

This Opinion is Not a
Precedent of the TTAB

Mailed: June 26, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Stager Intellectual Properties, LLC
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Serial No. 87756847
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Frank R. Jakes of Johnson Pope Bokor Ruppel & Burns LLP
for Stager Intellectual Properties, LLC.

Julie Watson, Trademark Examining Attorney, Law Office 109,
Michael Kazazian, Managing Attorney.

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Before Lykos, Shaw and English,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Stager Intellectual Properties, LLC (“Applicant”) seeks to register the mark STAGER in standard characters on the Principal Register for goods ultimately identified as:

“Downloadable theatrical management application featuring software for the collection, editing, organizing, modifying, and sharing of data and information in the fields of theater and social networking; GPS tracking devices for automated electronic check-in and location sharing to monitor and organize schedules; computer software development tools for business and social networking; Computer software to enable uploading, downloading, accessing, posting, displaying, editing,

tagging, blogging, streaming, linking, sharing and otherwise providing electronic media and information via computer and communication networks; Software for sending and receiving electronic messages, graphics, images, audio and audio visual content via global communication networks; Computer search engine software; Computer software for accessing, browsing and searching online databases; Computer software for personal information management, and data synchronization software” in International Class 9.¹

The Trademark Examining Attorney has refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the mark is merely descriptive of Applicant’s identified goods. The appeal is fully briefed.² For the reasons set forth below, we affirm the refusal to register.

In the absence of acquired distinctiveness, Section 2(e)(1) of the Trademark Act prohibits registration of a mark on the Principal Register that, when used in connection with an applicant’s goods, is merely descriptive of them. 15 U.S.C. § 1052(e)(1).³ “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 Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831

¹ Application Serial No. 87756847, filed January 16, 2018, 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.

² Exhibit A submitted with Applicant’s Reply Brief (7 TTABVue 7-8) consists of evidence which is not part of the record and therefore has been given no consideration. *See* Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d).

³ “No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it . . . (e) Consists of a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . .”

(Fed. Cir. 2007)). *See also In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015). By contrast, a mark is suggestive if it “requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods.” *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). Suggestive marks, unlike merely descriptive terms, are registrable on the Principal Register without proof of acquired distinctiveness. *See Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004).

The determination of whether a mark is merely descriptive must be made in relation to the goods for which registration is sought, not in the abstract. *In re Chamber of Commerce*, 102 USPQ2d at 1219; *In re Bayer*, 82 USPQ2d at 1831. This requires consideration of the context in which the mark is used or intended to be used in connection with those goods, and the possible significance that the mark would have to the average purchaser of the goods in the marketplace. *In re Chamber of Commerce*, 102 USPQ2d at 1219; *In re Bayer*, 82 USPQ2d at 1831; *In re Omaha Nat’l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859, 1861 (Fed. Cir. 1987). In other words, the question is not whether someone presented only with the mark could guess the goods listed in the identification. Rather, 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) (quoting *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002)).

Evidence that a term is merely descriptive to the relevant purchasing public “may be obtained from any competent source, such as dictionaries, newspapers, or surveys,” *In re Bayer*, 82 USPQ2d at 1831, as well as “labels, packages, or in advertising material directed to the goods.” *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978). It may also be obtained from websites and publications, and, in the case of a use-based application, an applicant’s own specimen of use and any explanatory text included therein. *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017); *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1565 (Fed. Cir. 2001). In this particular case, the involved application has been filed under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), meaning that Applicant has yet to claim use in the United States. Nonetheless, the Examining Attorney is not precluded from introducing excerpts from Applicant’s own materials, website, or news articles as evidence of public perception of the mark. *In re Promo Ink*, 78 USPQ2d 1301, 1303 (TTAB 2006) (examining attorney may introduce evidence that applicant’s own literature supports descriptiveness of term despite the fact that application based on intent-to-use under Trademark Act Section 1(b); fact that applicant has filed an intent-to-use application does not limit the examining attorney’s evidentiary options or shield an applicant from producing evidence that it may have in its possession).

