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THE TTAB

Mailed: March 31, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Medical Simulation Corporation

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Serial No. 77000387

Serial No. 77000390

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James L. Brown of Swanson & Bratschun, L.L.C. for Medical  
Simulation Corporation.

Zhaleh Delaney, Trademark Examining Attorney, Law Office 116  
(Michael W. Baird, Managing Attorney).

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Before Seeherman, Holtzman and Taylor, Administrative Trademark  
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Applicant, Medical Simulation Corporation, has filed two  
applications to register the standard character mark BEST PROGRAM  
(PROGRAM disclaimed) for goods and services currently identified  
as follows:

Computer hardware, computer software and one or more  
simulation input devices for use in performing simulated  
medical techniques for use in the training of medical  
professionals in medical techniques used as part of a

medical training program, and printed instructional material sold as a unit therewith (in Class 9).<sup>1</sup>

Medical training and teaching services for medical professionals; educational services for medical professionals, namely, conducting classes, seminars, conference and workshops in the medical field for healthcare providers (in Class 41).<sup>2</sup>

The trademark examining attorney has refused registration on the ground that the mark is merely descriptive of applicant's goods and services under Section 2(e)(1) of the Trademark Act. In addition, the examining attorney issued a requirement in each application for an acceptable identification of goods and services.

When the refusal and requirement were made final, applicant appealed. Applicant and the examining attorney have filed briefs.

Because the marks in both applications are the same and the issues are essentially the same, the appeals are hereby consolidated.

We turn first to the requirement for an acceptable identification of goods and services. In the Class 41 application, the examining attorney issued a final requirement for an amendment to change the word "conference" to

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<sup>1</sup> Serial No. 77000390, filed September 15, 2006, based on an allegation of a bona fide intention to use the mark in commerce.

<sup>2</sup> Serial No. 77000387, filed September 15, 2006, based on an allegation of a bona fide intention to use the mark in commerce.

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"conferences." Applicant agreed to this change in its brief and the examining attorney accepted the amendment. The amendment is accordingly entered.

As to the Class 9 application, the examining attorney issued a final requirement for a more definite statement of the goods identified as "input devices for use in performing simulated medical techniques." In particular, the examining attorney required applicant to indicate the common commercial name for these devices.

Applicant, in its brief, offered to change the wording to "input devices in the nature of catheters, probes, scopes, and gantry controls, contrast manifolds and balloon inflation devices for use in performing simulated medical techniques." However, the examining attorney rejected the amendment out of hand on the basis that it was not timely filed.

It is unclear why the examining attorney was willing to accept the untimely amendment filed in one application but not in the other. However, because she did, and because the applicant's submission of the amendment in its brief was clearly untimely,<sup>3</sup> we treat the original wording, "input devices for use in performing simulated medical techniques," as the operative

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<sup>3</sup> The proper procedure, if an applicant wishes to amend its application after it has filed its notice of appeal, is to file a request for remand.

identification.<sup>4</sup> With respect to that identification, although the examining attorney mentioned the final requirement for an acceptable identification in her discussion of the procedural history of the case, she did not specifically maintain the requirement in her brief, nor did she address the requirement on the merits. Under the circumstances, we consider the requirement for an acceptable identification in the Class 9 application to be withdrawn.

We turn then to the question of whether the mark BEST PROGRAM is merely descriptive of applicant's goods and services. 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 or services with which it is used or intended to be used. In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). Moreover, the question of whether a particular term is merely descriptive must be determined not in the abstract, but in relation to the goods or services for which registration is sought. See In re Engineering Systems Corp., 2 USPQ2d 1075 (TTAB 1986).

As the Federal Circuit has observed, "Marks that are merely laudatory and descriptive of the alleged merit of a product are also regarded as being descriptive.... Self-laudatory or puffing

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<sup>4</sup> With respect to the proposed amendment to the identification, we note that the examining attorney stated the amendment would not effect the refusal on descriptiveness grounds. We concur with that assessment.

marks are regarded as a condensed form of describing the character or quality of the goods." In re Boston Beer Co. L.P., 198 F.3d 1370, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999) quoting 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* §11:17 (4th ed. 1996)).

We find that the term BEST PROGRAM is a laudatory designation describing the superior quality of applicant's medical training and educational services, as well as its computer software used in medical training programs.

