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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re IXL Enterprises, Inc., by change of name from IXL
Holdings, Inc.¹

Serial No. 75/512,879

T. William Alvey, III, General Counsel of IXL Enterprises,
Inc.

Brendan Regan, Trademark Examining Attorney, Law Office 113
(Meryl Hershkowitz, Managing Attorney).

Before Hanak, Quinn and Chapman, Administrative Trademark
Judges.

Opinion by Chapman, Administrative Trademark Judge:

IXL Enterprises, Inc. (a Delaware corporation) appeals
from the Examining Attorney's final refusal to register on
the Principal Register the mark INTERACTIVE EXCELLENCE for
services identified as "kiosk design and development

¹ The records of the Assignment Branch of this Office indicate
that the involved applicant has undergone a change of name. See
Reel 1945, Frame 0547. Accordingly, applicant's name is set
forth to reflect the change.

services, website design and development services, and CD-ROM design and development services" in International Class 42² under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the basis that the mark, when used in connection with applicant's services, is merely descriptive of them. Both applicant and the Examining Attorney have filed briefs. Applicant requested an oral hearing but later withdrew that request.

Essentially, the Examining Attorney's position is that applicant's services are "inherently *interactive*," that is, "applicant's services are designing *interactive* devices for others," (brief, unnumbered page 3, emphasis in original) and that the word "excellence" is laudatory rather than source-indicating. The Examining Attorney argues that the combination of the words remains merely descriptive of applicant's kiosk, website and CD-ROM design and development services because consumers "would believe that said services are in the nature of (presumably excellent) interactive services" (brief, unnumbered page 7). In support of this position, the previous Examining Attorneys handling this application submitted dictionary definitions

² Application Serial No. 75/512,879, filed June 30, 1998, based on applicant's claimed date of first use and first use in commerce of January 1995.

of "interactive" and "excellence"³; photocopies of several third-party registrations in which the term "interactive" was disclaimed; and photocopies of several excerpted articles retrieved from the Nexis database to show that the word "interactive" is recognized as descriptive in applicant's industry.⁴

Applicant essentially contends that the Examining Attorney has improperly dissected applicant's mark; that the Examining Attorney's evidence regarding "interactive" does not relate to applicant's services of designing and developing kiosks, websites and CD-ROMs; that applicant's services are not "interactive" and do not include "interactive" communicative components of services such as online chat services or user access to the Internet; that applicant's mark is suggestive rather than merely descriptive; and that any doubt as to the question of whether a mark is merely descriptive should be resolved in applicant's favor. Applicant submitted photocopies of

³ The current Examining Attorney submitted a few dictionary definitions of the words "kiosk" and "premiere" with his brief on appeal. The Board takes judicial notice thereof. See TBMP §712.

⁴ The majority of the excerpted stories from the Nexis database are from foreign publications, and thus are of very limited probative value as to consumer perception of the term in the United States. See *In re Urbano*, 51 USPQ2d 1776, at footnote 3 (TTAB 1999). Moreover, several of the articles do not utilize the term "interactive" in any manner relevant to the involved services.

printouts from a search report showing several third-party registrations in which the words "interactive" and/or "excellence" were not disclaimed.⁵

It is well settled that "a term is descriptive if it forthwith conveys an immediate idea of the ingredients, qualities or characteristics of the goods [or services]." (Emphasis added). In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978). Moreover, the immediate idea must be conveyed with a "degree of particularity." In re TMS Corporation of the Americas, 200 USPQ 57, 59 (TTAB 1978). See also, See In re Nett Designs, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); and In re Entenmann's Inc., 15 USPQ2d 1750, 1751 (TTAB 1990), aff'd, unpub'd, Fed. Cir. February 13, 1991.

Further, it is well-established that the determination of mere descriptiveness must be made not in the abstract or on the basis of guesswork, but in relation to the goods or services for which registration is sought, the context in which the term (or phrase) is being used or is intended to be used on or in connection with those goods or services,

⁵ Generally, printouts from a private search company database are not an appropriate manner in which to submit such evidence. See In re Smith and Mehaffey, 31 USPQ2d 1531, at footnote 3 (TTAB 1994). However, the Examining Attorney did not object thereto, and, in fact, did not address the material at all until the appeal brief. Thus, the Board considers that the Office stipulated the material into the record.

and the impact that it is likely to make on the average purchaser of such goods or services. See *In re Omaha National Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); *Abcor*, 200 USPQ at 218; and *In re Pennzoil Products Co.*, 20 USPQ2d 1753 (TTAB 1991).

It has long been acknowledged that there is often a very narrow line between terms which are merely descriptive and those which are suggestive, and the borderline between the two is hardly a clear one. See *In re Atavio Inc.*, 25 USPQ2d 1361 (TTAB 1992).

Viewing this record in its entirety, we find that the evidence submitted by the Examining Attorneys does not establish a prima facie case that the mark INTERACTIVE EXCELLENCE is merely descriptive of applicant's identified services, "kiosk design and development services, website design and development services, and CD-ROM design and development services." None of the excerpted stories retrieved from the Nexis database show use of the words "INTERACTIVE EXCELLENCE"; and, as explained previously, most of the stories are from foreign publications and, in any event, do not evidence use of the word "INTERACTIVE" descriptively in relation to the services which are the subject of this application. Instead, the stories simply show that the term "interactive" is used in several

different connotations, such as the following (emphasis in original printouts), none of which are applicable to applicant's identified services:

...Flextech supplies a range of pay-TV channels, owns a string of websites, and provides interactive services such as online shopping...., "The Times (London)," January 28, 2000; and

...Small businesses often start by setting up a non-interactive website—for publicising their products and services and letting people know how to get in touch...., "Accountancy Age," January 27, 2000.

Thus, when considered in connection with applicant's design and development services, the mark INTERACTIVE EXCELLENCE does not readily and immediately evoke an impression and an understanding of the specific nature of applicant's identified services. See Concurrent Technologies Inc. v. Concurrent Technologies Corp., 12 USPQ2d 1054 (TTAB 1989); In re Intelligent Medical Systems Inc., 5 USPQ2d 1674 (TTAB 1987); and In re TMS Corporation of the Americas, supra.

Decision: The refusal to register the mark as merely descriptive under Section 2(e)(1) is reversed.