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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Open Software Associates, Inc.**

Serial No. 74/**672,089**

Michael J. Bevilacqua of Hale and Dorr for Open Software
Associates, Inc.

Cheryl S. Goodman, Trademark Examining Attorney, Law Office 102
(**Myra Kurzbard**, Managing Attorney).

Before **Simms, Cissel** and **Hohein**, Administrative Trademark Judges.

Opinion by **Hohein**, Administrative Trademark Judge:

Open Software Associates, Inc. has filed an application
to register the term "OPENUI" for "computer programs for use in
developing applications programs".¹

Registration has been finally refused under Section
2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the basis
that, when used in connection with applicant's goods, the term
"OPENUI" is merely descriptive of them.

¹ Ser. No. 74/672,089 filed on May 10, 1995, which alleges a bona fide
intention to use the term.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

Applicant, while conceding that "[t]he terms 'OPEN', 'UI', and 'USER INTERFACE' are ... frequently used in reference to" such goods and services as "computer hardware ..., computer systems or architectures, or network services," emphasizes that, by contrast, it "seeks registration for its mark in connection with 'computer programs for use in developing applications programs'." Applicant further asserts, without having furnished any evidentiary support therefor, that because the terms "OPEN," "UI" and "USER INTERFACE" "have so many varied meanings," a mark composed of them "is, by definition, ambiguous" and that, accordingly:

Given this ambiguity, potential purchasers confronting Appellant's mark would not be able to immediately discern that that mark is used in connection with computer programs for use in developing applications programs. Only through exposure to and investigation of the goods themselves would potential purchasers understand the nature of the goods.

In view thereof, applicant maintains that the term "OPENUI" is "at most suggestive" of its goods.

The Examining Attorney, on the other hand, contends that the term "OPENUI" signifies an open user interface and, as such, "[merely] describes[s] a type of software programming tool which creates open user interfaces" in connection with the programming applications developed by applicant's computer programs. In support of her position, the Examining Attorney

relies upon, inter alia, the following definitions of record from The Computer Glossary (7th ed. 1995):

"**open**," which among other things is listed at 279 as meaning "(3) Made to operate with other products";

"**UI**," which is set forth at 413 by reference to "See *UNIX International* and *user interface*"; and

"**user interface**," which is defined at 417 as "[t]he combination of menus, screen design, keyboard commands, command language and help screens, which create the way a user interacts with a computer. A well-designed user interface is vital to the success of a software package."

We judicially notice, in addition, the following definitions from the Microsoft Press Computer Dictionary (3d ed. 1997):²

"**UI**," which is listed at 482 by reference to "See user interface"; and

"**user interface**," which is set forth at 488 as meaning "[t]he portion of a program with which a user interacts. Types include command line interfaces, menu-driven interfaces, and graphical user interfaces. Acronym: UI (U-I')".

Moreover, as an aid to understanding some of the excerpts noted below from the "NEXIS" database, the Examining Attorney made of record and relies upon the definition of the following term from the Random House Personal Computer Dictionary (2d ed. 1996):

"**platform**," which is defined at 413 as "[t]he underlying hardware or software for a system."

² It is settled that the Board may properly take judicial notice of dictionary definitions. See, e.g., *Hancock v. American Steel & Wire Co. of New Jersey*, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953) and *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

The platform defines a standard around which a system can be developed. Once the platform has been defined, software developers can produce appropriate software and managers can purchase appropriate hardware and applications.

The term cross-platform refers to applications, formats or devices that work on different platforms. For example, a *cross-platform programming environment* enables a programmer to develop programs for many platforms at once."

