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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Hansen Information Technology**

Serial No. 76413117

Bernhard Kreten for Hansen Information Technology.

Brian J. Pino, Trademark Examining Attorney, Law Office 114
(Margaret Le, Managing Attorney).

Before Chapman, Bottorff and Holtzman, Administrative Trademark
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

An application has been filed by Hansen Information
Technology to register the mark DYNAMICPORTAL for the following
goods, as amended:¹

computer communications software to facilitate
communications between governments and quasi-governments
with citizens and businesses, in International Class 9.

The trademark examining attorney refused registration on
three bases: (1) the identification of goods is unacceptable; (2)
the specimens of use are unacceptable; and (3) the mark is merely

¹ Application Serial No. 76413117, filed May 29, 2002, alleging a date
of first use and first use in commerce of March 1, 2000.

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descriptive of the goods under Section 2(e)(1) of the Trademark Act.

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

We turn first to the refusal based on the identification of goods. The identification as originally filed read:

computer hardware and software to facilitate communications between governments and quasi-governments with citizens and businesses.

In his first Office action, the examining attorney rejected the identification on the ground that the meaning of "to facilitate communications" was indefinite and suggested the following, "if accurate":

computer hardware to facilitate communications between governments and quasi-governments with citizens and businesses; and computer communications software to facilitate communications between governments and quasi-governments with citizens and businesses.

In the same action, the examining attorney required a new specimen on the basis that the specimen submitted with the application was unacceptable advertising material.

In response to the Office action, applicant adopted verbatim the suggested identification for software:

computer communications software to facilitate communications between governments and quasi-governments with citizens and businesses.

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In addition, applicant submitted a substitute specimen consisting of the first page of the promotional brochure that was submitted originally.

In his final Office action, based on the information contained in the substitute specimen, the examining attorney rejected applicant's amended identification on the ground that it did not accurately describe the goods. The examining attorney stated the following:

[he] originally surmised that the applicant's software allowed computer hardware to communicate with other computer hardware. Therefore, the examining attorney suggested that the applicant adopt the communications software identification. However, the applicant's second proposed specimen shows that the applicant is not providing communications software but is providing software with a different purpose...

The examining attorney proposed another identification of goods which was subsequently rejected by applicant.

The examining attorney now argues on appeal that applicant's identification, as amended, is not acceptable, not only because it is not accurate, but also because it is indefinite and does not concisely or clearly describe the goods. Specifically, the examining attorney maintains that the wording "facilitate communications" does not accurately describe the goods as shown by applicant's specimens of use and the materials obtained by the examining attorney from applicant's web site; and moreover, the wording does not concisely or clearly describe the function of

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applicant's software because the nature of the "facilitation" is not known. The examining attorney states:

The reader does not know if the facilitation is in the nature of word processing software so that the user may draft letters, communication software that is sold to and/or used strictly by computer engineers to build web site portals, telecommunications software, or any other number of uses encompassed by the amorphous wording to "to facilitate communications."

Whether an identification of goods is definite, concise and clear must be determined by the language of the identification itself. We presume that the examining attorney would not have proposed an identification of goods that, while perhaps not accurate, was not definite, concise or clear.² In fact, in his final Office action, the examining attorney's only basis for rejecting applicant's amendment was on the ground that it was not accurate. Therefore, the examining attorney's reinstated refusal to accept applicant's amended identification of goods on the basis that it is not definite, concise or clear, is considered waived.

The only question then is whether applicant's identification of goods, as amended, is accurate. TMEP §1402.05 (3rd ed. 2003) (*Accuracy of Identification*) provides that:

² An identification of goods that is indefinite or unclear would not be appropriate under any circumstances, regardless of the nature of the goods. The examining attorney is not taking the position that the proposed identification would not be acceptable under any circumstances.

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An identification is unacceptable if it is inconsistent with the goods or services indicated by the specimens, or if the ordinary meaning of the identification language is at variance with the goods or services evidenced by the specimens or any other part of the record. ...

Thus, we must determine whether applicant's amended identification of goods encompasses the goods in connection with which applicant actually uses its mark. We find that it does. Applicant's website materials state that its "DynamicPORTALS provide a quick, easy, and integrated solution for municipal agencies to facilitate and broaden citizen-to-government access via the Web." It can be seen from other information on applicant's web page that this "integrated solution" includes software or a software package that creates this access.

