

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: May 26, 2026

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Brainlab SE*  
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Serial No. 79371727  
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Patrick Clunk and Francesca LaMontagne of Tucker Ellis LLP,  
for Brainlab SE.

Brendan Smith, Trademark Examining Attorney, Law Office 108,  
Kathryn E. Coward, Managing Attorney.

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Before Goodman, Allard, and Elgin,  
Administrative Trademark Judges.

Opinion by Allard, Administrative Trademark Judge:

Brainlab SE (“Applicant”) seeks registration on the Principal Register of the standard character mark EXACTRAC DYNAMIC SURFACE (SURFACE disclaimed) for goods ultimately identified as:

- “Computers; downloadable and recorded planning software and downloadable and recorded computer software programs for radiotherapeutic and radiosurgical purposes; computer hardware and recorded software for image guided patient positioning and monitoring, particularly based on optical and thermal imaging modalities; prerecorded magnetic and electronic data carriers featuring recorded software for radiotherapeutic and radiosurgical purposes,” in International Class 9; and

- “Electrical and electronic instruments and apparatus for medical purposes, namely radiotherapeutic apparatus; electrical and electronic instruments and apparatus for medical purposes for use in radiotherapy; image-processing and image-presenting instruments and apparatus for medical and surgical purposes and for image guided patient positioning and monitoring, particularly based on optical and thermal imaging modalities for use in radiotherapeutic procedures; intra-operative image guided localization instruments and apparatus being radiotherapeutic devices and apparatus; instruments and apparatus for software driven high precision treatments in radiosurgery and radiotherapy, namely, radiotherapy apparatus; patient immobilization devices and apparatus, namely, patient immobilization masks for medical purposes,” in International Class 10.<sup>1</sup>

The Trademark Examining Attorney refused registration of the proposed mark under Section 6(a) of the Trademark Act, 15 U.S.C. § 1056(a), based on Applicant’s failure to comply with the requirement to disclaim both terms DYNAMIC SURFACE on the ground that the terms are merely descriptive of Applicant’s identified goods within the meaning of Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), and are thus an unregistrable component of the mark.

After the refusal was made final, Applicant concurrently filed a notice of appeal and requested reconsideration.<sup>2</sup> The Board suspended the proceeding and remanded the application back to the Examining Attorney to act on the request for

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<sup>1</sup> Application Serial No. 79371727 was filed on April 25, 2023, as a request for extension of protection of International Registration No. 1734584 under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f(a).

<sup>2</sup> 1 TTABVUE; July 22, 2025 Request for Reconsideration after Final.

References to the briefs on appeal refer to TTABVUE, the Board’s online docketing system. The number preceding “TTABVUE” corresponds to the docket entry number; the number(s) following “TTABVUE” refer to the page number(s) of that particular docket entry.

Page references herein to the application record refer to the online database of the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system.

reconsideration.<sup>3</sup> Before the Examining Attorney acted on it, however, Applicant and the Examining Attorney fully briefed this matter.<sup>4</sup> Only after this appeal was fully briefed did it come to the attention of the Board that the request for reconsideration had not been addressed. Accordingly, the Board remanded the application back to the Examining Attorney, who subsequently denied the request.<sup>5</sup> Because the request for reconsideration did not involve a new refusal, new factual or legal issues, or any new evidence, and the Examining Attorney denied it for reasons that were already fully covered in the previously-filed appeal briefs, no supplemental briefing was warranted.<sup>6</sup> Proceedings then resumed.<sup>7</sup>

For the reasons discussed below, we affirm the refusal under Section 6(a).

#### **I. Disclaimer Requirement – Applicable Law**

In the absence of acquired distinctiveness, which Applicant does not allege here, merely descriptive terms are unregistrable under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), and therefore are subject to disclaimer if the mark is otherwise registrable. A “disclaimer” is a statement that an applicant does not claim exclusive rights to an unregistrable component of a mark:

[A] disclaimer of a component of a composite mark amounts merely to a statement that, in so far as that particular registration is concerned, no rights are being asserted in the disclaimed component standing alone, but rights are

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<sup>3</sup> 2 TTABVUE.

