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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Immersive Design, Inc.

Serial No. 75/200,113

Patrick R. Roche of Fay Sharpe Beall Fagan Minnich & McKee
for Immersive Design, Inc.

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(Tomas V. Vlcek, Managing Attorney)

Before Simms, Bucher and Rogers, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Immersive Design, Inc. has filed an application to register the mark "**Interactive•PreAssembly**," for "computer software for use by engineering and manufacturing companies to communicate product form and function through visualization or animation of product design," in International Class 9.¹

¹ Serial No. 75/200,113, in International Class 9, filed November 19, 1996, claiming dates of first use of November 1, 1995.

The Trademark Examining Attorney issued a final refusal to register based upon 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 the goods.

Applicant has appealed the final refusal to register. Briefs have been filed, but applicant did not request an oral hearing. We affirm the refusal to register.

Before considering the substantive issue herein, we deal first with an objection made by the Trademark Examining Attorney to electronic search results of third-party registrations submitted as an appendix to applicant's appeal brief, as well as applicant's objection to the request of the Examining Attorney that we take notice of a dictionary definition of "interactive system" which entry was attached to his appeal brief.

We agree with the Trademark Examining Attorney that the fifteen third-party, federal registrations attached to applicant's brief (Exhibit "B") were not properly made of record. These registrations purported to show instances where the Patent and Trademark Office had registered the word "Interactive" within composite marks, in connection with computer software, without requiring disclaimers thereof. However, in order to make third-party registrations of record, soft copies of the registrations or

photocopies of the appropriate U.S. Patent and Trademark Office electronic printouts should be submitted. See Weyerhaeuser Co. v. Katz, 24 USPQ2d 1230 (TTAB 1992). This was not done. Furthermore, the printouts of the search results were merely printouts attached to applicant's appeal brief. Copies of the registrations are to be made part of the record prior to the time of the appeal. See, 37 CFR 2.142(d); In re Smith and Mehaffey, 31 USPQ2d 1531, 1532 (TTAB 1994). In his appeal brief, the Trademark Examining Attorney never treated these registrations as if of record, and explicitly objected thereto.² Hence, because applicant failed to comply with the established rules as to the form and timing for the submission of the evidentiary record in an application, we have not considered this evidence in reaching our decision.

Applicant's request that we not take judicial notice of the definition of "interactive system" from a computer dictionary is not well taken and is denied. We may take judicial notice of facts of universal notoriety,³ which need

² Presumably, if these registrations had been timely submitted by applicant in an appropriate form, the Trademark Examining Attorney would then have had opportunity to proffer copies of federal registrations for computer software applications where the term "interactive" was disclaimed.

³ Judicial Notice: "...the cognizance of certain facts which jurors and judges may properly take and act upon without proof, because they already know them." Black's Law Dictionary (1990).

not be proved, and of whatever is generally known within our jurisdiction. See Brown v. Piper, 91 U.S. 37, 42 (S. Ct. 1875). To that end, dictionaries may be consulted. United States v. Merck & Co., 8 Ct.Cust.Appls. 171 (1917).

Applicant objects to this "so-called definition" without making any allegations about the infirmities of this particular dictionary. Furthermore, the statement from the submitted definition to which applicant objects, "Nowadays [1996] almost all computing is interactive..." appears to us not to be a contentious inference in need of further proof.

Under the guidance of Fed.R.Evid. 201(b) and (f), we conclude that this is an appropriate occasion for using judicial notice. We find that computer dictionary definitions are suitable subject matter for judicial notice by the Board. See, 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); In re Hartop & Brandes, 311 F.2d 249, 135 USPQ 419, 423 (CCPA 1962) at n. 6; and Hancock v. American Steele & Wire Co. of New Jersey, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953). Additionally, the Board has, in the past, taken judicial notice of dictionary listings *sua sponte*, or when submitted by the Trademark Examining Attorney after the notice of appeal. Accordingly, we have taken notice of the

definitions submitted with the Examining Attorney's brief as requested therein. See In re Tekdyne Inc., 33 USPQ2d 1949 (TTAB 1994).

Furthermore, even in the absence of this latest dictionary evidence, we would affirm the refusal on the basis of the other evidence made of record by the Trademark Examining Attorney. The entire record of this case before the Board fully supports this conclusion. For example, perhaps the best evidence of record as to the meaning of the word "interactive" in the field of computer programs includes applicant's own user's guide. These specimens demonstrate the context in which applicant repeatedly uses this term in a descriptive or generic sense.⁴

The sole question to be determined herein is whether the designation "**Interactive • PreAssembly**," is descriptive of features, characteristics, intended purposes, functions, or uses of applicant's goods, as contended by the Trademark Examining Attorney; or whether, as urged by appellant, this is a coined term, not used by anyone else in connection with goods of the type sold by applicant, that the term sought to be registered is incongruous, and therefore meaningless as applied to the goods, and that the Examining Attorney is

⁴ "**Interactive • PreAssembly** (IPA) is an *interactive* visualization and animation system..." p.1-1 (emphasis supplied).

improperly dissecting the mark in this attempt to conclude that it describes the goods. Applicant concludes that this matter should be considered, at worst, suggestive of the identified goods.

We must consider the question of descriptiveness under Section 2(e)(1) with respect to the goods as stated in the application, i.e., "computer software for use by engineering and manufacturing companies to communicate product form and function through visualization or animation of product design."

