

**This Opinion is Not a
Precedent of the TTAB**

Mailed: May 23, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Theia Group, Incorporated
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Serial No. 87896620
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Frank J. Bonini, Jr. of Bonini IP Law, LLC,
for Theia Group, Incorporated

Josette Beverly, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

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Before Kuhlke, Lynch, and Thurmon,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

I. Background

Theia Group, Incorporated (“Applicant”) seeks to register on the Principal Register the mark DECISION-GRADE in standard characters for the following services in International Class 42:¹

Spectral analysis of data via satellites utilizing visible and
non-visible electromagnetic wavelengths for use in

¹ Application Serial No. 87896620 was filed April 27, 2018, based on an alleged bona fide intent to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

monitoring and identifying and measuring activity, objects and/or living beings, taking place on, above and/or below the earth's surface, especially where the quality of the analytics are sufficient to replace human decision making for use in the commercial, agricultural, geologic, energy and industrial fields.

The Examining Attorney refused registration of Applicant's mark under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1), as merely descriptive of the recited services. Applicant argued that the mark is suggestive. After the Examining Attorney made the descriptiveness refusal final, Applicant requested reconsideration and appealed. The Examining Attorney denied reconsideration. The appeal then proceeded, and has been briefed.

II. Mere Descriptiveness

Section 2(e)(1) of the Trademark Act precludes registration of “a mark which, (1) when used on or in connection with the [services] of the applicant is merely descriptive . . . of them.” 15 U.S.C. § 1052(e)(1). “A mark is merely descriptive if it immediately conveys information concerning a feature, quality, or characteristic of the goods or services for which registration is sought.” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1373 (Fed. Cir. 2018) (quoting *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017)). “The major reasons for not protecting such [merely descriptive] marks are: (1) to prevent the owner of a mark from inhibiting competition in the sale of particular goods or services; 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 [or services].” *In re*

Stereotaxis Inc., 429 F.3d 1039, 77 USPQ2d 1087, 1090 (Fed. Cir. 2005) (quoting *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217 (CCPA 1978)).

Descriptiveness must be assessed “in relation to the particular [services] for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the [services] because of the manner of its use or intended use.” *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) (citing *Abcor Dev.*, 200 USPQ at 218). The descriptiveness analysis concentrates on the identification of services set forth in the application. See *In re Cordua Rests., Inc.* 823 F.3d 594, 118 USPQ2d 1632, 1636 (Fed. Cir. 2016) (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)). Evidence that a term is merely descriptive to the relevant purchasing public “may be obtained from any competent source,” *Bayer AG*, 82 USPQ2d at 1831, and “[t]hese sources may include Websites.” *N.C. Lottery*, 123 USPQ2d at 1710 (citation omitted).

The evidentiary record amply supports the descriptive significance of DECISION-GRADE in the data analysis field. For example, the following third-parties use the term descriptively or generically (emphasis added):

The abstract of an article from the Homeland Security Digital Library, previously published by the U.S. Army Command and General Staff College, is titled “**Decision Grade: Readiness, Mission Impacts, and Classified Data in the Defense Budgeting Process**” and discusses classified information in relation to “readiness to provide **decision-grade analysis** to Congress.”²

² TSDR September 4, 2018 Office Action at 4 (hsdl.org).

The website of Govini, which “uses **data science** ... and put[s] **decision-grade** information in the hands of National Security leadership” also states: “The ability to develop and prioritize National Security investments is dependent on leadership’s access to **decision-grade data**.”³

A profile in CIO Review titled “North Analytics: **Big Data for Decision-Grade Analytics**” discusses data analysis for business-critical decisions.⁴

The Delex Systems, Inc. webpage states: “Our unclassified maritime information products filter and evaluate relevant, timely and **decision-grade information** to support industry and government decision makers.”⁵

The SynFiny Advisors website promotes: “Our advisors help you transform these activities from mere tracking and reporting to **decision grade analytics** that help you drive growth and profitability.”⁶

The Trustable Credit website, under the heading “Decision-grade data,” states: “The WWF and World Bank as well as UNEP have called for **decision-grade data** about nature....**Decision-grade data** must be easily accessible online in different formats.... **Decision-grade data** must facilitate comparison through interoperable formats and consistent methods....”⁷

The Aetion website announces a partnership with HealthVerity for **data** access and analytics, “thus expanding the potential of real-world evidence for **decision-grade** analysis.”⁸

The VectorCenter website states: “Our AI-powered tools measure the delta between sentiment and trusted data to

³ *Id.* at 6-7 (govini.com).

⁴ *Id.* at 10 (bigdata.cioreview.com).

⁵ *Id.* at 12 (delex.com).

⁶ *Id.* at 14-15 (synfiny.com).

⁷ November 30, 2022 Office Action at TSDR 2-3 (trustablecredit.com).

⁸ *Id.* at 4 (aetion.com).

deliver real-time, **decision-grade** intelligence and foresight in actionable context for businesses, governments, and institutions.”⁹

The ispor.org website promotes a conference named “Developing **Decision-Grade** Real-World Evidence,” described in relevant part as guiding participants “through a hands-on analysis of real-world data (RWD) to develop decision-grade real world evidence (RWE) that could be used to support an indication expansion.”¹⁰

The Figure Eight Federal website includes an article titled “**Decision-Grade** AI: The Definitive Guide to Training Data and Deploying AI Programs in the Federal Space.”¹¹

Applicant criticizes the Examining Attorney’s evidence as “a mere handful of uses” of the term at issue, which Applicant characterizes as “very thin, sporadic, and *de minimus*.”¹² However, we disagree with this criticism. The evidence includes numerous uses, sufficient to indicate that consumers would recognize and understand “decision-grade” as describing high quality, reliable data and data analysis. This term appears to be relatively common in connection with data analysis in general. Just because Applicant’s services involve a particular type of data analysis, involve specific equipment, or are for purposes of replacing human decision-making, these aspects do not obviate the descriptive significance of DECISION-GRADE in relation to data and data analytics.