The record also contains various excerpts of articles from the "NEXIS" database of which the following, including stories on applicant's "OPENUI" goods, are particularly pertinent (**emphasis added**):

"First introduced in July 1990, XBUILD is an **open user interface** development tool (UIDT) for painlessly developing, testing, and perfecting production-ready graphical user interfaces ..." -- PR Newswire, November 26, 1990 (article headlined: "SIEMENS NIXDORF UNVEILS NEW VERSION OF USER INTERFACE BUILDER");

"The **open user interface** of TCP/IP is not compatible with the proprietary system developed for GSFC-mail" -- ASAP, April 1990;

"[The] product runs on Digital, Apollo, Sun, IBM mainframe and IBM PC with the same easy-to-use, easy-to-remember **open user interface**. It also guarantees connectivity integrity and data transportability between all these different machines." -- Business Wire, May 27, 1988;

"Open Software Associates (OSA), a leading supplier of enterprise-scale **application development tools**, today announced version 3.5 of **OpenUI**, a release that significantly extends the object-oriented functionality, power and ease-of-use of the company's popular **user interface** management system. **OpenUI enables rapid design and development of client/server**

applications across multiple platforms and graphical user interfaces (GUIs).

....
OSA has developed a database interface with full query and update capabilities for developers looking to quickly develop a working prototype of a **user interface** that requires access to a database. Based on the industry-standard **Open Database Connectivity (ODBC)**, **OpenUI's Database Interface can utilize any vendor's database** as a data source, as well as using multiple data sources concurrently from different vendors." -- PR Newswire, August 4, 1995; and

"OpenUI is OSA's visual integrated development environment that enables rapid design and development of client/server applications across multiple platforms and graphical user interfaces (GUIs).

....
OpenUI's architecture is uniquely suited to the needs of enterprise-scale distributed applications, allowing companies to seamlessly integrate new corporate applications with a standard GUI, using existing networks. With OpenUI, developers build applications on one GUI and then deploy it across any network to any standard GUI in their corporation without any redevelopment. Applications developed using **OpenUI** also ensure that a company's investment in technology is protected because they are fully adaptable to all future computing directions." -- PR Newswire, September 5, 1995.

In light of the above, the Examining Attorney asserts that "the applicant's computer software for use in developing applications programs is an open user interface development tool used for cross-platform programming of graphical user interfaces or OPENUI." Specifically, the Examining Attorney reasons that (footnote omitted):

The term OPEN is descriptive of the ability of the applicant's programming software to create platform-independent code, thereby enabling the graphical user

interfaces developed with applicant's software to "operate with other products," i.e., across multiple or cross (hardware or software) platforms or open systems. UI is descriptive of the function of the applicant's software, namely computer software for use in developing applications programs, specifically graphical user interfaces. Applicant's proposed mark OPENUI is merely descriptive because it describes a feature of the applicant's software, namely, computer software for developing open systems applications programs in the nature of open user interfaces that can be deployed across multiple hardware or software platforms or OPENUI.

With respect to applicant's essentially unsupported contention that the terms "OPEN" and "UI" have varied meanings and hence a mark which combines such terms is inherently ambiguous rather than merely descriptive, the Examining Attorney correctly observes that:

The registration of a term created by combining two or more [otherwise] unregistrable words depends on whether[,] in combination, a new and different commercial impression is created, and/or the term so created imparts a bizarre or incongruous meaning as used in connection with the goods. *In re Associated Theatre Club[s] Co.*, 9 USPQ2d 1660 (TTAB 1988); *In re Metcal Inc.*, 1 USPQ2d 1334 (TTAB 1986); *In re Quik-Print Copy Shop, Inc.*, 205 USPQ2d 505 (CCPA 1980)[.] The combination of two descriptive words may result in nothing more than the combination of two descriptive words. *In re IBP, Inc.*, 228 USPQ 303 (TTAB 1985); *In re Wink Corp.*[,] 218 USPQ 739 (TTAB 1983); *In re Quik-Print Copy Shop, Inc.*, 205 USPQ 505 (CCPA 1980). Where the combination of two descriptive words creates no incongruity, and no imagination is required to understand the nature of the goods, the mark remains merely descriptive. *In re Associated Theatre Clubs Co.*, 9 USPQ2d 1660 (TTAB 1988); *In re Gould Paper Corp.*, 5 USPQ2d 1110 (Fed. Cir. 1987); *In re Orleans Wines, Ltd.*, 196 USPQ 516 (TTAB 1977); *In re Scholastic Testing Service*,

Inc., 196 USPQ 517 (TTAB 1977); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973).

