

THIS DECISION IS NOT
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OF THE TTAB

Mailed: 5/11/05

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Kleindienst Corporation

Serial No. 78159843

Charles J. Rogers of Winstead Sechrest & Minick for applicant.

David Elton, Trademark Examining Attorney, Law Office 106 (Mary I. Sparrow, Managing Attorney).

Before Quinn, Bucher and Holtzman, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by Kleindienst Corporation to register the mark DYNAMIC RECOGNITION for "computer software for use in payment processing."¹

The trademark examining attorney refused registration under Section 2(e)(1) of the Trademark Act on the ground that applicant's mark, if applied to applicant's goods, would be merely descriptive of them.

¹ Application Serial No. 78159843, filed August 30, 2002, alleging a bona fide intention to use the mark in commerce.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs. An oral hearing was not requested.

Applicant contends that its proposed mark is only suggestive, and dismisses the examining attorney's evidence because, according to applicant, it does not show any use of the term "dynamic recognition" in connection with payment processing computer software. Specifically, applicant argues that "[a]lthough the term 'dynamic recognition' is often used in various industries to refer to a number of various different applications, the term 'dynamic recognition' has not become a term of art in the niche market in which the Applicant uses its mark." Further, applicant asserts that its own use of the term highlighted by the examining attorney is as a trademark, and not as a descriptive term. Applicant relies upon general dictionary definitions of the terms comprising its mark, stating that "these terms may be suggestive of a quality (intense and vigorous) and a part of the function (optical character recognition) of the Applicant's payment processing software, but they are not merely descriptive."

The examining attorney maintains that "dynamic recognition" is "a term of art used in the software industry to describe software that has the capability of

performing operations involving the recognition of data at the time it is needed rather than at a predetermined or fixed time." More specifically, the examining attorney contends that the term immediately and directly informs purchasers that the software is designed for the dynamic recognition of data for use in the payment processing industry. In support of the refusal, the examining attorney submitted dictionary definitions, excerpts of articles retrieved from the NEXIS database, articles found on the Internet, and a press release from applicant.

A term is deemed to be merely descriptive of goods or services, within the meaning of Trademark Act Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. See, e.g., *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987), and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods or services. See *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973).

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; that a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). It is settled that "[t]he question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods or services are will understand the mark to convey information about them." *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002); see also *In re Home Builders Association of Greenville*, 18 USPQ2d 1313 (TTAB 1990); and *In re American Greetings Corporation*, 226 USPQ 365 (TTAB 1985). Similarly, as the Board has explained:

...the question of whether a mark is merely descriptive must be determined not in the abstract, that is, not by asking whether one can guess, from the mark itself, considered in a vacuum, what the goods or services are, but rather in relation to the goods or services for which registration is sought, that is, by asking whether, when the mark is seen on the

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goods or services, it immediately conveys information about their nature.

In re Patent & Trademark Services Inc., 49 USPQ2d 1537, 1539 (TTAB 1998).

The record shows that applicant's software is used in processing payments that are made when submitted together with other forms or documents (referred to as "unstructured" forms or documents). Applicant touts its technology as the ability to process payments together with other documents: "[applicant] offers imaging technology uniquely capable of processing checks intermingled with full-page documents" and that applicant "offers recognition solutions for....applications where checks have to be processed together with large documents."

Applicant has relied upon definitions of the terms "dynamic" and "recognition" found in a general dictionary. The term "dynamic" is defined as "marked by intensity and vigor; forceful" and the term "recognition" means "the act of recognizing or condition of being recognized." Although we have considered these meanings, the definition of "dynamic" listed in a computer dictionary is more relevant. As shown by this evidence submitted by the examining attorney, the term "dynamic" means "in programming languages pertaining to properties that can only be

established during the execution of a program; for example, the length of a variable-length data object is dynamic; pertaining to an operation that occurs at the time it is needed rather than at a predetermined or fixed time."

Computer Glossary, www.di.com.

The record also includes descriptive uses of the term "dynamic recognition" in connection with computers and computer software. Uses include the following examples:

Another area offering opportunities of dynamic recognition of low-precision operations is in the memory and I/O hierarchy.

(*ASAP*, May 1, 2000)

Windows 2000 now performs automatic and dynamic recognition of hardware.

(*Computing*, February 10, 2000)

It is also possible to implement dynamic recognition, in which case a list of words to be recognized is obtained from some external source, such as a Web page, and pronunciation models for the words are generated dynamically at run-time.

(*ASAP*, March 1, 2002)

XP smart tags that enable real-time, dynamic recognition of content and claimed it would allow users to quickly access and analyze financial information directly from Bridge's database....

(*Securities Week*, June 4, 2001)

Copper Mountain's IP service intelligence enables dynamic recognition of user profiles and services at the IP layer and

appropriate routing of voice traffic between on-net and off-net resources.
(*Business Wire*, September 18, 2000)

A prime example is the development of customized third-party smart tags, which enable real-time, dynamic recognition of content and offer relevant options to workers, allowing them to quickly access and analyze information.
(*PR Newswire*, May 13, 2000)

Also of record is an article authored by Berthold Nennstiel, an employee of applicant, that appeared in *TODAY--The Journal of Work Process Improvement*. This particular supplement deals with "the business of automated document processing" and cites as the industry's greatest challenge the "handling of unstructured forms." The article is captioned "Dynamic Document Recognition on the Path to the 21st Century." The article includes the following excerpt:

DFR: Dynamic Forms Recognition

The Kleindienst Explanation Of Payment Server's (kEOPs) DFR component follows the dynamics of even half or non structured documents. A notable example is EOB's (Explanations of Benefit). It identifies the document type by structural analysis. Then it graphically analyzes each page layout individually to dynamically locate all fields of interest.

By assigning the proper recognition engine and parameters to each field, recognition is performed at the

individual level. This happens at high speeds, as all locating algorithms of the recognition engine pass by. Subsequently kEOPs present results in a logical structure for each XML transaction.

The results of this intelligent field locator are impressive with read rates that are better overall than single recognition engines working standalone.

The examining attorney also introduced one of applicant's press releases (dated February 13, 2002) announcing that "[applicant] presents a wide range of document management solutions for international use." The press release includes the following:

JP Morgan is a further software client of Kleindienst corporation. The bank uses a Kleindienst solution for automatically processing tax forms of the State of New York. The solution uses special scanners and a dynamic recognition server for recognizing unstructured documents as well as software for information recognition and extraction from Kleindienst.

We agree with the examining attorney's assessment that it is irrelevant that the word "dynamic" might have other meanings in different contexts as suggested by applicant. Although applicant may view its software as having intense, vigorous or forceful qualities, the relevant purchasers are far more likely to view the term as descriptive of software having the capability of performing dynamic recognition

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functions at the time such functions are needed, rather than at fixed or predetermined times. Indeed, applicant has used terms such as "dynamic forms recognition" and "dynamic recognition server" in a descriptive manner relative to its software for use in payment processing. In the words of the examining attorney, applicant's "goods comprise software, a significant function of which is the capability of facilitating the 'recognition' of data, i.e., fields within documents (including checks and documents processed with checks) performed at an on-demand individual level, hence, 'dynamic recognition.'"

We conclude that, when used in connection with applicant's goods, the term DYNAMIC RECOGNITION immediately describes, without conjecture or speculation, a significant characteristic or feature of the goods, namely, that the software is designed to recognize data on an as needed basis (i.e., dynamically) in payment processing.

Decision: The refusal to register is affirmed.