A term that identifies a group to whom the applicant directs its goods or services is merely descriptive. *See In re Planalytics, Inc.*, 70 USPQ2d 1453 (TTAB 2004) (GASBUYER merely descriptive of risk management services in the field of pricing

and purchasing natural gas); *Hunter Publ'g Co. v. Caulfield Publ'g Ltd.*, 1 USPQ2d 1996 (TTAB 1986) (SYSTEMS USER found merely descriptive of a trade journal directed toward users of large data processing systems; evidence sufficient to establish distinctiveness under Section 2(f)); *In re Camel Mfg. Co., Inc.*, 222 USPQ 1031 (TTAB 1984) (MOUNTAIN CAMPER held merely descriptive of retail mail-order services in the field of outdoor equipment and apparel). Consistent with this line of reasoning, the Examining Attorney takes the position that Applicant's computer software products are designed and marketed for "stagers" working in the field of theater production. In support of the refusal, the Examining Attorney made of record the following definition of "stager" from Vocabulary.com and TheFreeDictionary.com as "someone who supervises the physical aspects in the production of a show and who is in charge of the stage when the show is being performed."⁴ The AMERICAN HERITAGE DICTIONARY (www.ahdictionary.com) defines "stager" more generally as "one who stages: a stager of pageants; a stager of protests."⁵ In addition, the Examining Attorney points to Applicant's response to the information request issued under Trademark Rule 2.61(b), 37 C.F.R. § 2.61(b):⁶

⁴ April 26, 2018 Office Action pp. 5 and 10. Citations to the prosecution history in the USPTO's TSDR database are to the downloadable .pdf version. *See, e.g., In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 n.4 (TTAB 2018). We have not considered any dictionary definitions obtained from foreign sources i.e. "British" English.

⁵ June 5, 2019 Office Action, p. 6.

⁶ According to the Rule, "[t]he Office may require the applicant to furnish such information, exhibits, affidavits or declarations, and such additional specimens as may be reasonably necessary to the proper examination of the application." For a further information regarding Trademark Rule 2.61(b), see Section 814 of the TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") (Oct. 2019).

Examining Attorney's Information Request:

1. Will the applicant's goods be designed for use by theater and/or stage managers? If the answer is yes, please state which goods will be designed for use by theater and/or stage managers.
2. Will the intended user of applicant's goods be [sic] theater and/or stage managers? If the answer is yes, please state which goods will be intended for use by theater and/or stage managers.
3. Will the applicant's goods be marketed to theater and/or stage managers? If the answer is yes, please state which goods will be marketed to theater and/or stage managers.
4. Is the word "stager" a term of art in the theatrical management field or industry?⁷

Applicant's Response:

1. Yes. Stager's technology is intended primarily for producers, theatre companies, designers, university and college theatre departments, theatre technicians, and actors. Thus, theater and/or stage managers are among the intended users. The goods are a single downloadable software application; therefore the app will be used by the described groups of users which would include theater and/or stage managers.
2. The answer above applies.
3. The answer to Question 1 applies.
4. No. The term "stager" is not a term of art in the theatrical field or industry.⁸

⁷ November 14, 2018 Office Action.

⁸ May 14, 2019 Response to Office Action, p. 5.

Applicant also provided with its information request response a detailed description of its identified goods which as it noted are still in the production stage.⁹ Some relevant excerpts include:

Stager is a multipurpose application and online platform that eases communication and logistics when mounting theatrical productions and or any other live performance. Stager is designed to make it simple for large teams to work together and mount productions.

Stager includes the following features:

An audition guide that allows directors and producers to quickly and easily set up auditions/interviews...

A budget guide that allows producers to calculate the budget of the project and release funds for various members of the project.

Based on the foregoing evidence, we agree with the Examining Attorney's determination that prospective purchasers will immediately perceive Applicant's mark STAGER as merely describing the intended users of its computer software. Taken together, this evidence shows that Applicant's mark STAGER immediately conveys the target market for Applicant's identified goods.