Under the circumstances, and because an applicant is entitled to identify its goods in terms that are as broad as the circumstances justify (TMEP §1402.03 (3rd ed. 2003)) we find the identification, as amended, accurately describes applicant's goods.

We turn next to the specimens. Applicant submitted with the original application, the second page of a brochure advertising its goods. The examining attorney rejected the specimen as consisting of unacceptable advertising material and required appropriate specimens for

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goods such as tags, labels or containers showing the mark on the goods or on the packaging for the goods.

In response to the requirement, applicant submitted the first page of the brochure while maintaining that the original specimen was appropriate. In addition, applicant stated, "Labels do not exist."

In his final refusal, the examining attorney rejected applicant's substitute specimen as consisting of "mere advertising material that did not meet any exception" and pointed out that appropriate specimens may include "screen shots" of the mark on the software.

Applicant argues on appeal that its advertising material "is certainly within the permitted genre of specimens" insisting that a brochure "is effective and more than legally adequate." Applicant maintains that a "screen shot" would not be appropriate because the purchasers of its software are "primarily large institutions" and that the users of the software, as opposed to the purchasers of the software, would not need to be exposed to the mark. Applicant concludes by stating, without explanation, that "TMEP §904.06 reveals that point of sale material is certainly adequate."

The examining attorney argues in his brief that applicant's advertising materials are unacceptable to show

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trademark use and rejects applicant's apparent claim that the specimen is a point of sale display.

We agree with the examining attorney.

Specimens must show the mark used on or in connection with the goods or on displays associated with the goods.³ Applicant's specimens are not acceptable because they do not show use of the mark on the actual goods or labels or tags for the goods. Nor is there any evidence that they constitute displays associated with the goods.⁴

The specimens in this case consist of two pages of an advertising brochure. Specimens are invalid for registration purposes if they constitute mere advertising. In re Shipley Co., 230 USPQ 691 (TTAB 1986). Thus, the question is whether these materials constitute mere advertising for the goods or whether, in addition to advertising the goods, they also perform the function of displays associated with the goods. As explained by the Board in In re Bright of America, Inc., 205 USPQ 63, 71 (TTAB 1979):

³ Section 45 of the Trademark Act provides that a mark shall be considered to be used in commerce on goods when "it is placed in an manner on the goods or their containers or the displays associated therewith ..."

⁴ Applicant has not asserted that the nature of its goods makes the placement of tags or labels on those goods or other traditional forms of specimens impracticable. Moreover, applicant specifically states in

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A display associated with the goods...comprises essentially point-of-sale material such as banners, shelf-talkers, window displays, menus, or similar devices which are designed to catch the attention of purchasers and prospective purchasers as an inducement to consummate a sale and which prominently display the mark in question and associate it or relate it to the goods in such a way that an association of the two is inevitable ...

Brochures describing goods and their characteristics or serving as advertising for the goods are not per se "displays." In order to rely on such materials as displays, it either must be clear from the materials themselves or it must be made clear by other evidence that the materials are displays associated with the goods. See, e.g., *In re MediaShare Corp.*, 43 USPQ2d 1304, (TTAB 1997) citing *In re Ancha Electronics Inc.*, 1 USPQ2d 1318 (TTAB 1986).

There is nothing on the face of applicant's brochure to indicate that it is a point-of-sale display. There is no depiction of the software anywhere on the material submitted by applicant, and moreover, the brochure does not contain all of the information necessary "to consummate a sale." Compare, e.g., *Lands' End Inc. v. Manbeck*, 797 F.Supp. 511, 24 USPQ2d 1314 (E.D. Va. 1994). There is a phone number and website to contact for information but a purchaser could not make a decision to purchase solely from this information.

the application that its mark is, in fact, applied to tags and labels, discussed later herein.

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For example, the brochure lacks information such as the price of the product, or the conditions or terms on which it is licensed or otherwise sold.

Nor is there any evidence, such as photographs of the displays or even an explanation by applicant that the brochure is used in association with the goods as a point-of-sale display. Compare *In re Ancha Electronics Inc.*, supra. Accordingly, we find that the pages from applicant's brochure are merely advertisements that simply promote the sale of its goods.

We also note the following statement by applicant in the original application:

The mark is used by applying it to brochures and literature associated with the goods, labels and tags attached to the containers for the goods and the goods.

Despite a signed declaration that the statements made in the application were true, including the statement that the mark is applied to labels, in response to the examining attorney's requirement for acceptable specimens applicant stated that "Labels do not exist." Applicant never amended its statement to delete labels.