The examining attorney has introduced a number of definitions of "program" from a variety of sources. We note, in particular, the following:<sup>5</sup>

1. c. A course of academic study; a curriculum.
    - d. A plan or system of academic and related or ancillary activities: *a work-study program.*
- The American Heritage Dictionary of the English Language  
(Third Edition 1992) (Electronic version.)

-noun

7. a prospectus or syllabus: *a program of courses being offered.*

Dictionary.com Unabridged (V 1.1) based on the Random House Dictionary Unabridged (2006) (from the website [www.dictionary.reference.com](http://www.dictionary.reference.com).)

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<sup>5</sup> As requested by the examining attorney, we take judicial notice of the entries from *Dictionary.com Unabridged* and *Wordnet 3.0* which were attached to the examining attorney's brief. The Board may take judicial notice of dictionaries, including online dictionaries which exist in printed format or have regular fixed online editions. See In re Red Bull GmbH, 78 USPQ2d 1375, 1378 (TTAB 2006) (taking judicial notice of, for example, *Wordnet 2.0* which although not available as a print publication, was determined to be the electronic equivalent of a print publication).

*noun*

6. an integrated course of academic studies; "he was admitted to a new program at the university" [syn: course of study].

*Wordnet 3.0* (Princeton University 2006) from the website [www.dictionary.reference.com](http://www.dictionary.reference.com).

We take judicial notice of the following additional definitions of "program" (emphasis added):

a group of activities or things to be achieved

**a training program**

*the university basketball program*

*a pilot recycling program*

Cambridge Dictionary of American English (2008).

SET OF CLASSES a series of classes or lectures on something.  
Microsoft Encarta College Dictionary (2001).

*n.* A sequence of instructions that can be executed by a computer. The term can refer to the original source code or to the executable (machine language) version. **Also called: software.**

Microsoft Computer Dictionary (Fifth Edition 2002).

It is clear from the above definitions that the term PROGRAM is a descriptive, if not generic, name for applicant's goods and services. The training and classes, or set of classes, offered by applicant constitute a PROGRAM. It can also be seen that "program" is another word for "software." Thus, in relation to applicant's goods, the term PROGRAM identifies the product itself, namely, "computer software." Furthermore, the

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identification of goods specifically states that the computer software is used as part of a "medical training program."

The examining attorney has also submitted the following definition which demonstrates the meaning of BEST as a laudatory term:

*"adjective. Superlative of good. 1. Surpassing all others in excellence, achievement, or quality; most excellent; the best performer; the best grade of ore. 2. Most satisfactory, suitable, or useful; most desirable; the best solution; the best time for planting." The American Heritage Dictionary of the English Language (Third Edition 1992) (Electronic version.)*

The laudatory meaning and significance of BEST is also shown by the twelve third-party registrations that are of record for marks containing the word BEST in a variety of fields. Each of these registrations issued either on the Supplemental Register, or on the Principal Register under Section 2(f) or with a disclaimer of BEST. See, for example, Reg. No. 3014257 for the mark AREA'S BEST HOMES for "real estate advertising services" (Supplemental Register); Reg. No. 3070387 for the mark BEST WINDOWS & DOORS and design for services including "retail outlets featuring residential windows" (all wording disclaimed); Reg. No. 3150170 for the mark BEST SOURCE for "distributorships featuring pharmaceuticals" (Supplemental Register); and Reg. No. 3109325 for the mark BEST PEST CONTROL for "pest control" (Section 2(f)). Third-party registrations, while not evidence of actual use, "may be given some weight to show the meaning of a mark in the same

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way that dictionaries are used." *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694 (CCPA 1976).

In an attempt to show that "best" is not descriptive, applicant submitted (in the Class 41 application) seven third-party registrations for BEST combined with other wording for various services in that class, arguing that these marks are "are registered on the Principal Register without a showing of acquired distinctiveness."<sup>6</sup> However, as the examining attorney points out, in two of those registrations (Reg. Nos. 2935396 and 2126880), the word BEST is disclaimed. We also note that one other registration (Reg. No. 2436836) has been cancelled, and it is therefore of no probative value. As to the remaining four registrations, the combination of BEST with other wording results in marks which are, in their entirety, nondescriptive terms that simply have no direct meaning in relation to the services identified in the registrations. For example, in Reg. No. 3018012, the mark BEST LIFE conveys no clear meaning in the context of "online magazines in the field of health." See *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir.