Applicant counters that the definition of "stager" from Vocabulary.com and TheFreeDictionary.com¹⁰ is obscure and that the more commonly recognized meaning of the term pertains to the real estate industry to identify a person who prepares a house for sale. In support thereof, Applicant submitted a WIKIPEDIA entry for "stager"

⁹ *Id.* at Attachment 1, pp. 9-10.

¹⁰ Applicant's argument that TheFreeDictionary.com is less reliable than other online dictionaries such as Merriam-Webster.com is misplaced. *See, e.g., In re Thomas Nelson*, 97 USPQ 1712 (TTAB 2011) (affirming mere descriptiveness refusal under Section 2(e)(1) based on entries from AcronymFinder.com and TheFreeDictionary.com for "NKJV").

as “someone who uses style to improve the appeal of real estate for sale” and Google® search results for the term showing truncated advertisements for real estate stagers in the Tampa Bay/St. Petersburg Florida metropolitan area.¹¹ Descriptiveness is considered in relation to the relevant goods. *DuoProSS Meditech*, 103 USPQ2d at 1757. “That a term may have other meanings in different contexts is not controlling.” *Robinson v. Hot Grabba Leaf, LLC*, 2019 USPQ2d 149089, at *5 (TTAB 2019) (citing *In re Canine Caviar Pet Foods, Inc.*, 126 USPQ2d 1590, 1598 (TTAB 2018)). “It is well settled that so long as any one of the meanings of a term is descriptive, the term may be considered to be merely descriptive.” *In re Mueller Sports Med., Inc.*, 126 USPQ2d 1584, 1590 (TTAB 2018) (quoting *In re Chopper Indus.*, 222 USPQ 258, 259 (TTAB 1984)). Thus the fact that “stager” has a different meaning in the real estate industry does not alter our determination.

In addition, Applicant urges the Board to draw a negative inference based on the lack of evidence in more specialized glossaries and reference materials in the theater industry. In particular, Applicant points to the following “negative” evidence:¹²

- The term “stager” is absent from glossaries of technical theatre terms published by Theatrecrafts.com.

¹¹ October 26, 2018 Response to Office Action, pp. 19-28. The Examining Attorney objects to this evidence obtained from Google and requests that the Board disregard the search results. *See In re Bayer AG*, 82 USPQ2d at 1833; *In re Star Belly Stitcher, Inc.*, 107 USPQ2d 2059, 2062 n.3 (TTAB 2013). While it is true that search results summary from an Internet search engine have limited probative value, we need not strike this evidence from the record. Rather, the Board has considered the evidence for the limited probative weight it has given that a list does not show the context in which the term or phrase is used on the listed web pages and may not include sufficient surrounding text to show the context within which the term or phrase is used.

¹² *See* May 14, 2019 Response to Office Action, pp. 6-7.

<http://www.theatre crafts.com/pages/home/topics/beginners/glossary/>

<http://www.theatre crafts.com/pages/home/glossary-of-technical-theatre-terms/>

- The American Association of Community Theatre does not include the term “stager” in its 1000+ definitions of theatre terms.

<https://aact.org/terms>

- *Backstage* Magazine – a premier publication related to theatre – makes no reference to the term “stager” although it describes the various stage manager related positions.

<https://www.backstage.com/magazine/article/theater-terms-every-actor-know-4975/>

- WIKIPEDIA: WikiProject Stagecraft/Terminology/List of theatre terms omits any reference to the term “stager.”

https://en.wikipedia.org/wiki/Wikipedia:WikiProject_Stagecraft/Terminology/List_of_theatre_terms#S

- The Glossary of theatrical terms at Grandstage.com does not use the term “stager.”

<http://grandstage.com/images/pdf/Glossary.pdf>

- The Collins Dictionary List of Theatre Terms does not include the term “stager.”