<sup>4</sup> Applicant’s brief appears at 4 TTABVUE, the Examining Attorney’s brief appears at 6 TTABVUE, and Applicant’s reply brief appears at 7 TTABVUE.

<sup>5</sup> 10, 11 TTABVUE.

<sup>6</sup> 12 TTABVUE.

<sup>7</sup> 12 TTABVUE.

asserted in the composite; and the particular registration represents only such rights as flow from the use of the composite mark.

*In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 1338 (Fed. Cir. 2015) (Newman, Circuit Judge, concurring).

An examining attorney may require an applicant to disclaim an unregistrable component of an otherwise registrable mark. Trademark Act Section 6(a), 15 U.S.C. § 1056(a) (“The Director may require the applicant to disclaim an unregistrable component of a mark otherwise registrable.”). Failure to comply with a disclaimer requirement is a basis for refusal. *In re Stereotaxis, Inc.*, 429 F.3d 1039, 1041 (Fed. Cir. 2005) (“[T]he Trademark Office may require a disclaimer as a condition of registration if the mark is merely descriptive for at least one of the products or services involved.”); *In re Korn Ferry*, No. 90890949, 2024 TTAB LEXIS 224, at \*5 (TTAB 2024) (“Failure to provide the required disclaimer constitutes a ground for refusing registration.”) (quoting *In re Lego Juris A/S*, No. 88698784, 2022 TTAB LEXIS 175, at \*6 (TTAB 2022)).

## **II. Analysis**

The Examining Attorney required Applicant to disclaim the terms DYNAMIC SURFACE apart from the mark as a whole, asserting that in the context of Applicant’s identified goods, DYNAMIC SURFACE merely describe a feature or function of Applicant’s goods, namely, “the ability of the goods [to] constantly track a patient’s body surface, and collect data and imaging thereof, to provide

radiotherapeutic or radiosurgical treatment.”<sup>8</sup> The Examining Attorney maintains that the terms DYNAMIC SURFACE create “a merely descriptive commercial impression that is distinct from the terms DYNAMIC and SURFACE on their own.”<sup>9</sup> Because the entire phrase DYNAMIC SURFACE is merely descriptive, a disclaimer of the entire phrase, not just the term SURFACE, is required.<sup>10</sup>

In support of his argument, the Examining Attorney made of record definitions of each term from the MERRIAM-WEBSTER DICTIONARY:

- DYNAMIC is defined as “marked by usually continuous and productive activity or change;”<sup>11</sup> and
- SURFACE is defined as “the exterior or upper boundary of an object or body,” i.e., “on the **surface** of the water” and “the earth’s **surface**.”<sup>12</sup>

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<sup>8</sup> 6 TTABVUE 6.

We take judicial notice of the following dictionary definitions, all from the Merriam-Webster Dictionary:

- “Radiotherapy” is defined as “the treatment of disease by means of radiation (as X-rays); called also **radiation therapy, radium therapy**”. <https://www.merriam-webster.com/dictionary/radiotherapy>.
- “Radiosurgery” is defined as “surgery by means of a **radio** knife.” <https://www.merriam-webster.com/dictionary/radiosurgery>.
- “Radio” is defined as “(1) of, or relating to, or operated by radiant energy[;] (2) of or relating to electric currents or phenomena (such as electromagnetic radiation) of frequencies between about 3000 hertz and 300 gigahertz.” <https://www.merriam-webster.com/dictionary/radio>.

Each definition was accessed on May 22, 2026. *In re Tapio GmbH*, No. 87941532, 2020 TTAB LEXIS 483, at \*19 n.22 (TTAB 2020) (“We take judicial notice of these dictionary definitions.”).

<sup>9</sup> 6 TTABVUE 6.

<sup>10</sup> 6 TTABVUE 6.

<sup>11</sup> June 12, 2024 Office Action at TSDR 4.

<sup>12</sup> June 12, 2024, Office Action at TSDR 12.

