

This Opinion is Not a
Precedent of the TTAB

Mailed: April 17, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Cytoveris Inc.

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Serial No. 88226502

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Richard D. Getz of Getz Balich LLC, for Cytoveris Inc.

Josh Galante, Trademark Examining Attorney, Law Office 127,
Mark Pilaro, Managing Attorney.

—
Before Wolfson, Coggins, and Dunn,
Administrative Trademark Judges.

Opinion by Dunn, Administrative Trademark Judge:

Cytoveris Inc. (“Applicant”) seeks registration on the Principal Register of the mark TUMORMAP (in standard characters) for “medical apparatus and instrument for diagnostic use, namely, apparatus for medical diagnostic testing in the fields of cancer or other tissue-based diagnostic testing, cytology and cell-based testing; probes for medical purposes,” in International Class 10.¹

¹ Application Serial No. 88226502 filed December 12, 2018 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce.

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that Applicant's mark TUMORMAP is merely descriptive of a feature or characteristic of Applicant's goods.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

I. Refusal as Merely Descriptive of the Goods

Section 2(e)(1) of the Trademark Act prohibits registration on the Principal Register of "a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . . of them." 15 U.S.C. § 1052(e)(1). A term is "merely descriptive" within the meaning of Section 2(e)(1) 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 (Fed. Cir. 2007)). "Where a mark consists of multiple words, the mere combination of descriptive words does not necessarily create a non-descriptive word or phrase." *In re Omniome, Inc.*, 2020 USPQ2d 3222, at *4 (TTAB 2019) (affirming descriptiveness refusal to register SEQUENCING BY BINDING for reagents for analysis of biological analytes, research laboratory analyzers for analysis of biological analytes, and devices for analysis of biological analytes, and for services involving analysis of biological analytes). "A mark comprising a combination of

merely descriptive components is registrable only if the combination of terms creates a unitary mark with a non-descriptive meaning, or if the composite has a bizarre or incongruous meaning as applied to the goods or services.” *Id.* See also *In re Carlson*, 91 USPQ2d 1198, 1200 (TTAB 2009) (URBANHOUSING merely descriptive of real estate brokerage, real estate consultation and real estate listing services); *In re A La Vieille Russie Inc.*, 60 USPQ2d 1895, 1897 n. 2 (TTAB 2001) (“[T]he compound term RUSSIANART is as merely descriptive as its constituent words, ‘Russian Art.’”); *In re Gagliardi Bros., Inc.*, 218 USPQ 181 (TTAB 1983) (telescoped term BEEFLAKES merely descriptive of thinly sliced beef).

Descriptiveness must be assessed “in relation to the particular goods 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 goods because of the manner of its use or intended use.” *In re Bayer AG*, 82 USPQ2d at 1831. We find that the average purchasers of Applicant’s goods are health care providers and procurement employees of medical laboratories.

Evidence that a term is merely descriptive to the relevant purchasing public may be obtained from any competent source. *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1564, 1566 (Fed. Cir. 2001). Dictionaries, newspapers, or surveys may provide evidence of mere descriptiveness. *In re Chamber of Commerce of the U.S.*, 102 USPQ2d at 1300; *In re Bayer*, 82 USPQ2d at 1831. In addition, sources may include websites, publications, and use “in labels, packages, or in advertising material

directed to the goods.” *In re N.C. Lottery*, 123 USPQ2d at 1710; *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978).

II. Analysis

In support of the refusal, the Examining Attorney contends that, as used in Applicant’s proposed mark and as viewed in the context of Applicant’s medical device industry, the term TUMORMAP merely describes a device which identifies “different types of tissues that may or may not have cancerous tumor cells, including the relative location of the healthy or unhealthy cells in tumors in what is called a map or provided via mapping.”² The record shows that TUMOR is defined as a noun, “the swelling of a part of the body, generally without inflammation, caused by an abnormal growth of tissue, whether benign or malignant” and MAP is defined as a noun, “a diagram or collection of data showing the spatial arrangement or distribution of something over an area.”³ The record also shows that the term “map” has specific meaning for medical diagnoses (**emphasis added**):

Genomic analysis is a relatively new way to look for unique genetic mutations in cancer tumors. Genomic analysis means researchers **map** out (called sequencing) the genome of a cancer tumor to look for mutations that may allow a cancer to be treated with a medicine that specifically targets that mutation - a targeted therapy medicine.⁴

² 8 TTABVUE 3.

