

This Opinion is not a
Precedent of the TTAB

Hearing: June 23, 2015

Mailed: August 17, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Inovalon, Inc.

Serial No. 85351975

Lynn E. Rzonca of Ballard Spahr LLP for Inovalon, Inc.

Tracy Cross, Trademark Examining Attorney, Law Office 109 (Dan Vavonese,
Managing Attorney).

Before Cataldo, Taylor and Shaw,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Inovalon, Inc. (“Applicant”) seeks registration on the Principal Register of the mark INDICES (in standard characters) for “business analysis services in the field of healthcare data, namely, the collection, reporting and analysis of healthcare data for business purposes” in International Class 35.¹

The Trademark Examining Attorney has refused registration of Applicant’s mark under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1), on the ground that the mark is deceptively misdescriptive of a feature of the identified services.

¹ Application Serial No. 85351975 was filed on June 21, 2011, based on Applicant’s claim of a bona fide intent to use the mark in commerce.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. The appeal is fully briefed.² We reverse the refusal to register.

Analysis

The test for deceptive misdescriptiveness under Section 2(e)(1)³ has two parts. First, we must determine whether the matter sought to be registered misdescribes the goods or services. In order for a term to misdescribe goods or services, “the term must be merely descriptive, rather than suggestive, of a significant aspect of the goods or services which the goods or services plausibly possess but in fact do not.” *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1051 (TTAB 2002); *see also In re Shniberg*, 79 USPQ2d 1309, 1312 (TTAB 2006). The examining attorney bears the burden of showing that a term is merely descriptive (and thus is potentially deceptively misdescriptive) of the relevant goods or services. *See In re Merrill Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987).

² Any of the evidence attached to the Examining Attorney’s appeal brief that was not previously submitted is untimely and we give it no consideration. Trademark Rule 2.141(d); 37 C.F.R. §2.141(d). *See also* TBMP §1203.02(e) (2015) and authorities cited therein. Any of the evidence attached to her appeal brief that was previously submitted is duplicative and unnecessary. *See In re Sela Products, LLC*, 107 USPQ2d 1580, 1584 (TTAB 2013). *See also* TBMP §1203.01 (2015) and authorities cited therein.

³ We note that the issue of whether Applicant’s mark is deceptive under Trademark Act Section 2(a) is not before us.

We further note that the Examining Attorney previously refused registration under Section 2(e)(1) on the ground that the mark merely describes a feature of the services, but subsequently withdrew that refusal to register.

Second, if the term misdescribes the goods or services, we must ask whether consumers are likely to believe the misrepresentation. *In re White Jasmine LLC*, 106 USPQ2d 1385, 1394 (TTAB 2013); *In re Phillips-Van Heusen Corp.*, 63 USPQ2d at 1048; *In re Quady Winery Inc.*, 221 USPQ 1213, 1214 (TTAB 1984). The Board has applied the reasonably prudent consumer test in assessing whether a mark determined to be misdescriptive also would deceive consumers. *See R. J. Reynolds Tobacco Co. v. Brown & Williamson Tobacco Corp.*, 226 USPQ 169, 179 (TTAB 1985) (“On this evidence, we do not believe reasonably prudent purchasers are apt to be deceived.”).

Whether INDICES Misdescribes Applicant’s Services

The Examining Attorney introduced a dictionary definition showing that INDICES is “a plural of index”⁴ and that “index” is “a sequential arrangement of material, esp. in alphabetical or numerical order” or “(computers) a reference table that contains the keys or references needed to address data items.”⁵ The Examining Attorney argues and introduced evidence showing that Applicant “is a leading medical informatics solutions provider touted for its superior healthcare dataset.”⁶ “Informatics” is “the sciences concerned with gathering and manipulating and

⁴ October 6, 2011 Office Action at 17 (from dictionary.infoplease.com).

⁵ *Id.* at 19 (from dictionary.infoplease.com).

⁶ 9 TTABVUE 4, citing *Id.* at 7. Record citations are to TTABVUE, the Trademark Trial and Appeal Board’s publically available docket history system. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

storing and retrieving and classifying recorded information.”⁷ A “data set” is defined as “a data file or collection of interrelated data.”⁸

The Examining Attorney further argues that Applicant’s services, as well as the technologies underlying its services, “encompass data aggregation, integrity analysis, validation, intervention and reporting systems.”⁹ The Examining Attorney contends that “[i]nformatics and data aggregation companies often employ indices in the presentation and organization of their data”¹⁰ and submitted evidence from informational and commercial Internet websites in support of her contention. The following examples are illustrative. (emphasis added by Examining Attorney)

(rimes.com) Rapidly evolving needs of business lead to an increased demand for new *index*, benchmark and reference data. Unlike many other data sets, these emanate from different sources. As data volumes grow, so does the complexity of all types of data, in particular *indexes*, custom benchmarks and blends.

All of this complex data from diverse sources must be aggregated and standardized for use within specific databases and business applications....¹¹

(businesswire.com) Fitch’s initial *indices* present mortgage delinquency statistics for the Subprime market sector by period of security issuance, and facilitates the comparison of performance over time.