We turn then to the refusal to register on the ground that the mark is merely descriptive.

Applicant is seeking registration of DYNAMICPORTAL for "computer communications software to facilitate

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communications between governments and quasi-governments with citizens and businesses."

In support of his position that the mark is merely descriptive, the examining attorney relies on evidence including excerpts of articles from the Nexis database, portions of third-party websites, search engine summaries, and applicant's brochure and website materials, all of which, according to the examining attorney, contain various descriptive references to "portal," "dynamic portal," or "portal software."

A term is merely descriptive within the meaning of Section 2(e)(1) if it immediately conveys knowledge of a quality, characteristic, function, feature, purpose or use of the goods with which it is used. In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). The question of whether a particular term is merely descriptive must be determined not in a vacuum or on the basis of speculation, but in relation to the goods for which registration is sought. See In re Engineering Systems Corp., 2 USPQ2d 1075 (TTAB 1986).

We find that the term DYNAMICPORTAL when applied to applicant's goods, immediately and without conjecture, describes a significant feature or function of software that enables or facilitates Internet communication and interaction between organizations, such as government agencies, and their customers.

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A portal is a webpage that serves as a starting point to other designated information and destinations on the Internet. The term "portal" is defined in the *Microsoft Computer Dictionary* (5th ed. 2002)⁵ as follows:

A Web site that serves as a gateway to the Internet. A portal is a collection of links, content, and services designed to guide users to information they are likely to find interesting - news, weather, entertainment, commerce sites, chat rooms, and so on. Yahoo!, Excite...are examples of portals.

This portal is created or enabled by applicant's software, and the software is marketed to government agencies who wish to provide this type of Internet service to their customers. Applicant's product brochure contains the sample screen of a city government website offering a list of government services, links to other government services and information, and a window for performing searches within the site.

The "portal" created or enabled by applicant's software is "dynamic", meaning essentially that updating of information and content is performed while a program or system is running.⁶ The nature of a "dynamic portal" is explained in the following website excerpt (bold added, other emphasis in original):

⁵ The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

⁶ See, e.g., *The Computer Glossary* (9th ed. 2001) of which we take judicial notice.

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There are two kinds of portals. One is the *static portal*, in which most of the information consists of "static" web pages. The original Yahoo! index and search engine is a good example of a static portal. The second kind of portal is the **dynamic portal**, where most of the information is generated dynamically out of one or more databases. The portal user can easily personalize the portal's content. ...Note that the line between static and dynamic portals isn't fixed, since all portals usually have both static and dynamic content associated with them. ...
www.wirelessdevnet.com

Other Internet and Nexis references submitted by the examining attorney similarly show descriptive usage of "dynamic portal" in the context of a website (emphasis added):

Drive Repeat Users/Visitors to your Web Site!
Many Internet marketing and branding models focus on repeat users/visitors to the Site. One of the most effective methods of securing repeat users is by implementin[g] [a] **dynamic portal** Web Site that provides its users useful content and applications, [illegible words] lure them to your site time-and-time again.
www.yourbrand.net

SRA and Plumtree Partner to Deliver **Dynamic Portal** Solutions for the Federal Government
SRA International, Inc. has teamed with leading corporate portal vendor Plumtree Software to provide portal solutions for the federal government. SRA will provide systems integration services for customers in the public sector who are deploying the Plumtree Corporate Portal to reduce paperwork, take advantage of all the resources on the Internet, and share information securely with their employees, contractors and constituencies. ...
www.sra.com

The branded Internet services launched for this client included a robust **dynamic portal** solution that permits end-users to select and format the content and appearance of their initial Web site portal, branded with the MLM client's information and content. This includes the distribution of dynamic content to end-user's Web portal sites from syndication sources that IKANO has contracted with.
www.ikano.com

"... And the way that we use that technology is what makes us unique. We're using it with our software and hardware products to enable these **dynamic portals**, in real time. Every time you change the service there is virtually no time lapse between when the information is stored in the directory and when it presents itself on your own **dynamic portal** page. That is the value to the end user. ..." *New Hampshire Business Review* (May 18, 2001).

