

This Opinion is not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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*In re Daktronics, Inc.*¹

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Serial No. 87101453
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David D’Zurilla of Schwegman Lundberg & Woessner PA,
for Daktronics, Inc.

Faith Beaudry-Torres,² Trademark Examining Attorney, Law Office 126,
Andrew Lawrence, Managing Attorney.

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Before Shaw, Goodman and English,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Daktronics, Inc. (“Applicant”) seeks registration on the Principal Register of the mark LIVETICKER (in standard characters) for “Computer graphics software” in International Class 9.³

¹ The application was originally filed by ATJ Systems Inc. and assigned to Daktronics Inc., with the assignment recorded on September 11, 2019 with the Office’s Assignment Branch.

² Two other examining attorneys handled this matter prior to the above-identified Examining Attorney filing the brief on the case.

³ Application Serial No. 87101453 was filed on July 12, 2016, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

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). After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board.⁴ The new Examining Attorney assigned to the case sought a remand to supplement the record with additional evidence, which was granted. After the Examining Attorney maintained and continued the final refusal, the appeal was resumed and the Board gave Applicant an opportunity to file a supplemental brief. Applicant did not file a supplemental brief but indicated it would proceed on its initial brief.⁵ We affirm the refusal to register.

I. Mere Descriptiveness

Section 2(e)(1) of the Trademark Act prohibits the registration of a mark which, when used on or in connection with the goods of the applicant, is merely descriptive of them. A term is merely descriptive if it immediately conveys knowledge of a significant quality, characteristic, function, feature or purpose of the goods it identifies. *See, e.g., In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009,

Page references to the application record refer to the online database of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal refer to the Board's TTABVUE docket system.

⁴ The application had been abandoned for failure to provide a complete response to an office action. Applicant filed a petition to revive with the Director, which was accepted, and the application was reinstated.

⁵ The Board had dismissed the appeal in error, but on reconsideration vacated that order and reinstated the appeal.

1009 (Fed. Cir. 1987); *In re Abcor Dev. Corp.*, 200 USPQ 215, 217-18 (CCPA 1978) (a term is merely descriptive if it describes the ingredients, qualities, characteristics, features, or parts of the goods, or if it immediately conveys information regarding a function, purpose, use, or property of the goods). The question is whether someone who knows what the goods are will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012).

II. Argument and Analysis

As Applicant has correctly pointed out in its brief, the question of mere descriptiveness must be decided on the basis of the identification of goods in the application and not in the abstract. *Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007). We consider descriptiveness in relation to an applicant's identified goods, the context in which the mark is being used, and the possible significance the mark would have to the average purchaser because of the manner of its use or intended use. *See In re Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219 (citing *In re Bayer Aktiengesellschaft*, 82 USPQ2d at 1831); *In re Vehicle Identification Network, Inc.*, 32 USPQ2d 1542, 1544 (TTAB 1994) (descriptiveness of mark in an intent-to-use application determined by services identified in application). We must consider the goods to include anything within the scope of the identification, regardless of what the applicant's actual product, or, in this case, the intended product, may be. *See Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1636 (Fed. Cir. 2016) (Section 2(e)(1) refusal is assessed as to the

identified, rather than actual, goods or services). *See also Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014) (“Parties that choose to recite services in their trademark application that exceed their actual services will be held to the broader scope of the application.”).

Because LIVETICKER is a composite mark, we examine the meaning of each component individually for descriptiveness in relation to the identified goods, and then determine whether the mark as a whole is merely descriptive in relation to the identified goods. *See DuoProSS Meditech Corp.*, 103 USPQ2d at 1758.

“[E]vidence [that a term is merely descriptive] may be obtained from any competent source, such as dictionaries, newspapers, or surveys.” *See In re Stereotaxis, Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005) (citations omitted). Internet evidence of third-party websites and an applicant’s website may be offered as evidence of descriptiveness. *In re Promo Ink*, 78 USPQ2d 1301, 1303 (TTAB 2006). In this case, because the application is intent-to-use, we have no specimens of record or product literature illustrating Applicant’s goods. Therefore, we must look to dictionary definitions and Internet evidence made of record to make conclusions about the likely nature of Applicant’s goods.

The following evidence is of record:

- Dictionary definitions:

“Ticker,” made of record by the Examining Attorney and defined as “a narrow area that shows information across the top or bottom of a television or computer screen.”

