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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Mdintellesys, LLC

Serial No. 85136211

Zachary D. Messa of Johnson, Pope, Bokor, Ruppel & Burns, LLP for Mdintellesys, LLC.

James W. Stein, Trademark Examining Attorney, Law Office 107 (J. Leslie Bishop, Managing Attorney).

Before Kuhlke, Ritchie, and Masiello, Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

Mdintellesys, LLC has applied to register on the Principal Register the mark ADAPTIVE TEMPLATE TECHNOLOGY in standard character form for goods identified as "Electronic medical records software for database management, namely, the creation, management, and access to medical records and charts," in International Class 9.

The trademark examining attorney refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that applicant's mark merely describes the goods. When the refusal was made final, applicant requested

reconsideration, which was denied. This appeal ensued. Applicant and the examining attorney have filed appeal briefs.

The question before the Board is whether the mark ADAPTIVE TEMPLATE TECHNOLOGY, viewed in its entirety, merely describes the goods identified in the application. "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).

The record shows that applicant's software generates templates for use by medical professionals in the review and updating of patients' medical records. Applicant described its product as follows during prosecution:

> Applicant's software, however, employs its technology to allow a customized template for each patient to be created through the use of Applicant's proprietary picklists specific to the individual patient. … The creation of a customized template for a patient allows the clinic and physician to save a tremendous amount of time by obviating the need to proceed through numerous fields that are inapplicable to the specific patient.[1]

Applicant's website describes the goods as follows:

> [T]he intelligent system utilizes the shared knowledge base to essentially design templates right on the fly, customized to each patient and based on their previous history and potential outcomes.
>
> The choices presented by the adaptive template are both short and relevant to that particular patient… resulting in a level of charting efficiency not possible with conventional template driven systems.[2]

[1] Applicant's response of July 12, 2011, p. 3.

[2] Excerpt from <mdintellesys.com>, submitted with the examining attorney's Office action of January 12, 2011.

> …
>
> Our Adaptive Template Technology address [sic] this problem with system generated templates populated with intelligent picklists specific to the individual patient. Coupled with the Shared Clinical Knowledge Base, each menu drop down now has intelligence and presents only relevant choices: essentially a custom template for every patient in your practice.[3]

In essence, applicant's product is a computer software program that generates a form or chart that is "populated" with information relating to a patient's "previous history and potential outcomes," drawn from a "shared knowledge base" (which is presumably some form of database of medical information). Each such form is customized for use with a particular patient, includes information relating to that patient, and is formatted with "choices" that are relevant to that patient, excluding "fields that are inapplicable to the specific patient."

The examining attorney has submitted internet evidence to demonstrate the meaning of the expression "adaptive software."[4] However, it is not clear from the record that applicant's goods are software of the type described. The examining attorney's evidence indicates that "adaptive software" is a type of computer program that can modify its own algorithms in response to data that the program interacts with. Another kind of "adaptive software" appears to be computer programs that are designed for use by disabled persons. The record does not establish that applicant's software is either of these two types of software. Accordingly, this

[3] Excerpt from <mdintellesys.com>, submitted with applicant's response of July 12, 2011.

[4] Office action of August 9, 2011.

evidence does not demonstrate that any part of applicant's mark is merely descriptive.

The applicant, in an effort to demonstrate that its mark is not merely descriptive, has submitted evidence to show that the expression "adaptive template" is used in other industries to describe computing functions relating to object tracking and object recognition. Clearly, applicant's goods are not software of this type. However, the fact that a term may have other meanings in different contexts does not mean that applicant's mark is not merely descriptive in the context of applicant's goods. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979); *In re Champion Int'l Corp.,* 183 USPQ 318, 320 (TTAB 1974).

As none of the terms of art proposed by applicant and the examining attorney are clearly relevant to the applicant's goods, we will consider the mark in light of the ordinary meaning of its component words.

The word ADAPTIVE means "showing or having a capacity for or tendency toward adaptation."[5] The word "adaptation" means "the act or process of adapting, fitting, or modifying."[6] "Adapt" means "to make suitable or fit (as for a particular use, purpose, or situation)…. to make suitable (for a new or different use or situation) by means of changes or modifications."[7]

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[5] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) p. 24. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

[6] *Id.* at 23.

[7] *Id.*

In the field of computing, a TEMPLATE is "a preset format for a document file, used so that the format does not have to be recreated each time it is used."[8]

The word TECHNOLOGY means "a technical method of achieving a practical purpose."[9]

Clearly a software application is aptly described as a "technology." We must therefore consider whether applicant's software is a technology that is characterized by any feature that is described by the words ADAPTIVE TEMPLATE. We find that it is.

Applicant's goods are software (a "technology") that creates computerized formats ("templates") that are capable of being modified or changed ("adaptive") for purposes of customizing the templates to particular patients and making them suitable for organizing the medical information of those patients. The three words of applicant's mark, interpreted according to their ordinary dictionary definitions in the order in which applicant uses them, have a meaning that is entirely consistent with this description of applicant's goods. If a mark consists of several descriptive components and, when those components are combined, each component retains its merely descriptive significance in relation to the goods, the combination results in a composite that is itself merely descriptive. *See* e.g., *In re Oppedahl & Larson LLP,* 373 F.3d 1171, 71 USPQ2d 1370 (Fed. Cir. 2004); *In re Petroglyph Games Inc.*, 91 USPQ2d 1332 (TTAB 2009); *In re Carlson*, 91 USPQ2d 1198 (TTAB 2009. There is

[8] Definition from <oxforddictionaries.com>, submitted with the examining attorney's Office action of January 12, 2011.

[9] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) p. 2348.

nothing about the combination of the three words of applicant's mark that results in a meaning that is new or different from the individual descriptive meanings of the component terms. Considering applicant's mark as a whole in the light of the dictionary definitions discussed above, we find that applicant's mark ADAPTIVE TEMPLATE TECHNOLOGY does indeed merely describe applicant's goods.

Applicant objects that the record lacks any dictionary definition for the expression ADAPTIVE TEMPLATE.[10] However, it is well-settled that the fact that a term is not found in a dictionary is not controlling on the question of whether a mark is merely descriptive. *See In re Zanova Inc.*, 59 USPQ2d 1300, 1305 (TTAB 2001); *In re Orleans Wines, Ltd.*, 196 USPQ 516, 517 (TTAB 1977). Our finding of descriptiveness is supported by the fact that applicant itself uses the expression "adaptive template" on its website in a descriptive manner in the language quoted above, to describe the function of its software, *i.e.*, the creation of templates that are customized or modified for each patient.

The fact that not every detail of applicant's product is immediately made apparent to one who sees the mark does not require a different result. Whether a term is merely descriptive is determined in relation to the goods and their commercial context. *In re Bright-Crest,* 204 USPQ at 593. "The question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods

[10] Applicant's brief at 5.

or services are will understand the mark to convey information about them." *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002).

Finally, we note applicant's objection that the examining attorney's evidence relating to the descriptiveness of the mark cannot demonstrate that applicant's mark was descriptive on or before the filing of the application, because the evidence post-dates the filing date.[11] There is no need to demonstrate that a mark was descriptive at the time the application was filed. The question of the distinctiveness of a mark may and should be considered throughout the examination of the application. *In re Chippendales USA Inc.*, 622 F.3d 1346, 1354, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010).

In accordance with our analysis set forth above, the Board finds that applicant's mark is merely descriptive of applicant's goods within the meaning of Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1).

Decision: The refusal to register is affirmed.

[11] Applicant's brief at 4.