

This Opinion is not a
Precedent of the TTAB

Hearing: September 20, 2016

Mailed: October 20, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Rieker Instrument Company, Inc.

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Serial No. 86197455

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Timothy D. Pecsénye and Bradford C. Craig of Blank Rome LLP,
for Rieker Instrument Company, Inc.

April E. Reeves, Trademark Examining Attorney, Law Office 102,
Mitchell Front, Managing Attorney.

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Before Shaw, Masiello, and Lynch,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

Rieker Instrument Company, Inc. (“Applicant”) seeks registration on the Principal Register of the mark CARS in standard characters for “Computer software used for capturing road data and determining safe curve speeds for automobiles; Computer hardware used for capturing telemetry and road data” in International

Class 9 and “Software as a service featuring software for capturing road data and determining safe curve speeds for automobiles” in International Class 42.¹

The Trademark Examining Attorney refused registration of Applicant’s mark under Section 2(e)(1), 15 U.S.C. § 1052(e)(1), as merely descriptive of the identified goods and services. After the Trademark Examining Attorney made the refusal final, Applicant requested reconsideration and appealed to this Board. The Examining Attorney denied the request for reconsideration. The appeal resumed and has been fully briefed, and an oral hearing took place. We affirm the refusal to register.

Section 2(e)(1) of the Trademark Act precludes registration of “a mark which, (1) when used on or in connection with the goods [or services] 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 Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); *see also In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015).

We consider whether someone familiar with the identified goods and services will understand the mark to convey information about them, rather than considering the mark in the abstract. *DuoProSS Meditech Corp. v. Inviro Med.*

¹ Application Serial No. 86197455 was filed on February 19, 2014, asserting use in commerce under Section 1(a), 15 U.S.C. § 1051(a).

Devices Ltd., 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012); *In re Abcor Dev.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Remacle*, 66 USPQ2d 1222, 1224 (TTAB 2002). The descriptiveness analysis concentrates on the identification of goods and services set forth in the application “regardless of what the record may reveal as to the particular nature of an applicant’s goods [or services].” See *In re Cordua Rests., Inc.* 823 F.3d 594, 118 USPQ2d 1632, 1636 (Fed. Cir. 2016) (quoting *Octocom Sys., Inc. v. Houston Computer Servs., Inc.*, 918 F.2d 937, 16 USQP2d 1783, 1787 (Fed. Cir. 1990)). Descriptiveness therefore must be assessed “in relation to the goods [and 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 goods [and services] because of the manner of its use or intended use.” *Bayer Aktiengesellschaft*, 82 USPQ2d at 1831 (citing *Abcor Dev. Corp.*, 200 USPQ at 218).

Applicant has identified, both as a good and as a service, software for capturing road data and determining safe curve speeds for automobiles, as well as hardware for capturing telemetry² and road data. The Examining Attorney’s evidence

² The *Merriam-Webster Learner’s Dictionary* defines “telemetry” as “the process of using special equipment to take measurements of something (such as pressure, speed, or temperature) and send them by radio to another place.” www.merriam-webster.com/. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

establishes that “automobiles,” as used in the identification, is a synonym for “cars.”³

Applicant’s own identification establishes that its hardware and software involves data capture and determinations “for automobiles.” In addition, the Examining Attorney submitted evidence showing that “cars” is used descriptively in the context of curve speed determination, both to refer to the type of vehicles for which safe curve advisory speed may be determined and to the automobiles used to gather data used in calculations to determine safe curve speed. For example, website evidence regarding the CurveRite 1200 Advisory Speed Meter indicates that it employs “custom software technology” and collects data for use in “establishing safe and consistent advisory speeds for highway curves.”⁴ Its promotional material further states that it can be used to measure safe speeds for “cars” and that the device would plug into a “car socket” to collect the data.⁵ The record also includes the Texas Department of Transportation’s and Texas Transportation Institute’s “Horizontal Curve Signing Handbook,” “intended for use by traffic engineers and technicians that have been given the responsible charge of evaluating and maintaining horizontal curve signing and delineation devices,”⁶ which uses “car” and “cars” several times in describing the speed data collection necessary for the evaluation. An excerpt from the Manual on Uniform Traffic

³ *E.g.*, December 9, 2015 Office Action at 15 (*American Heritage Dictionary*); June 2, 2014 Office Action at 3-6 (*Merriam-Webster Dictionary*).

⁴ December 9, 2015 Office Action at 9.

⁵ *Id.* at 11-12.

⁶ December 9, 2015 Office Action at 2-6.

