

Paper No. 16
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SEPT. 29, 99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re *Ziff Davis Publishing Company*

Serial No. 75/178,501

*James E. Rosini of Kenyon & Kenyon for Ziff Davis
Publishing Company.*

Gary R. Thayer, Trademark Examining Attorney, Law Office
103 (Michael A. Szoke, Managing Attorney).

Before Seeherman, Hanak and Quinn, Administrative Trademark
Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Ziff-Davis Publishing Company has appealed the refusal
of the Trademark Examining Attorney to register VAR SHOPPER
as a mark for "providing multiple user access to a global
computer information network for the transfer and
dissemination of a wide range of information regarding
computer related products and services; providing
information regarding computer related products and

services via a computer network."¹ Registration has been refused pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. 1052(e)(1), on the ground that applicant's mark is merely descriptive of its identified services.

Both applicant and the Examining Attorney have filed briefs. An oral hearing was not requested.

As a preliminary matter, we note that in his brief the Examining Attorney has stated, at footnote 3, that "to the extent that the proposed mark does not describe any aspect of the services as indicated above, the proposed mark would be deceptively misdescriptive and, therefore, should still be refused under Section 2(e)(1) as well." The Examining Attorney never, during the examination of this application, raised the issue of deceptive misdescriptiveness as an alternative ground for refusal. He cannot, therefore, make such a refusal in his brief. Accordingly, the only issue before the Board in this appeal is whether VAR SHOPPER is merely descriptive of applicant's identified services.

¹ Application Serial No. 75/178,501, filed October 8, 1996, based on an asserted bona fide intention to use the mark in commerce. During the course of the prosecution of this application applicant has stated that it changed its name first to Ziff-Davis, Inc. and subsequently to ZD Inc. Although applicant also stated that each change of name would be recorded with the Patent and Trademark Office, Office records do not reflect any such recordations. Accordingly, we continue to refer to applicant as Ziff Davis Publishing Company.

It is the Examining Attorney's position that applicant's mark merely describes the intended audience or subject matter of applicant's identified services. According to the Examining Attorney, this audience is "those who serve as buying/selling agents, or 'shoppers,' on behalf of organizations known in the trade as 'value added resellers' (or 'VAR's')--i.e., what would be aptly referred to as 'VAR shoppers')." Brief, p. 2.

The only evidence relied on by the Examining Attorney during the examination of this application was a dictionary definition of "shopper" submitted by applicant, namely, "one whose occupation is shopping as an agent for customers or for an employer."² With his brief the Examining Attorney submitted what he described as a dictionary definition of "VAR" taken from "The Computer Glossary," 7th ed., and has asked that we take judicial notice of it. The submission, however, does not appear to come from any standard dictionary, but appears, instead, to be a printout from an computer web site with the address "<http://www.techweb.com/encyclopediadineterm?term=var>." It is not clear exactly what the source for the definition is, although on the page we see references to "TechEncyclopedia" and "Computer

² Webster's Ninth New Collegiate Dictionary, © 1989.

Desktop Encyclopedia." Although the Board may take judicial notice of dictionary definitions, see **University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.**, 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), we are reluctant to do so in this case, where the definition has been retrieved from an on-line source which is unclear, and therefore raises questions about the reliability of the definition. See **In re Total Quality Group, Inc.**, __USPQ2d__ (March 23, 1999).

Even if we were to accept the Examining Attorney's position that VAR would be readily understood by the relevant group of consumers for applicant's services as meaning "value added reseller", we find that the Examining Attorney has failed to establish that VAR SHOPPER is merely descriptive of the identified services. As both applicant and the Examining Attorney agree, a term is merely descriptive if it immediately conveys information concerning a quality, characteristic, function, ingredient, attribute or feature or a product or service. **In re Venture Lending Associates**, 226 USPQ 285 (TTAB 1985).

In this case, as noted above, the Examining Attorney has stated that VAR SHOPPER describes "the intended audience or subject matter of the services, namely those who serve as buying/selling agents, or 'shoppers,' on

behalf of organizations known in the trade as 'value added resellers' (or VAR's')." Brief, p. 2. Even the Examining Attorney does not appear to be sure whether VAR SHOPPER refers to the user of applicant's services or whether VAR SHOPPER is the subject matter of the services. Frankly, we are at a loss to understand, from the Examining Attorney's arguments, how VAR SHOPPER is the subject matter of the services.

As for whether the term immediately and directly conveys information about the users of the services, the Examining Attorney seems unsure whether such a user would be a buyer for value added resellers or one who sells products to these resellers. There is simply no evidence in the record about whether purchasing agents for, or sellers to, value added resellers, would be involved with the services identified in the application. In view of this lack of evidence, and noting that there is some incongruity in the juxtaposition of "reseller" and "shopper," we find that the Examining Attorney has failed to establish that VAR SHOPPER is merely descriptive of applicant's identified services.

Accordingly, we follow our long established policy of resolving doubt in behalf of the applicant. **In re The Gracious Lady Service, Inc.**, 175 USPQ 380 (TTAB 1972).

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However, we wish to make clear that our decision herein rests solely on the evidence, or lack thereof, that is in the present record. On a different record, such as might be adduced during the course of an opposition proceeding, we might well come to a different conclusion.

Decision: The refusal of registration is reversed.

E. J. Seeherman

E. W. Hanak

T. J. Quinn
Administrative Trademark Judges
Trademark Trial and Appeal Board