³ March 15, 2019 Office Action TSDR 5-6, OxfordDictionaries.com, North American English.

⁴ March 15, 2019 Office Action TSDR 11, excerpt from Breastcancer.org. We agree with Applicant’s point that the term MAP also has non-descriptive meanings. 6 TTABVUE 5. However, descriptiveness must be determined in relation to the goods for which registration is sought. Therefore, the fact that a term may have a different meaning(s) in a different context is not controlling. *See In re RiseSmart Inc.*, 104 USPQ2d 1931, 1933 (TTAB 2012).

In addition, the Examining Attorney placed in the record excerpts from different online articles discussing the mapping of tumors, or the creation of a tumor map, in connection with treatment of certain cancers (**emphasis added**):

Mayo Clinic

Image-based **Mapping** of Brain **Tumors**

The purpose of this study is to combine MRI images with histologic and genetic analysis of cancer (from blood and tissue samples) to improve the overall accuracy of diagnosis and effectiveness of cancer treatment.⁵

Cancergrandchallenges.org

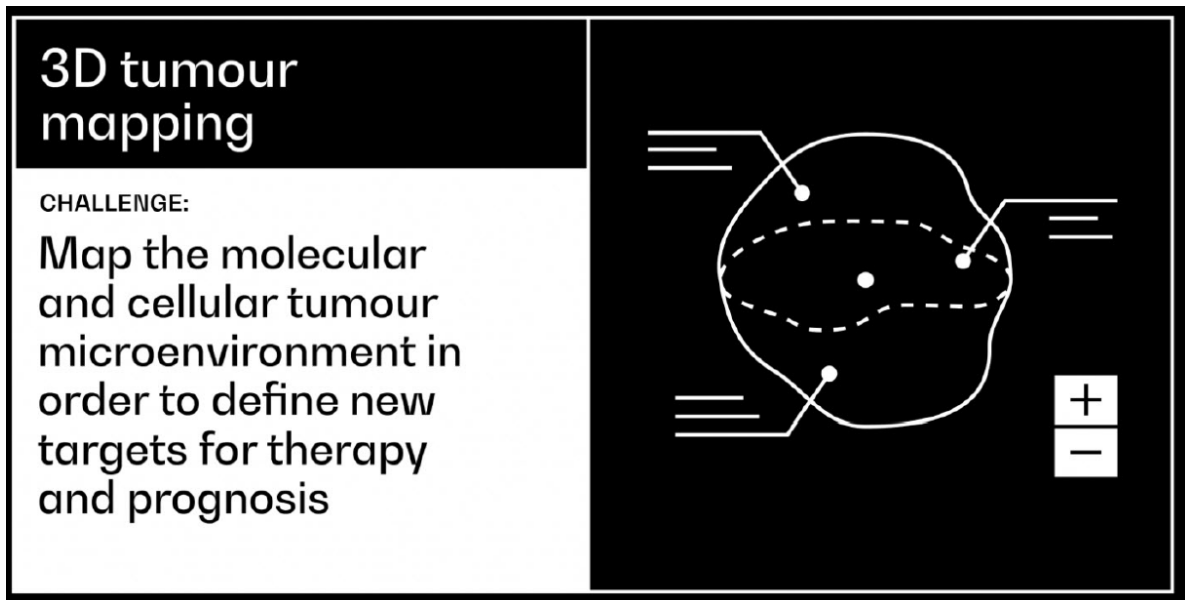


Figure 1 3D TUMOUR MAPPING GRAPHIC

A **tumour** is a complex and organized tissue whose behaviour reflects the interaction between heterogeneous **tumour** cells, immune cells, **tumour** cell clones arising from stem/progenitor cells, and the many other components of the '**tumour** microenvironment'. ... Technologies such as *in situ* and single-cell sequencing and high-resolution imaging can now reveal the 3D cellular and molecular details of the **tumour** as a real organ, whether in primary **tumours** or metastases. What's missing is a detailed **map** at a single cell level of the mutational and structural heterogeneity in DNA, patterns of conventional and nonconventional RNA transcription and protein expression,

⁵ June 6, 2022 Office Action TSDR 8.

and the biochemical signature of all the cells and cell types in a **tumour**, which simultaneously captures the complexity of the intra-**tumour** architecture.⁶

Peltarion.com

The illustration demonstrates the four modalities of data used in the input data; Flair, T1, T1C and T2, as well as the target data of the **tumor map**.