Applicant's literature and the above identification of goods both stress that this product is a specialized communications tool. This desktop computer application permits complex, information to move in real time among those involved in product design, development, creation, training, sales and service. The large organization using this software reaps the benefits of cross-functional collaboration as to the form and function of a new product. This is an "interactive" application, as computer software programmers and users understand that term.⁵ If the mark

⁵ In re Omaha National Corporation, 819 F2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987) ["FirsTier" -- the phonetic equivalent of "first tier" -- is merely descriptive of banking services because corporate users of banking services who understand the industry meaning of a "first tier" bank constitute "average" or "ordinary" customers]; and In re Intelligent Instrumentation Inc., 40 USPQ2d 1792 (TTAB 1996) ["VISUAL DESIGNER," is descriptive for "computer

consisted solely of the word "Interactive," we would readily sustain the instant refusal under Section 2(e)(1) as being merely descriptive of a critical feature of these goods.

We turn next to the "PreAssembly" portion of applicant's alleged mark. During the design phase of a complex product, it has traditionally been necessary to construct costly, full-scale mock-ups of the product. In this digital age, it is clear that one of the advantages of computer aided design (CAD) to the manufacturer of an innovative, new product is the use of sophisticated digital preassembly applications. Even during the conception phase of product development, the product can be "preassembled" on the computer, eliminating the need for a costly prototype. Clearly, the goods as defined are used by professionals accustomed to working with CAD programs. Such consumers,⁶ when confronted with applicant's alleged mark for the identified goods, will immediately conclude that the software allows for interactive computer simulations of proposed products prior to the assembly of a solid model,

programs for controlling the acquisition of data from measurement devices for the purposes of analysis, display, testing and automatic control," especially because the sophisticated and technically knowledgeable purchasers and users of applicant's goods would be familiar with the programming trade's uses of the generic terminology "visual design tools" in connection with software development tools such as applicant's computer programs].

⁶ *Id.*

prototype or the first manufactured item. Accordingly, if the mark consisted solely of the word "PreAssembly," we would readily sustain a refusal under Section 2(e)(1) as being merely descriptive of another critical feature of these goods.

This alleged mark comprises two critical features of the software application -- both of which are merely descriptive. When these two components are joined, the Trademark Examining Attorney argues that the combined phrase, "Interactive PreAssembly," contains no incongruities or unusual results, and hence is still merely descriptive.⁷ Applicant has not made a persuasive case to the contrary, and we agree with the Trademark Examining Attorney on this key point. The facts herein are quite similar to the facts in *In re International Game Technology Inc.*, 1 USPQ2d 1587, 1588-89 (TTAB 1986):

We hold the term "ON-LINE, ON-DEMAND" to be merely descriptive of applicant's computer lottery terminals. It is well settled that a term which, when applied to the goods, forthwith conveys to prospective purchasers information as to the characteristics or features of the goods, is merely descriptive of the goods. *In re Bright-*

⁷ See also *In re Copytele Inc.*, 31 USPQ2d 1540 (TTAB 1994) ["SCREEN FAX PHONE" is merely descriptive of applicant's goods absent anything incongruous in the combination of these three words]; and *In re Lowrance Electronics*, 14 USPQ2d 1251 (TTAB 1989) ["COMPUTER SONAR" is generic for "sonar apparatus for detecting the depth of water and the depth of objects and fish in the water," because the combination of the two generic terms is not incongruous].

Crest Ltd., 204 USPQ 591 (TTAB 1979).

Descriptiveness is determined from the viewpoint of the relevant purchasing public, *In re Abcor Development Corp.*, 588 F.2d 811, 814, 200 USPQ 215, 218 (CCPA 1978), and must be considered in relation to the particular goods in connection with which the mark is used. *In re Universal Water Systems, Inc.*, 209 USPQ 165 (TTAB 1980). The evidence submitted by the Examining Attorney establishes that the two component terms that make up the mark have readily understood meanings as applied to applicant's goods. Applicant has not made of record any evidence to contradict this fact. The combination of the two merely descriptive terms does not result in an unusual or incongruous result. As the Examining Attorney points out, the situation here is rather like using "white, granulated" to describe sugar. The descriptive significance of each term is not altered by combining it with the other descriptive term. The result of the combination is simply that more information about the characteristics of the applicant's computer lottery terminals is provided than if only one of the descriptive terms were used by itself. See *In re Nash-Fitch Co.*, 160 USPQ 210 (TTAB 1968), where "TENDER FRESH" was held unregistrable on the Supplemental Register for fresh cut chickens. Applying the ordinary meanings to the words which make up a mark does not constitute improper dissection of the mark in this case, nor does it result in any incongruity.

Applicant's argument that the mark is not merely descriptive because the term is not used by anyone else is not well taken. A merely descriptive term used first or only by one party is no less descriptive because of its limited use, nor is it registrable as long as the relevant public perceives of the term as describing the goods.

In summary, because the term sought to be registered would immediately convey to purchasers of computer lottery terminals that the terminals operate on-line and provide tickets on demand, the term is merely descriptive of the goods and unregistrable under Section 2(e)(1) of the Act.

Applicant argues that the Trademark Examining Attorney has incorrectly "dissected" this designation. We disagree with this argument. As seen above, multiple descriptive

terms such as "SCREEN FAX PHONE" and "COMPUTER SONAR" are still merely descriptive absent anything incongruous in the combination of the several words.⁸

Accordingly, we find that the term "**Interactive • PreAssembly**" is merely descriptive for "computer software for use by engineering and manufacturing companies to communicate product form and function through visualization or animation of product design."

Decision: The refusal to register is affirmed.

R. L. Simms

D. E. Bucher

G. F. Rogers

Administrative Trademark
Judges, Trademark Trial and
Appeal Board

⁸ Moreover, the drawing herein shows a large, raised dot after the word "Interactive" and before the term "PreAssembly. This presentation in the special form drawing calls to mind the Board's conclusions about "ON-LINE, ON-DEMAND," where a comma separates the two descriptive terms. *cf.* [International Game Technology Inc.](#), *supra*.