<https://www.collinsdictionary.com/word-lists/theatre-theatre-terms>

The fact that a term is not found in a dictionary, much less that it is found only in some dictionaries, is not controlling on the question of registrability if the Examining Attorney can show that the term has a well-understood and recognized meaning. *See In re Mine Safety Appliances Co.*, 66 USPQ2d 1694, 1697 (TTAB 2002); *In re Orleans Wines, Ltd.*, 196 USPQ 516 (TTAB 1977) (BREADSPRED held merely descriptive of

jellies and jams); *see also In re Gen'l Permanent Wave Corp.*, 118 F.2d 1020, 49 USPQ 184, 186 (CCPA 1941) (“Because appellant has combined two common English words, which in combination are not found in the dictionaries, is wholly immaterial.”) (citation omitted). The two dictionary definitions which define the term “stager” as someone who assists in stage management or more generally as one who stages are sufficient to support the refusal.

Applicant also notes that the record is devoid of evidence of third-party use of the term “stager” in the vernacular by competitors in the theater industry. The Examining Attorney is not required to prove that others have used the mark at issue or that they need to use it. The correct test is whether the mark conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods. *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1514 (TTAB 2016). *See also In re Walker Mfg. Co.*, 359 F.2d 474, 149 USPQ 528, 530 (CCPA 1966) (“The question . . . is not whether the Board or others may or would utilize ‘CHAMBERED PIPE’ to describe applicant’s goods, but whether this designation does, in fact, describe such goods.”). Even if Applicant were the first and only entity in this industry to use “stager” as a potential source indicator this would not obviate the descriptive nature of the proposed mark. *See KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 122 (2004) (trademark law does not countenance someone obtaining “a complete monopoly on use of a descriptive term simply by grabbing it first”) (citation omitted); *Clairol, Inc. v. Roux Distrib. Co.*, 280 F.2d 863, 126 USPQ 397, 398 (CCPA 1960) (“Even novel ways of referring to a product may nonetheless

be merely descriptive.”); *In re Bailey Meter Co.*, 102 F. 2d 843, 41 USPQ 275, 276 (CCPA 1939) (“The fact that appellant may have been the first and only one to adopt and use the mark sought to be registered does not prove that the mark is not descriptive . . .”). Vocabulary in the computer science field evolves rapidly. *Cf. In re Styleclick.com Inc.*, 57 USPQ2d 1445, 1448 (TTAB 2000) (noting “a year or two is an eternity in ‘Internet time,’ given the rapid advancement of the Internet into every facet of daily life”). The logic of Applicant’s argument fails because the record shows that “stager” has a specific meaning when considered in relation to the goods by identifying the intended users. Competitors in this field should be able to use this descriptive term when advertising to the public their own similar goods. As explained in the seminal case of *In re Abcor Dev. Corp.*, 200 USPQ at 217:

The major reasons for not protecting such marks are: (1) to prevent the owner of a mark from inhibiting competition in the sale of particular goods; and (2) to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing their own products.

Applicant also counters that its proposed mark is suggestive and requires the consumer to engage in multistep reasoning. Given the function of the software, we are skeptical that prospective consumers would attribute any other meanings. Again, the question of whether a proposed mark is merely descriptive is not determined by asking whether one can guess, from the mark itself, what the goods are, but rather by asking, when the mark is seen on or in connection with the goods, whether it immediately conveys information about their nature. *In re MBNA Am. Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003); *In re Tower Tech*, 64 USPQ2d

at 1316-17; *In re Patent & Trademark Serv. Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998). No imagination or thought is required by prospective consumers to discern the nature of Applicant's goods. To the contrary, to purchasers encountering Applicant's Class 9 software, Applicant's proposed mark immediately conveys, without conjecture or speculation, the intended users of Applicant's goods.

In sum, we find Applicant's standard character mark STAGER to be merely descriptive of the identified goods in International Class 9 and therefore ineligible for registration on the Principal Register in the absence of a showing of acquired distinctiveness.

Decision: The refusal to register is affirmed.