October 26, 2016 Office Action at TSDR 4; January 4, 2019 Request for Remand at TSDR 31. Merriam-Webster dictionary, Merriam-webster.com.

“Live,” made of record by the Examining Attorney, which is defined as “Broadcast while actually being performed; not taped, filmed, or recorded: *a live television program.*” April 22, 2018 Office Action at TSDR 2.⁶ January 4, 2019 Request for Remand at TSDR 29. American Heritage Dictionary of the English Language Fifth Edition,⁷ credoreference.com.

“News ticker” which is defined as “a scrolling electronic display of news headlines on a building or along the lower portion of a television or computer screen.” January 9, 2019 Office Action at TSDR 7. Oxford Living Dictionary, oxforddictionary.com.

• Internet evidence from Applicant’s website generally describing its products for live-to-air graphics in the broadcast industry:⁸

ATJ systems develops software and turnkey systems for live-to-air graphics rendering and video servers targeted to the Broadcast industry. ... While our products are used for broadcast graphics in a wide variety of applications including news tickers, weather and election coverage, over the last 15 years we have emerged as a clear leader in live Sports broadcasting. October 26, 2016 Office Action at TSDR 2. ATJ Systems. Atjsystems.com.

⁶ The Examining Attorney also submitted the British English dictionary definition for “live” from the MacMillan dictionary. Because this definition is not American English it is of little or no probative value. October 26, 2016 Office Action at TSDR 3.

⁷ In its response to the first Office Action, Applicant referenced dictionary definitions with hyperlinks for “live” and “ticker.” The Examining Attorney has objected to these definitions as not being properly made of record. We agree. Providing a web address or hyperlink to Internet materials is insufficient to make the associated web pages of record. *In re HSB Solomon Assocs., LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012).

⁸ We acknowledge that the printouts from Applicant’s website do not show use of the term LIVETICKER.

- Internet evidence from Applicant’s website showing Applicant’s Camino computer graphics software interface that can be applied to tickers during live news and sporting events.

Real time graphics overlay can be applied to tickertapes, scoreboards, schedule boards, program junctions and TV show promotions. Graphics overlay may be done via predefined templates, which then may be populated with live data during payout. This makes real-time rendering of data-driven graphics possible in news and sports events. January 4, 2019 Motion to Remand, at TSDR 2-14. <https://ajtsystems.com>.

- Internet evidence of third-party websites using “live ticker,” in connection with computer graphics software and broadcast graphics displays. January 4, 2019 Motion to Remand, at TSDR 15-28. The evidence includes the following excerpts from multiple web sites (emphasis supplied):

Live tickers are traditionally displayed in the form of scrolling text displayed at the bottom of [] programming that can provide the viewers with more information on the live screen or even some complimentary info to keep their attention engaged. Tickers act as an eye-catching visual delivery system that uses the minimum amount of the premium screen’s real estate. These tickers are widely used for sports channels to give game scores, player info as well as any other trivia related to the game. ... The information ranges from live scores, stats, news alerts, or even social media integration displaying the trending tweets. January 4, 2019 Request for Remand at TSDR 16. Rinsoft, www.rinsoft.com.

The VDS Election software suite is a “comprehensive and cost effective set of applications for Election graphics generation.” “The VDS election ticker module provides a **live ticker** in the lower-third format [of the screen] which

displays the status of selected races in a pre-defined sequence.” January 4, 2019 Request for Remand at TSDR 18. Video Design Software, <http://videodesignsoftware.com>.

MSNBC has updated its graphics package and cut the **live ticker**. ... We’re moving the scrolling ticker at the bottom of the screen for a cleaner view... January 4, 2019 Request for Remand at TSDR 19. TKNN, <http://tknn.info>.

The Newtek Blog discusses on screen graphics for watching live judo matches stating that “[a] **live ticker** displaying updates from other matches further bolsters the coverage” and that “on screen graphics...play a crucial role in increasing viewer understanding and enjoyment of the matches they are watching.” January 4, 2019 Request for Remand at TSDR 22. Newtek Blog, www.newtek.com.