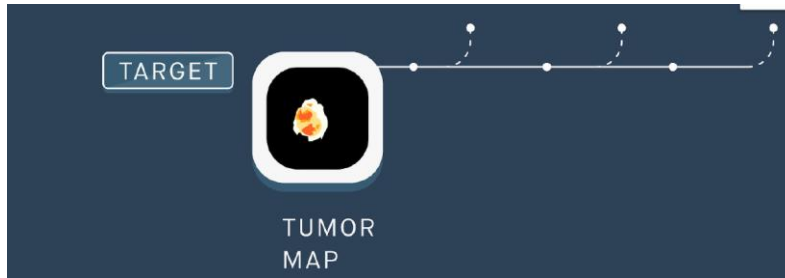


Figure 2 Tumor Map illustration⁷

Premier Health

Brain **Mapping** Charts Successful Course for **Tumor** Treatment

...

Today, brain **mapping** tools can tell us just how much of the **tumor** can be resected without damaging those critical cognitive areas.⁸

Xconomy.com

Late Friday, the CMS said that, going forward, it will start to reimburse for tests that use DNA sequencing technology to **map** the **tumors** of patients with advanced cancers once approved by the FDA.⁹

DermBoston.com

Mohs is scheduled with the understanding that the patient may be spending the entire day in the office depending on the number of levels necessary to clear the **tumor**. ... The procedure uses frozen sections of skin that are then stained with special dyes. The dyed frozen pieces of skin are examined under the

⁶ June 6, 2022 Office Action TSDR 4-5. While this evidence uses the British variant “tumour,” the source indicates that it is directed to an international audience, presumably including relevant consumers in the United States, and presents monetary references in both British pounds and U.S. dollars. We find it probative. *In re Bayer AG*, 82 USPQ2d at 1835 (“Information originating on foreign websites or in foreign news publications that are accessible to the United States public may be relevant to discern United States consumer impression of a proposed mark.”); *In re Well Living Lab Inc.*, 122 USPQ2d 1777, 1781 n.10 (TTAB 2017) (discussing the probative value of a foreign website in any given case).

⁷ March 15, 2019 Office Action TSDR 8.

⁸ June 6, 2022 Office Action TSDR 9.

⁹ March 15, 2019 Office Action TSDR 12.

microscope and a **tumor map** showing the sites of any residual cancer cells is drawn by the Mohs surgeon. The process permits an examination of the entire **tumor's** margins simultaneously while the patient is waiting in the office.¹⁰

Lifeboat.com

Currently there are animations for **tumor** that allow virtual flew throughs. However, they are mock-up. The real models will include data on the expression of thousands of genes and dozens of proteins in each cell of a **tumor**. The hope is that this spatial and functional detail could reveal more about the factors that influence a **tumor's** response to treatment.

The project is just one of a string that aims to build a new generation of cell atlases: **maps** of organs or **tumors** that describe location and make-up of each cell in painstaking detail.

Cancer Research UK awarded another team up to **116** million to make a similar **tumor map** that will focus on metabolites and proteins. Later this year, the US National Institute of Mental Health will announce the winners of grants to **map** mouse brains in extraordinary molecular detail. And on 23-24 February, researchers will gather at Stanford University in California to continue planning the Human Cell Atlas, an as-yet-unfunded effort to **map** every cell in the human body.¹¹

aacrjournals.org

Determination of **Tumor** Margins with Surgical Specimen **Mapping** Using Near-Infrared Fluorescence

...

Previous research on another anti-EGFR antibody, cetuximab-IRDye800CW, demonstrated promising results, and, due to the higher binding affinity and improved safety profile of panitumumab, we chose panitumumab-IRDye800CW to evaluate a new, innovative method of utilizing fluorescence for tumor discrimination and **tumor-mapping** of surgical specimens.

...

Surgical Specimen **Tumor Mapping**

...

Mapping Tumor Depth Around the margins of the Primary Specimen

...

Tumor mapping ex vivo

Tumor mapping of the surgical specimen was performed ex vivo with a closed-field NIR imaging system, the Pearl Impulse (LI-COR Biosciences). ... Although the first in-human study was designed not to interfere with standard

¹⁰ March 15, 2019 Office Action TSDR 7.