Applicant's own website describes its product in a manner consistent with each term's dictionary definition. For example, Applicant's website states:

- “ExacTrac Dynamic Surface®, with its thermal-**surface** camera, is a **surface guided radiation therapy (SGRT) patient tracking system** that offers streamlined workflows, enables department-wide standardization and can always be upgraded to an ExacTrac Dynamic® system to include X-Ray verification.”<sup>13</sup>
- “From the start of prepositioning to delivery of the last gray, the central position of the thermal-**surface** camera provides **real-time monitoring and an unobstructed view of the patient**. By augmenting the **surface** grid with thermal information, **highly accurate tracking of the patient's surface is maintained throughout the entire procedure**.”<sup>14</sup>
- “**Surface** guided radiotherapy enables **precise tracking of the patient's surface and breathing to consistently gate the beam so the tumor is only irradiated when in the planned position**.”<sup>15</sup>
- “300,000 3D **surface** points are acquired by two 3D cameras and matched to the heat signal obtained by the thermal camera, creating another dimension **to track the patient's position**.”<sup>16</sup>
- “The combined use of these products leverages the **surface and breathing information of the patient to efficiently perform prepositioning and monitoring and gate the beam automatically as needed**.”<sup>17</sup>
- “[C]linical workflows can become more time efficient and optimized while enabling **accurate tracking of the patient's surface** and providing safe radiation delivery.”<sup>18</sup>
- “This integration enables efficient **tracking and automated beam hold based on the thermal-surface and breathing of the patient**.”<sup>19</sup>

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<sup>13</sup> June 12, 2024, Office Action at TSDR 31-32 (emphasis added).

<sup>14</sup> June 12, 2024, Office Action at TSDR 32 (emphasis added).

<sup>15</sup> June 12, 2024, Office Action at TSDR 33 (emphasis added).

<sup>16</sup> June 12, 2024, Office Action at TSDR 36 (emphasis added).

<sup>17</sup> June 12, 2024, Office Action at TSDR 36 (emphasis added).

<sup>18</sup> June 12, 2024, Office Action at TSDR 36 (emphasis added).

<sup>19</sup> June 12, 2024, Office Action at TSDR 36 (emphasis added).

- “Monitor [the patient’s] surface during external imaging and **constantly track their thermal surface** during beam delivery to maintain accuracy and safety.”<sup>20</sup>

We agree with the Examining Attorney that other evidence of record consisting of printouts from third-party websites shows that within the context of medical devices and applications, particularly radiotherapy, the phrase DYNAMIC SURFACE merely describe a feature or function of medical devices to continuously track a patient’s body surface during a procedure through a range of patient movements, consistent with applicant’s own description of the features, function, and purpose of its identified goods:

- CLA published a paper titled, “**Dynamic Surface** Electromyography.” “Affixed **surface** electrodes may be employed for real time assessment of paraspinal muscle activity **through ranges of motion**. The author has developed a protocol for the **dynamic** assessment of paraspinal muscle activity in chiropractic practice.”<sup>21</sup>
- IEEE.com published an article titled “3D Body Surface Measurement and Display in Radiotherapy Part II: **Dynamic Surface** Sensing and Visualisation.” The phrase “dynamic surface” appears several times in the article, the following of which is representative: “Data captured at video frame rates provides the very first genuinely **dynamic** information across the patient body **surface** during high energy radiation therapy...it is shown that display of the **dynamic surface** data can be reduced to a mean surface height map and a residual **surface** time series.”<sup>22</sup>
- IOPScience published a paper entitled “Real-Time Optical Measurement of the **Dynamic** Body **Surface** for Use in Guided Radiotherapy,” which includes the following: “Optical measurements are increasingly used in radiotherapy. In this paper we present ... the design and implementation

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<sup>20</sup> June 12, 2024, Office Action at TSDR 37 (emphasis added).

<sup>21</sup> June 12, 2024 Office Action at TSDR 22-27 (emphasis added).