Studies' chapter on "Safe Curve Speed Study" describes the use of equipment in a car to collect the necessary data.⁷ This evidence demonstrates that safe curve speed determinations are done for cars, and that cars often are used to gather the necessary information for such determinations, in that hardware and software installed in cars driven over the roads at issue collect the information. Thus, competitors and others in this field would use the term "cars" to describe the purpose of their products and services, as well as how they work. Applicant's use of "for automobiles" in its identification corroborates this finding because the synonym "cars" would be equally useful in describing these types of goods and services.

The record also includes evidence showing that "cars" is used to describe automobile-related software generally. In one especially probative example, a website promoting PERFORMANCE TRENDS software for race cars uses "car" and "cars" to describe software that can record car settings and race results, including "Data Logger and Computer Software to actually measure what your Road Race or Circle Track car is doing out there on the track, now with GPS for track mapping and lap/segment timing."⁸ The software described in that website is similar to Applicant's product because the GPS track mapping feature of the described software captures "road data," as referred to in Applicant's identification. As another example, in an explanation of "How Car Diagnostic Software and Tools Work," one article notes that the software "takes regular readings of different

⁷ *Id.* at 18 (www.dot.state.fl.us).

⁸ December 23, 2014 Office Action at 36-38 (www.performancetrends.com).

systems in the car.”⁹ Evidence of the website promoting TOAD diagnostic software repeatedly uses the term “car” and “cars” descriptively in connection with the software which, *inter alia*, can collect data on a car’s speed while it travels.¹⁰ Similarly, the website for OBD AUTO DOCTOR uses “car” and “cars” in describing its software, which allows the user to “[v]iew engine sensor data in realtime” and “[m]onitor engine performance and functionality.”¹¹ Although this evidence involves automobile software more generally, rather than specifically for safe curve speed determination, in the context of the record as a whole, the evidence helps show that the term “cars” describes software used in and for cars.

Applicant maintains that the descriptiveness refusal represents an oversimplification of its goods and services, which it argues constitute “a complete, indivisible hardware and software unit” “used by sophisticated state and local governments to capture speed data, with the resulting data ultimately used to achieve speed advisory signage uniformity from state to state.”¹² Applicant contends that the term is at worst suggestive of a feature of its goods and services, but does not merely describe them. As an initial matter, we note that we cannot rely on a narrower characterization of the goods and services than that set forth in the identification, which controls the analysis. *See Cordua Rests.*, 118 USPQ2d at 1636 (Section 2(e)(1) refusal is assessed as to the identified, rather than actual, goods or

⁹ *Id.* at 33-35 (www.carsdirect.com/).

¹⁰ *Id.* at 12-27 (www.totalcardiagnostics.com/toad/).

¹¹ *Id.* at 28-32 (www.obdautodoctor.com/).

¹² 8 TTABVUE 20-21 (Applicant’s Brief).

services). Moreover, we find that the Examining Attorney's evidence shows descriptive use of "cars" in the field of determining "safe curve speeds for automobiles," and "capturing telemetry and road data." Thus, we disagree with Applicant that the refusal rests on a mischaracterization or simplification of its hardware and software.

Also according to Applicant, CARS should be registrable as a double entendre whereby the "primary significance of the CARS mark is thus derived from the meaning and overall commercial impression engendered by the CARS mark as an acronym for 'Curve Advisory Reporting System.'"¹³ However, Applicant supported this contention only with its own use of, and several instances of third-party use of, CARS along with the additional wording "Curve Advisory Reporting System," but offered no proof of consumer recognition of this acronym. There is no persuasive evidence to warrant the conclusion that in this context, consumers would understand CARS to refer to anything other than automobiles. *See In re Ginc UkK Ltd.*, 90 USPQ2d 1472, 1479 n.8 (TTAB 2007) (rejecting unsupported argument that ZOG would be perceived as an acronym). Moreover, while Applicant may sometimes use the additional wording in combination with CARS, any registration that would issue from the application would not include those words and Applicant would not be required to use them. "Thus, we assess the connotation of [A]pplicant's mark from the perspective that consumers will see only that which applicant seeks to register." *The B.V.D. Licensing Corp. v. Florencio Rodriguez*, 83 USPQ2d 1500, 1508

¹³ 8 TTABVUE 14 (Applicant's Brief).

(TTAB 2007) (citations omitted); *Blue Cross and Blue Shield Association v. Harvard Community Health Plan Inc.*, 17 USPQ2d 1075, 1077 (TTAB 1990) (“The problem that we have with applicant’s argument is that applicant is not seeking to register a service mark slogan containing its trade name”). We find that without the additional wording that is not part of the mark, consumers would ascribe the common descriptive meaning to CARS and would not recognize it as an acronym. Thus, we reject Applicant’s double entendre argument.

Consumers would immediately understand CARS, when used in connection with Applicant’s identified goods and services, to describe key features of the software and hardware – that their purpose involves cars and that they are used in cars.

Decision: The refusal to register Applicant’s mark CARS as merely descriptive is affirmed.