image.

Decision: The examining attorney's refusal to register applicant's mark AUTOSTITCH on the ground that it is merely descriptive of its goods and services is affirmed.