¹¹ March 15, 2019 Office Action TSDR 9.

of clinical care, several observations indicated the clinical benefit of ex vivo tumor fluorescence **tumor mapping**.¹²

Futuremedicine.com

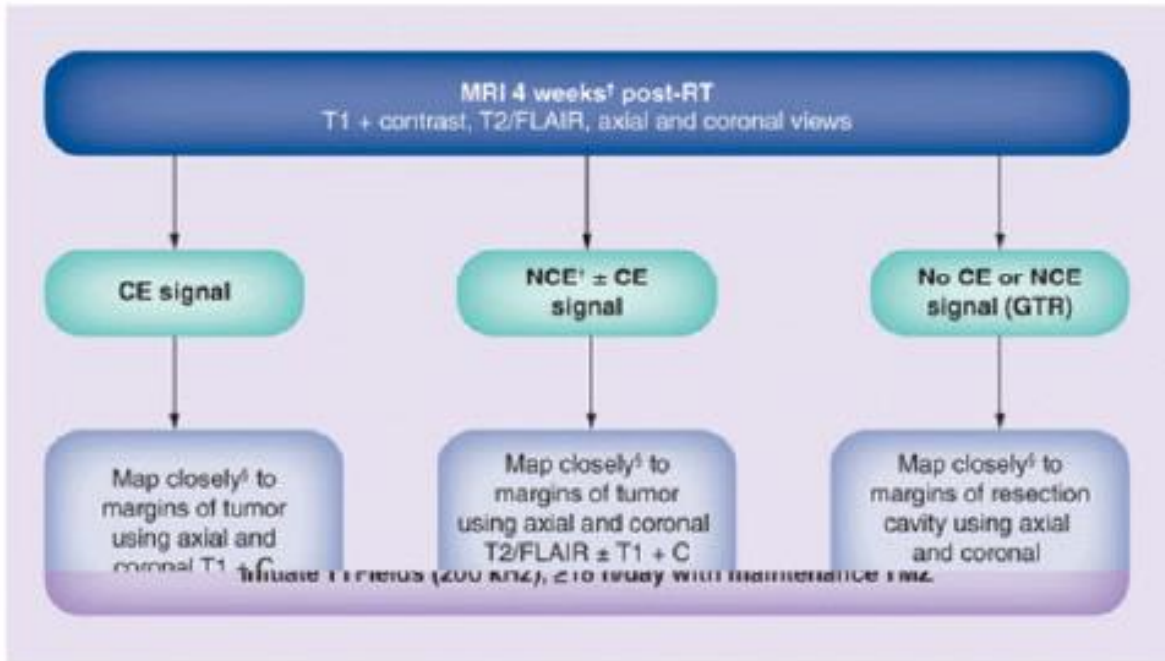


Figure 3 Tumor treating fields treatment planning algorithm for newly diagnosed glioblastoma

In instances where a newly diagnosed patient has exclusively NCE signal, **mapping** should be performed using axial and coronal T2/FLAIR images, closely approximating to the margins of the **tumor**.

...

Treatment should be planned **mapping** closely to the boundaries of active **tumor** or to the margins of a resection cavity visualized in axial and coronal planes using T1 postcontrast or T2/fluid-attenuated inversion recovery sequences as appropriate.

...

Conventional treatment **mapping** using the FDA-approved NovoTAL software is performed by planning treatment to the extent of contrast-enhancing disease most indicative of active **tumor** (methods described previously).

...

As mentioned previously, field intensity will be maximized in the GTV and PBZ, when the field is **mapped** as closely as possible to the margin of active **tumor**, so care should be taken not to overestimate the extent of active residual **tumor**.

¹² June 29, 2021 Office Action TSDR 45-46, 51, 55

...

In instances where there has been a dramatic reduction in the extent of contrast enhancement (>50% reduction) in the absence of antiangiogenic therapy, it is also feasible for the treating physician to re-map the **tumor** based on the latest imaging, to ensure that the field is focused to the reduced area of contrast enhancement.¹³

JAMA Dermatology

Tumor Mapping in 2 Large Multigenerational Families With CYLD Mutations

...