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<sup>6</sup> Although this evidence is untimely, having been submitted for the first time with applicant's brief, because the examining attorney did not object to this evidence and moreover has treated it on the merits, we have considered it as properly of record. We note that applicant also attached seven different third-party registrations to its brief in the Class 9 application. Inasmuch as the examining attorney did object to the untimeliness of this evidence, we have not considered it. We add, however, that even if we had considered the evidence, it would not change our decision in this case.

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2001), observing that a term "may tilt toward suggestiveness or descriptiveness depending on context and any other factor affecting public perception."

In any event, it is well settled that each case must be decided on its own facts, based on the particular mark, the particular goods or services, and the particular record in each application. See *In re Nett Designs*, supra. Even to the extent the marks in these prior registrations have some characteristics similar to applicant's application, as our primary reviewing court stated in *Nett Designs* at 1566, "the PTO's allowance of such prior registrations does not bind the Board or this court."

It is clear from the dictionary definitions and other evidence of record that the term BEST is a nondistinctive, laudatory term which when combined with PROGRAM, does nothing more than tout the superior or excellent quality of applicant's medical training and educational services, as well as applicant's computer software and materials used for a training program.

Applicant makes various arguments as to why BEST PROGRAM is not descriptive of its goods and services. However, none of the arguments is persuasive.

Applicant argues, pointing to printouts of pages from its website, [www.medsimulation.com](http://www.medsimulation.com),<sup>7</sup> that BEST PROGRAM is not used to

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<sup>7</sup> This website material was attached to the briefs in both applications. However, the examining attorney did not object to this

identify a "traditional 'program'" or a "simple training program or curriculum," but instead is used to identify "complex hands-on medical training services" provided with a medical simulation apparatus.

Whether the training services are "traditional" or "complex" is simply irrelevant. The dictionary definitions of "program" make no such distinctions. Applicant's services, as identified, fall squarely within the plain dictionary meaning of a "program." In fact, applicant even has a listing for "Education Programs" on its website, and the subject matter is identified as "technologies," "physicians," and "Custom Courses."

Applicant further argues that BEST PROGRAM is used to identify complex medical training apparatus; and that while the apparatus includes software elements, it is "far more than a mere computer program." Applicant maintains that BEST PROGRAM cannot possibly convey an immediate idea of applicant's medical training apparatus, since the apparatus is not a "program."

While obviously the apparatus is not a "program," the fact remains that one of the products for which applicant is seeking registration is a "computer program." Registration must be refused if a mark is merely descriptive of any of the goods for

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evidence in the Class 41 application and her objection to the late-filed evidence in the Class 9 application was directed solely to the third-party registrations in that application. Accordingly, we have considered this evidence on the merits.

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which registration is sought. See *In re Quik-Print Copy Shop, Inc.*, 616 F.2d 523, 205 USPQ 505 (CCPA 1980).

Applicant contends that the software program "runs invisibly in the background when Applicant's goods are used ... the way one or more computer programs run in the background of a modern automobile, cell phone, or even a digital coffee maker."

It is not clear what point applicant is trying to make here. We presume that applicant has a bona fide intent to use the mark on the computer programs, and that the computer programs will in fact be goods in trade.<sup>8</sup> Therefore, the purchasers of applicant's computer program, if not the users of the program, will certainly be aware of the mark on the program and they will clearly understand the meaning of BEST PROGRAM in relation to those goods.

Finally, while admitting that BEST has a laudatory meaning, applicant argues that the word is not "only" descriptive because it has another meaning as an acronym for "Basic Endovascular Systems Training." Applicant maintains that the acronym meaning will be readily apparent to the medical professionals seeking such training assistance who are the customers for its services.

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<sup>8</sup> If this is not the case, and if applicant is arguing that its computer software is merely incidental to the services such that the software is only used by applicant to render its training services, and it is not a good in trade, applicant would not be entitled to a registration for the mark on these goods.

Apart from the fact that the alleged underlying meaning may itself be descriptive, there is nothing in the record - not in the mark, applicant's company name, or the website materials - to indicate that BEST has that other meaning or to indicate that the word would be understood by applicant's customers as an acronym standing for those other words.

There is no question that purchasers of applicant's training services as well as its computer programs for use in a training program would, without any guesswork or the exercise of any imagination, immediately understand the descriptive and laudatory meaning of BEST PROGRAM as applied to those goods and services.

**Decision:** The refusal to register under Section 2(e)(1) of the Trademark Act as to both applications is affirmed.