This system allows Fitch to generate *indices* based on the market approach....¹²

⁷ October 6, 2011 Office Action at 31 (from rhymezone.com).

⁸ August 28, 2013 Office Action at 25 (from encyclopedia2.thefreedictionary.com).

⁹ 9 TTABVUE 4, quoting October 6, 2011 Office Action at 22-3.

¹⁰ *Id.*

¹¹ August 28, 2013 Office Action at 30-1.

(lexjansen.com) The techniques for managing large data sets include compression, indexing and summarization.¹³

(informationweek.com) MedAssurant is able to achieve a superior healthcare dataset consisting of targeted, timely, and pertinent components of information.¹⁴

The Examining Attorney contends that

a dataset may be analogous to “a reference table that contains the keys or references needed to address data items” or “a sequential arrangement of material, esp. in alphabetical or numerical order.” [internal citations omitted] Thus, consumers generally encounter the use of indices in the analysis, organization and/or presentation of large sets of data. Here, applicant’s healthcare datasets may be analogous to indexes or “indices.” For the reasons set forth above, it is plausible that the applicant’s services would feature indices.¹⁵

Applicant, for its part, argues as follows:

As established herein, the mark INDICES is an acronym standing for **INSIGHTS DATA INTELLIGENCE SOLUTION**. The services provided under the mark are business analysis services in the healthcare field. They are not “indexing” services. The mark INDICES requires a multi-step reasoning process for viewers to understand the relationship between this acronym and Applicant’s healthcare business analysis services.¹⁶

We observe that neither Applicant nor the Examining Attorney introduced any evidence that Applicant’s INDICES mark is intended or understood by consumers as an acronym for **INSIGHTS DATA INTELLIGENCE SOLUTION**. We further

¹² January 14, 2013 Office Action at 32-3.

¹³ August 28, 2013 Office Action at 28-9.

¹⁴ October 6, 2011 Office Action at 7.

¹⁵ 9 TTABVUE 5.

¹⁶ Applicant’s April 6, 2012 communication at 6.

observe that in his declaration, Eric P. Pomerantz, Chief Legal Officer of Applicant, confirms that “Applicant’s INDICES services do not provide information to customers in an index format.”¹⁷ However, he makes no mention of the asserted acronym significance of INDICES.

Based on the totality of the evidence of record, including any evidence not specifically discussed herein, we find that the Examining Attorney has failed to carry the burden of demonstrating that INDICES may plausibly describe a characteristic of Applicant’s “business analysis services in the field of healthcare data, namely, the collection, reporting and analysis of healthcare data for business purposes.” The Examining Attorney argues that companies providing informatics and data aggregation may present data in the form of “indices;” that consumers encounter “indices” in the analysis and presentation of large sets of data; that Applicant provides datasets in the field of healthcare; and that Applicant’s datasets in the field of healthcare “may be analogous to indexes or ‘indices.’” However, even if we accept that the evidence of record shows various forms and compilations of data may be presented in “indices,” that consumers may encounter such “indices” of data and that Applicant’s services may be viewed as datasets in the field of healthcare, the evidence fails to support a finding that Applicant’s datasets “may be analogous” to “indices” or that, as a result, INDICES merely describes a feature or characteristic of Applicant’s services.

¹⁷ Applicant’s November 19, 2012 communication at 9-10.

For instance, the definition of “index” as a reference table containing keys needed to address data items relied upon by the Examining Attorney is specific to computers, and it is not clear either from the definition or other evidence of record that such definition pertains to Applicant’s business analysis services. Evidence of the use of the term “index” or “indices” to describe aspects of “the presentation and organization” of data in certain industries similarly is too speculative to support the Examining Attorney’s contention that Applicant’s “business analysis services in the field of healthcare data...” necessarily utilizes “indices” in the presentation of its data.¹⁸ Simply put, the Examining Attorney’s evidence requires several steps from the use of “indices” to present and organize data in various industries to the interpretation of Applicant’s services as providing datasets in the healthcare field to analogizing such datasets as “indices” for us to find that the mark INDICES merely describes a function, feature or characteristic of the recited services. At best, the evidence indicates that INDICES may be suggestive thereof.¹⁹

Whether Consumers Are Likely to Believe the Misrepresentation

Because the Examining Attorney has failed to demonstrate on this record that INDICES is merely descriptive of a feature of the recited services when in fact the services do not present or organize data in “indices,” we need not and do not engage

¹⁸ Similarly, the Examining Attorney’s reliance in her May 18, 2012 Office Action upon evidence of use by various industries of presentation of information in the form of “dashboards” fails to demonstrate that a dashboard is an index or that “indices” describes an aspect of Applicant’s services.

¹⁹ We observe that on a different record, such as might be adduced in an inter partes opposition or cancellation proceeding, we might come to a different result on this issue.

Serial No. 85351975

in a separate analysis of whether consumers are likely to believe the misrepresentation.

Decision: The refusal to register Applicant's mark INDICES is reversed.