The Examining Attorney insists that, in this case, the two descriptive terms "OPEN" and "UI" are "known computer terms which are in common usage in the [software] trade," as evidenced by the dictionary definitions and "NEXIS" excerpts of record, and that "the combination of the terms OPEN and UI do not create a bizarre or incongruous meaning in connection with computer software for developing applications programs." Instead, the Examining Attorney maintains that the combined term "OPENUI" merely describes the open user interface feature of applicant's goods, which are used to develop applications programs which can be used with other vendors' products and/or operate across multiple hardware or software platforms.

It is well settled that a term is considered to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it immediately describes an ingredient, quality, characteristic or feature thereof or if it directly conveys information regarding the nature, function, purpose or use of the goods or services. See *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or idea about them. Moreover, whether a term is merely descriptive is determined not in the abstract but in relation to the goods or services for which registration is sought, the context in which

it is being used on or in connection with those goods or services and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use. See In re Bright-Crest, Ltd., 204 USPQ 591, 593 (TTAB 1979). Consequently, "[w]hether consumers could guess what the product [or service] is from consideration of the mark alone is not the test." In re American Greetings Corp., 226 USPQ 365, 366 (TTAB 1985).

In the present case, it is our view that, when applied to computer programs for use in developing applications programs, the term "OPENUI" would be regarded by the systems analysts, software engineers and computer programmers who would constitute the principal purchasers and/or users of such goods as immediately describing, without any conjecture or speculation, a significant feature or purpose of applicant's goods. Although Trademark Rule 2.51(d) requires that a typed drawing of a mark be in all capital letters, thereby otherwise tending in this case to obscure somewhat the fact that the term "OPENUI" is actually a combination or telescoping of the descriptive terms "OPEN" and "UI," the press reports regarding applicant's "OpenUI" computer programs, as shown by certain of "NEXIS" excerpts, demonstrate that such term typically is used in a manner in which its component elements are readily recognizable. Moreover, to the technically trained and highly knowledgeable purchasers and users of applicant's goods, the terms "OPEN" and "UI" would be clearly discernible even when run together into the term "OPENUI". Consequently, it is plain that in combining the terms "OPEN" and

"UI", there is nothing in the combined term "OPENUI" which is bizarre, incongruous, indefinite or ambiguous, especially when viewed in the context of applicant's goods.

In particular, the fact that in the computer software industry, the term "UI" stands for "user interface" and, like the term "OPEN," is thus widely known and familiar to actual and prospective buyers and users of applicant's computer programs for use in developing applications programs, means that there is nothing which requires the exercise of imagination, cogitation, mental processing or the gathering of further information in order for the merely descriptive significance of the term "OPENUI" to be immediately perceived. Plainly, to purchasers and users of applicant's goods, such term readily conveys that a principal feature or purpose of applicant's goods is to provide an open user interface in applications programs developed with applicant's computer programs. Stated otherwise, "OPENUI" computer programs are those which can be used to develop applications programs which can be used or interfaced with other vendors' products and/or run on a variety of different hardware or software platforms. Furthermore, as the dictionary definitions and "NEXIS" excerpts make clear, the combination of the descriptive terms "OPEN" and "UI" into the designation "OPENUI" results in a term which has the same meaning which ordinary usage in the trade would ascribe to the individual terms in combination. See, e.g., In re Gould Paper Corp., 834 F.2d 1017, 5 USPQ2d 1110, 1112 (Fed. Cir. 1987) [term "SCREENWIPE," formed from combination of words "SCREEN" and "WIPE," is

unregistrable for a "pre-moistened, anti-static cloth for cleaning computer and television screens"].

Accordingly, because the term "OPENUI" forthwith conveys that a significant feature or purpose of applicant's goods is the open user interface which its software creates, such term is merely descriptive of computer programs for use in developing applications programs within the meaning of the statute.

Decision: The refusal under Section 2(e)(1) is affirmed.

R. L. Simms

R. F. Cissel

G. D. Hohein
Administrative Trademark Judges,
Trademark Trial and Appeal Board