The pixel power website discusses NASL.TV’s selection of its Pixel Power Package software for graphics insertion, graphics creation and playout. In connection with e-sports live broadcasting of video game leagues and tournaments “NASL.TV has developed a **live ticker** where it hosts live, interactive chat or Twitter feeds.” January 4, 2019 Request for Remand at TSDR 27. Pixel Power, www.pixelpower.com.

The dictionary definitions and website evidence establish that “live” has a descriptive meaning when used in connection with computer software that displays on-screen graphics or provides a graphic overlay with information in real time during the broadcasting of live events. The dictionary definitions and website evidence also establish that “ticker” has a descriptive meaning when used in connection with computer software that provides graphics or a graphic overlay in connection with a narrow area on a screen that displays information, or on-screen scrolling text displays.

The website evidence also establishes that the combined term “live ticker” has a descriptive meaning in connection with computer graphics software or computer software that provides graphics displays or graphic overlays. “Live ticker” describes an on-screen graphic, generated through the software, that scrolls across the screen, providing viewers with information in real time, i.e., at the time the event is happening. When viewed in the context of Applicant’s computer graphics software, the term LIVETICKER describes a use, function, purpose or feature of the goods, namely software that provides graphics for on-screen tickers and provides information to viewers in real time, during a live broadcast.

Applicant submits that the Examining Attorney considered LIVETICKER in the abstract and “erred by comparing Appellant’s mark to data on Appellant’s website, whose pages do not even include the LIVETICKER mark, rather than comparing Appellant’s LIVETICKER mark to the identification of goods in Appellant’s intent-to-use application.” 4 TTABVUE 10, 12. Applicant submits that “[w]ithout evidence of how Appellant uses or will eventually put its mark to use, the Examiner’s support for his contentions is simply non-existent.” 4 TTABVUE 10.

It appears that Applicant is arguing that because its website does not show use of the LIVETICKER product and there is currently no evidence of how it uses or intends to use its mark, the term is not merely descriptive of its goods. However, in order to prove that an applied-for term is merely descriptive, it is not necessary that there be evidence of descriptive uses from Applicant’s website or evidence of Applicant’s use.

If that were true, no application based on intent-to-use could ever be refused on the basis of mere descriptiveness.

As stated, the Examining Attorney may provide evidence from any competent source. Here, the evidence establishes that “live ticker” has a descriptive meaning in connection with computer software that provides graphics during live broadcast events. Applicant’s computer graphics software is broadly identified to encompass such software for providing on-screen graphics in connection with real time on-screen scrolling displays of information. *See In re Allen Elec. and Equip. Co.*, 458 F.2d 1404, 173 USPQ 689, 690 (CCPA 1972) (“Since the goods are described merely as “antennas” and that term is broad enough to encompass “scanning antennas,” the mark SCANNER as applied to the goods is merely descriptive.”). *Cf. CyberFinancial.Net*, 65 USPQ2d at 1791 (BONDS.NET is generic for, financial services including, inter alia, “taxable and tax exempt debt instruments” because “taxable and tax exempt debt instruments encompass bonds).

Applicant also argues that the Examining Attorney is attempting to “guess or infer” how Applicant will use its mark, and that “at this stage the Examining Attorney is in no position to determine” how Applicant will use its mark. 4 TTABVue 11. However, the Examining Attorney’s position that Applicant’s goods are merely descriptive is not speculative and rests on reasonable assumptions which have a demonstrable basis in fact. The evidence, in summary, is sufficient to establish that a function, feature, purpose or use of computer graphic software is to take real time

data, and provide an on-screen display of that data that scrolls across a television or computer screen.

Applicant also argues that LIVETICKER is suggestive and multi-step reasoning is required to understand what the term means in connection with its goods. As noted above, however, the evidence supports the conclusion that the term immediately conveys significant information about a function, use, purpose or feature of the computer graphics software to a prospective purchaser. Applicant has provided no basis upon which we could conclude that imagination, multi-step reasoning or additional thought is required to understand what the term conveys in connection with the broadly identified goods set forth in this application.

The evidence supports a conclusion that when prospective purchasers encounter LIVETICKER on Applicant's goods, they will immediately know that a function, use, purpose or feature of Applicant's computer graphics software is to provide graphics for a scrolling text display or ticker during a real-time or live broadcast. Therefore, LIVETICKER is merely descriptive of Applicant's goods.

Decision: The refusal to register Applicant's mark LIVETICKER is affirmed.