Applicant also argues that its “services involve spectral analysis of data via satellites, which involves monitoring and identifying and measuring activity,” such

⁹ *Id.* at 7-8 (vector-center.com).

¹⁰ *Id.* at 10-11 (ispor.org).

¹¹ *Id.* at 13 (f8federal.com).

¹² 6 TTABVUE 10 (Applicant’s Brief).

that the mark is suggestive rather than descriptive because the refusal “attempts to read into Applicant’s listed services something that is not even there ... and how the services will even be used – namely to make decisions.”¹³ According to Applicant, the suggestiveness is “that the Applicant’s *services* are of a high level,” but “[t]here are no *per se* DECISION-GRADE services, and that has been overlooked in the refusal.”¹⁴ Applicant asserts that the incorporation into Applicant’s services of “some allegedly ‘decision-grade’ or fact-based information upon which decisions are being made” would not suffice to render its services merely descriptive.¹⁵ Next, Applicant argues that even if, for purposes of argument, it conceded that “decision grade analysis” had a recognized meaning (which Applicant contests), descriptiveness still would be avoided because of the aspect of its services as spectral analysis that can replace human decision-making.¹⁶ Applicant insists that the consumer would be left wondering “[w]hat is DECISION-GRADE spectral analysis of data via satellites services?”¹⁷

We find Applicant’s arguments unavailing, as DECISION-GRADE describes both high quality, reliable data, and high quality, reliable data analytics services. Applicant’s recited services involve the use of data that presumably includes decision-

¹³ 6 TTABVUE 8 (Applicant’s Brief).

¹⁴ *Id.* at 9.

¹⁵ *Id.*

¹⁶ *Id.* at 12.

¹⁷ *Id.* at 10.

grade data, and Applicant's data analytics services involve decision-grade analysis, even where the data-based "decisions" may not be by humans.

Applicant also contends that its proposed mark is suggestive because the component word GRADE has two definitions that supposedly could be relevant in this context. Specifically, Applicant posits that grade in this context can refer to both "a level of rank on a scale" and as "what is taking place on the earth surface, below it or above it," given the recitation of services' reference to objects and/or living beings so placed.¹⁸ Applicant therefore contends that its proposed mark "presents an inventive double entendre" that renders it "more than simply descriptive."¹⁹ However, we agree with the Examining Attorney that the record reflects that "decision-grade" as a whole is a term of art in Applicant's industry, and consumers of Applicant's services would not look to alternative meanings of "grade" standing alone.

Moreover, even if consumers did consider GRADE by itself, we remain unconvinced that consumers in this context would perceive the secondary, earth-related definition of GRADE proffered by Applicant, which does not readily relate to the identified services. Given the dictionary entry offered by Applicant,²⁰ of which we take judicial notice, with Applicant pointing to "a datum or reference level especially: ground level," consumers would not be likely to associate this meaning with Applicant's services merely because they involve "activity, objects and/or living

¹⁸ 6 TTABVUE 13 (Applicant's Brief).

¹⁹ *Id.* at 14.

²⁰ *Id.* at 15 (merriam-webster.com).

beings, taking place on, above and/or below the earth's surface." Ultimately, the question is whether someone who knows the services will understand DECISION-GRADE to immediately convey information about them, and we find that they would. *Real Foods*, 128 USPQ2d at 1374; *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (we evaluate whether someone who knows what the goods or services are will understand the mark to convey information about them); *In re Fallon*, 2020 USPQ2d 11249, at *7 (TTAB 2020).

The cases cited by Applicant do not persuade us otherwise. Mostly, they are inapposite, involving different proposed marks and different records. For example, although Applicant correctly cites cases noting that the line between suggestiveness and descriptiveness can be thin, and that doubts are resolved in an applicant's favor, we do not consider the refusal of DECISION-GRADE close to the line, or subject to doubt. And while the Court in *In re Reynolds Metals Co.*, 480 F.2d 902, 178 USPQ 296 (CCPA 1973) stated that a registrable suggestive mark still could convey information, the descriptiveness refusal in that case apparently was not supported by any third-party use of the same or similar wording, which sharply contrasts with the record in this case, replete with examples of third-party descriptive use.

Finally, contrary to Applicant’s argument, we are unswayed by the existence of a



cancelled registration for the mark, _____, that included the wording “DECISION GRADE CHANNEL VISIBILITY,” without a disclaimer of it, for services in Class 35.²¹ First, a third-party cancelled registration is evidence only of the fact that it issued, and is not probative. *See Kemi Organics, LLC v. Gupta*, 126 USPQ2d 1601, 1606 (TTAB 2018). Second, given the differences in the registration’s Class 35 services and Applicant’s Class 41 services, as well as the differences in the marks and timeframes of their examination, we would not consider the third-party registration comparable to the subject application regardless. We must decide each case on its own record and merits. *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“The Board must decide each case on its own merit Even if some prior registrations had some characteristics similar to Nett Designs’ application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”).

Consumers encountering DECISION-GRADE in connection with Applicant’s services would immediately recognize the term as describing features of the services.

²¹ March 4, 2019 Response to Office Action at TSDR 14.

Decision: We affirm the refusal to register Applicant's proposed mark on the ground that it is merely descriptive under Section 2(e)(1) of the Trademark Act.