Tumor mapping done in the clinic correlated well with the template data on the torso and face. Detailed location on the scalp was accurate when there were fewer than approximately 10 **tumors**; accurate resolution was not possible when confluent **tumors** were present.

...

The detailed **tumor** distribution **maps** comprising a total of 14 female and 12 male patients from both families were combined to produce composite **maps** (Figure 2) The **tumors** extended beyond the head and neck, with the trunk being involved in 18 patients (69%). ... In addition, although not depicted on the **tumor maps**, patients with advanced scalp tumors (family A VI-1; family B IV-1, IV-2, and IV-3) showed a higher density of **tumors** over areas that are pre-disposed to androgenic alopecia (Figure 3D).¹⁴

Applicant points out that the “application does not recite that the present mark is to be used with TUMORS or MAPS;” that TUMORMAP will not be used “with an apparatus that identifies ‘tumors;” and that its goods “provide information regarding the identity of different types of excised tissue; e.g., target tissue (which may be suspect) and non-target tissue” and “[t]hat information, in turn, may be used by a clinician for diagnostic purposes.”¹⁵ We must, however, consider the goods as they are identified in the application. *Cf. Octocom Sys., Inc. v. Houston Comput. Servs. Inc.,*

¹³ June 29, 2021 Office Action TSDR 7, 11, 15, 16-17, 19.

¹⁴ June 29, 2021 Office Action TSDR 22, 25, 27.

¹⁵ 6 TTABVUE 5-6.

918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application ...”). *See also DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (“The 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 and services are will understand the mark to convey information about them.”).

The identification of goods includes “apparatus for medical diagnostic testing in the fields of cancer or other tissue-based diagnostic testing, cytology and cell-based testing.” The apparatus described by the identification encompasses a device that may be used to detect the presence of tumors. Although Applicant’s goods may not specifically identify tumors, and it will not necessarily be the individual using Applicant’s goods that identifies mapped tissue as tumors, given the breadth of the identification Applicant’s goods may be used to identify tumors. That is, Applicant’s goods may map the characteristics of different types of tissue, and some tissue will be tumors and some will not. However, in view of the record evidence of the use of the terms TUMOR and MAP in the medical field, we find that the relevant consumer for Applicant’s goods will perceive the term TUMORMAP as immediately informing them of a pertinent purpose or function of the goods.

Applicant also contends that the term TUMORMAP “is fanciful, and that as such it points away from the separate analysis of the words TUMOR and MAP that is

relied upon in the rejection.”¹⁶ The term TUMORMAP is not a fanciful term but is instead simply a compound word comprised of two ordinary, descriptive words which lack a space separating them. A party cannot obtain exclusive rights to a merely descriptive (or generic) term by depicting merely descriptive constituent terms as a compound word, i.e., without a space, when the separate words retain their descriptive significance when joined in the compound. *See In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110 (Fed. Cir. 1987) (SCREENWIPE generic for a wipe for cleaning television and computer screens); *In re Abcor Dev.*, 200 USPQ at 218 (GASBADGE at least descriptive for gas monitoring badges; three judges concurred in finding that term was the name of the goods); *In re Orleans Wines, Ltd.*, 196 USPQ 516 (TTAB 1977) (BREADSPRED descriptive for jams and jellies that would be a spread for bread); *In re Perkin-Elmer Corp.*, 174 USPQ 57 (TTAB 1972) (LASERGAGE merely descriptive for interferometers utilizing lasers). *See also Minn. Mining & Mfg. Co. v. Addressograph-Multigraph Corp.*, 155 USPQ 470, 472 (TTAB 1967) (“It is almost too well established to cite cases for the proposition that an otherwise merely descriptive term is not made any less so by merely omitting spaces between the words . . .”).

We have carefully considered Applicant’s arguments but find they do not detract from the evidence that the term TUMORMAP will be perceived by the relevant public when used in connection with Applicant’s “medical apparatus and instrument for diagnostic use, namely, apparatus for medical diagnostic testing in the fields of

¹⁶ 6 TTABVUE 4.

cancer or other tissue-based diagnostic testing, cytology and cell-based testing; probes for medical purposes,” as immediately informing the relevant public of a significant feature of the goods, namely that the goods may be used to map tumors.

III. Decision

The refusal to register Applicant’s mark TUMORMAP under Trademark Act Section 2(e)(1) on the ground that it is merely descriptive of Applicant’s goods is affirmed.