<sup>22</sup> January 22, 2025 Final Action at TSDR 5-13 (emphasis added).

of a multi-channel optical system optimized for fast, high spatial resolution, **dynamic** body **surface** measurement in guided therapy.”<sup>23</sup>

- ACTA Press published a paper titled “Visualisation of **Dynamic Surface** Data for a Patient Display to Reduce Movement during Radiotherapy.” It recites, for example: “[W]e use an optical sensor system to gather **real-time positional data about the patient during radiotherapy**. When the mean-surface, calculated by taking optical data **over a number of breathing periods**, is subtracted from each sequential surface in a dataset the result is a simple flexing **surface** lamina.”<sup>24</sup>
- Science Direct published a paper on the topic of breast cancer radiotherapy, which includes several references to “dynamic surface,” such as:
  - “To limit the impact of a patient breathing on surface deformation, **dynamic surface** captures and the use of corrected patient position should be privileged.”<sup>25</sup>
  - “Next, **dynamic surface** captures were acquired across the entire breathing cycle...”<sup>26</sup>
  - “Taking **dynamic surface** captures proved efficient in minimizing such uncertainties with a systematic analysis at end exhale.”<sup>27</sup>
  - “Nonetheless, the conservative approach introduced here to manage patient breathing based on **dynamic surface** captures should allow for good estimate of tissue swelling at the end exhale phase.”<sup>28</sup>
- National Library of Medicine published a paper titled “The Role of Optical **Surface** Imaging Systems in Radiation Therapy.” It states: “SGRT [Surface-Guided Radiation Therapy] enables a reduction of initial setup variability, provides verification of immobilization continuously during treatment including at noncoplanar linac gantry angles, and provides **dynamic surface** information for use in gated and breath-hold treatment

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<sup>23</sup> January 22, 2025 Final Action at TSDR 14-34 (emphasis added).

<sup>24</sup> January 22, 2025 Final Action at TSDR 35 (emphasis added).

<sup>25</sup> January 22, 2025 Final Action at TSDR 38 (emphasis added).

<sup>26</sup> January 22, 2025 Final Action at TSDR 41 (emphasis added).

<sup>27</sup> January 22, 2025 Final Action at TSDR 45 (bold added, underlining in original).

<sup>28</sup> January 22, 2025 Final Action at TSDR 46 (emphasis added).

techniques, all of which can permit reduction in the margins required to account for target localization uncertainty.”<sup>29</sup>

Here Applicant’s use of the phrase DYNAMIC SURFACE as evidenced by its website is consistent with each term’s dictionary definition and with the third-party website evidence of record discussed above, all of which shows that consumers will understand the terms to mean the ability of the identified goods to continuously track a patient’s body surface and collect data and imaging therefrom throughout the duration of a treatment or procedure. *In re N.C. Lottery*, 866 F.3d 1363, 1367-69 (Fed. Cir. 2017) (applicant’s own promotional materials helped evidence mere descriptiveness). Indeed, an applicant’s own website and marketing materials may be “the most damaging evidence” in indicating how the relevant purchasing public perceives a term. *In re Gould Paper Corp.*, 834 F.2d 1017, 1019 (Fed. Cir. 1987).

Applicant does not challenge or dispute the above-described evidence. Rather, it argues that the term DYNAMIC must be considered on its own and that, on its own, it is a suggestive term.<sup>30</sup> We disagree and find that the evidence of record demonstrates that DYNAMIC SURFACE is unitary because the phrase has a fairly uniform and established meaning when used in connection with medical devices and their applications, particularly those for use in the field of radiotherapy, where the terms describe the ability to continuously monitor and collect data from the surface of a patient’s body even while the patient is moving, such as from breathing. As shown by the dictionary definitions and third-party website evidence of record, this meaning

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<sup>29</sup> January 22, 2025 Final Action at TSDR 51-53 (emphasis added).

<sup>30</sup> 4 TTABVUE 4.

directly and immediately describes a feature, function or purpose of Applicant's identified goods in both classes, such as (1) "downloadable and recorded planning software and downloadable and recorded computer software programs for radiotherapeutic and radiosurgical purposes," in International Class 9; and (2) "instruments and apparatus for software driven high precision treatments in radiosurgery and radiotherapy, namely, radiotherapy apparatus," in International Class 10. These goods inherently involve the collection of data from a continuously moving patient. There is no multitude of connotations here that would require imagination to connect the terms DYNAMIC SURFACE to the identified goods; rather, the entire phrase is merely descriptive as explained in more detail below.

