

**THIS OPINION IS  
NOT A PRECEDENT  
OF THE TTAB**

Mailed:  
May 25, 2016

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re dPackaging LLC

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Serial No. 86335576

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William J. Kolegraff of Thomas Whitelaw,  
for dPackaging LLC.

Jason R. Nehmer, Trademark Examining Attorney, Law Office 121<sup>1</sup>  
Michael W. Baird, Managing Attorney.

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Before Quinn, Ritchie, and Pologeorgis, Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Applicant dPackaging LLC (“Applicant”) filed an application to register on the Principal Register the mark DIGITAL REAL ESTATE, in standard character format, for services identified as “a retail space for technology driven brands to showcase product and service offerings and to enable

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<sup>1</sup> The case was reassigned to this Trademark Examining Attorney after the appeal was filed.

consumers to directly interact with and experience the brand, products, and services, namely, providing a live forum for companies to showcase, display, demonstrate and promote new and innovative ideas, products and services in the technology field; advertising and showcasing the goods and services of others by providing a set of retail outlets in close proximity featuring goods and services that are offered for on-line sale,” in International Class 35.<sup>2</sup>

The Trademark Examining Attorney refused registration on ground that the applied-for mark is merely descriptive of the services pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1). When the refusal was made final, Applicant filed this appeal, which is fully briefed.

#### **Mere Descriptiveness**

A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *See, In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (citing *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987)); *see also In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services, and the possible

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<sup>2</sup> Serial No. 86335576, filed on July 13, 2014, under Section 1(b) of the Trademark Act, 15 U.S.C. §1051(b), alleging a bona fide intent to use the mark in commerce.

significance that the term would have to the average purchaser of the goods or services because of the manner of its use. That a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). Moreover, it is settled that “[t]he 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 or services are will understand the mark to convey information about them.” *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002). See also *In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537 (TTAB 1998); *In re Home Builders Association of Greenville*, 18 USPQ2d 1313 (TTAB 1990); and *In re American Greetings Corporation*, 226 USPQ 365 (TTAB 1985). On the other hand, if a mark requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods or services, then the mark is suggestive. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1755 (Fed. Cir. 2012) (citing *In re Abcor Dev. Corp.* 200 USPQ 215).

A composite of descriptive terms is registrable only if it has a separate, non-descriptive meaning. *In re Colonial Stores, Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) (holding SUGAR & SPICE not merely descriptive of bakery products). The Examining Attorney argues that the applied-for mark “DIGITAL REAL ESTATE” describes a feature or characteristic of Applicant’s services which include promotion of on-line sales. Accordingly, we

look to the plain meaning of the words, and then, more importantly, the meaning of their combination.

The Examining Attorney submitted definitions of the terms of the applied-for mark, in relevant part as follows:

Real estate: 2. Something that someone owns or can make money from, especially online. *The goal is to carve out lucrative online real estate for advertisers who are willing to pay a premium to get their messages embedded into the entertainment.*  
*Macmillandictionary.com*

Digital: 4. Relating to or used in e-commerce (=buying and selling goods on the Internet). *Digital music sales continue to rise.*  
*Macmillandictionary.com*

The Examining Attorney also submitted evidence of third-party use of the term “DIGITAL REAL ESTATE” to refer to ownership of domain names, websites, and other digital or online platforms. Examples include the following:

How to buy a taken domain: Domains are like **digital real estate**. And just like real estate there are people buying it up, hoping to sell it later for more money. The truly smart people add value to the domain before doing so. The same way that people buy empty land, build a house on it and sell it. Attached to the May 5, 2015 Final Office Action, p. 32.  
*Hoasted.com*

Why You Should Invest In **Digital Real Estate**: Having your own domain name and a website is like building your own home – virtual home – on the internet. The domain name is the property address. Your website is the digital property. Your property can be a shop, a home where you share your thoughts, photos and videos or a place where you simply connect with other people. . .

Not only that but more and more people are investing in digital real estate. They are investing in domain names, websites and apps.

Attached to the May 5, 2015 Final Office Action, p. 42.  
*Lyopia.com*

Flippa: Why Smart People Invest in Digital Real Estate: The future is digital. The future is now. And **digital real estate** is serious business. It gives companies and individuals the chance to build a platform, get heard, and above all, make money online. . . . In the digital age, your websites, domains, and apps are your most valuable business assets. What's stopping you from investing in digital real estate?

Attached to the May 5, 2015 Final Office Action, p. 7-9.  
*http://flippa.com*

Develop some **digital real estate** with .land: The .LAND TLD creates an online space that's ideal for marketing real estate listing property holdings, and any other type of land or property.

Attached to the May 5, 2015 Final Office Action, p. 40.  
*Name.com*

Dot.com Promotions: DotCom Promotions owns 100's of premium domains and is quickly building some of the hottest brands online. The internet is quickly becoming the next real estate market. Let us assist you through the difficulty of getting your brand noticed online. From finding the right domain for your brand to helping you develop an online campaign, DCP knows and understand the art of building **digital real estate**.

Attached to the May 5, 2015 Final Office Action, p. 48.  
*Dotcompromotions.com*

Applicant argues that the term "DIGITAL REAL ESTATE" is not descriptive of its services since, as stated in its identification of services, it offers actual physical "retail space" and "a live forum for companies to showcase, display, demonstrate and promote" their "products and services." Nevertheless, the identification further states that these "goods and services" are "offered for on-line sale." Thus, e-commerce is an integral aspect of Applicant's identification as are the associated websites or, as they are descriptively known, "digital real estate."

Based on the plain meaning of the term as a whole as well as the third-party evidence, we find that Applicant's composite term "DIGITAL REAL ESTATE," when viewed in relation to Applicant's services, immediately conveys that Applicant provides a service related to e-commerce which includes the promotion of goods and services that are offered for sale on-line. While doubt is resolved for Applicant, we have no doubt that consumers require no imagination, thought or perception to arrive at this conclusion. *See DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd*, 103 USPQ2d at 1755. Therefore, we find that the mark is merely descriptive of the identified services, and we affirm the refusal to register.

**Decision: The Board affirms the refusal to register.**