The Internet evidence also shows that software is used to enable or create a dynamic portal (emphasis added):

BiznizWeb Inc., an industry leader in **dynamic portal software**, announced today the release of Version 8.0 of its flagship DynaPortal™ portal management software. DynaPortal is a turnkey application suite that integrates more than 30 modules to produce a compelling, full-featured Web portal. It provides **dynamic content management**, ecommerce, targeted advertising, and membership maintenance functions in an easy to use, affordable solution.
www.dynaportal.com

...server **software** and tools allows system integrators, businesses, and independent software vendors to develop high productivity **dynamic portal** applications:
www.kenamea.com

...major new features - Process Control, **dynamic portal** functions, and Scheduling - that represent significant enhancements to the **software's** capabilities, ...
www.qsp.com

"We understand that service providers that make the most money are the ones that own the last foot - AOL, Yahoo," said Bill Clark, director of product marketing for Ellacoya. "What we've done is to develop a **software** package that is a **dynamic portal** creator." *Telephony* (October 23, 2000).

It is clear that applicant's DYNAMICPORTAL software performs the type of function described on these websites, i.e., that its software enables or creates the "dynamic portal." Applicant's brochure and website materials show that its software integrates

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multiple departmental systems (and aggregates the data from those systems) into a common system or database which then allows a single access to those various systems and their databases by the user:

Citizen-to-Government Access

Hansen's DynamicPORTAL™ represents breakthrough technology that securely links your citizen-based Internet services directly to Hansen's Version 7.5 applications. While incorporating your Web site's look and feel, Hansen's DynamicPORTALS provide a quick, easy, and integrated solution for municipal agencies to facilitate and broaden citizen-to-government access via the Web.

Hansen's DynamicPORTALS are intention specific service portals that automatically manage communications with citizens.

Every Hansen solution is developed to combine your numerous departmental systems onto a common system and database.

All data resides in a single enterprise database to reduce system management requirements and eliminate the duplicating of data and processes.

The Hansen Enterprise is fully integrated between modules eliminating the need to build and maintain costly interfaces between departmental systems.

Hansen offers built-in Web integration through our DynamicPORTAL™ products allowing you to quickly put common services online for your citizens.

Applicant claims that "government and quasi-government are looking for a seamless interface with consumers" and that "'Dynamic Portal', as used by applicant does not describe the interface." On the contrary, that is the very function applicant's software performs. The evidence shows that a portal is itself an interface between a user and particular sources of

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information, in this case information from government agencies. Applicant's software, in fact, enables this "seamless interface" with consumers. In other words, applicant's software facilitates a government entity's online communications and interfacing so that the public can readily access government information and services.

The fact that applicant may have been the first to use DYNAMICPORTAL is not dispositive where, as here, the term unquestionably projects a merely descriptive connotation. See *In re MBAssociates*, 180 USPQ 338 (TTAB 1973).

Moreover, it is not necessary that the mark be seen or understood by customers who access the website. Their perception or understanding of the term is not relevant. Rather, the relevant consideration is whether the term has a descriptive meaning to that segment of the public who are purchasers or prospective purchasers of applicant's goods.⁷ See *In re Northland Aluminum Products, Inc.*, 777 F.2d 1556, 1559, 227 USPQ 961, 963 (Fed. Cir. 1985). Applicant's software is directed to

⁷ Evidence of the relevant public's understanding of the term may be obtained from any competent source, such as consumer surveys, dictionaries, newspapers and other publications. *In re Northland Aluminum Products, Inc.*, 777 F.2d 1556, 1559, 227 USPQ 961, 963 (Fed. Cir. 1985). Contrary to applicant's apparent claim, the Nexis and Internet references submitted by the Examining Attorney are not considered for the purpose of for the truth of the matter asserted therein, that is, for example, whether SRA and Plumtree actually provide or will be the first to provide dynamic portals, but rather to show the meaning of the term in a specific context.

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and is purchased by government and quasi-government entities. When DYNAMICPORTAL is considered by those purchasers, not on the basis of guesswork as to what applicant's goods are, but in relation to the goods, there is no question that they would readily understand the descriptive meaning of the term.⁸

Decision: The requirement for an acceptable identification of goods is reversed; the requirement for acceptable specimens is affirmed; and the refusal to register on the ground that the mark is merely descriptive of applicant's identified goods is affirmed.

⁸ The third-party registration for the mark PORTAL DYNAMICS submitted for the first time with applicant's brief is untimely and has not been considered. See Trademark Rule 2.149(d). The Board does not take judicial notice of registrations merely because they reside in the USPTO. See *In re Duofold Inc.*, 184 USPQ 638 (TTAB 1974). Even if we had considered the registration, it would not affect any aspect of our decision.