Applicant argues that the term DYNAMIC is suggestive because the term (1) "only vaguely suggests a desirable characteristic of a 'continuous and productive activity' performed by a good or service"<sup>31</sup> and (2) "does not directly convey a specific, concrete aspect of the goods."<sup>32</sup> Because the term DYNAMIC "may carry a number of different meanings, such as a product that is constantly changing, energetic, responsive, or suitable for active environments,"<sup>33</sup> Applicant contends that one must exercise some imagination or thought to arrive at the proper understanding of the phrase in light of the identified goods.<sup>34</sup> Applicant also maintains that the phrase DYNAMIC

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<sup>31</sup> 4 TTABVUE 5.

<sup>32</sup> 4 TTABVUE 6.

<sup>33</sup> 4 TTABVUE 6.

<sup>34</sup> 4 TTABVUE 6.

SURFACE is suggestive.<sup>35</sup> We disagree. “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.*, No. 87209946, 2018 TTAB LEXIS 156, at \*18 (TTAB 2018) (quoting *In re Chopper Indus.*, No. 73273140, 1984 TTAB LEXIS 118, at \*5-6 (TTAB 1084)). “The fact that a term may have other meanings in different contexts is not controlling.” *In re Nursecon, LLC*, No. 88052194, 2024 TTAB LEXIS 545, at \*16 (TTAB 2024). *See also In re Tokutake Indus. Co.*, No. 79018656, 2008 TTAB LEXIS 26, at \*12 (TTAB 2008) (affirming refusal to register AYUMI and Japanese-character equivalent as merely descriptive of footwear despite evidence of multiple meanings of “ayumi,” including “walking,” “a step,” and “one’s pace”). Here, and contrary to Applicant’s arguments, the dictionary definitions of the terms DYNAMIC SURFACE set out above apply and describe a feature, function or purpose of the identified goods, namely, the ability of the identified goods to continuously monitor and collect data about the surface of a patient’s body even during movement, without requiring any thought or imagination by the consumer.

Applicant argues that because it owns a registration for EXACTRAC DYNAMIC “for nearly identical goods” (Reg. No. 5630026), the involved application should be allowed to pass to publication because the “USPTO typically allows registration of [a] subsequent application in the absence of a significant change in facts or law.”<sup>36</sup> This argument is unavailing. Applicant’s prior registration for a mark that does not

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<sup>35</sup> 7 TTABVUE 3-6.

<sup>36</sup> 4 TTABVUE 3.

include both of the terms at issue here, namely DYNAMIC SURFACE, is not persuasive evidence that these terms should not be disclaimed in the involved application. Moreover, it is well-settled that, when determining whether a mark is eligible for registration, each application must be considered on its own record. *In re Cordua Rests., Inc.*, 823 F.3d 594, 600 (Fed. Cir. 2016) (“[The Federal Circuit], like the Board, must evaluate the evidence in the present record to determine whether there is sufficient evidence [to support a refusal]...”); *In re Shinnecock Smoke Shop*, 571 F.3d 1171, 1174 (Fed. Cir. 2009) (“Applicant’s allegations regarding similar marks are irrelevant because each application must be considered on its own merits.”); *In re Nett Designs, Inc.*, 236 F.3d 1339, 1342 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to Nett Designs’ application, the [US]PTO’s allowance of such prior registrations does not bind the Board or this court.”).

### **Decision**

The refusal based on Applicant’s failure to submit a disclaimer of DYNAMIC SURFACE is affirmed. However, if Applicant submits a disclaimer of DYNAMIC SURFACE within thirty (30) days from the mailing date of this decision, the disclaimer requirement will have been met and the application will proceed to publication. *See* Trademark Rule 2.142(g), 37 C.F.R. § 2.142(g). The disclaimer should read as follows: “No claim is made to the exclusive right to use DYNAMIC SURFACE apart from the mark as shown.”