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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Exponential Interactive, Inc.

Serial No. 77264037

Lee Hagelshaw of Tech Law for Exponential Interactive, Inc.

Emily K. Carlsen, Trademark Examining Attorney, Law Office
103 (Michael Hamilton, Managing Attorney).

Before Grendel, Rogers and Walsh, Administrative Trademark
Judges.

Opinion by Walsh, Administrative Trademark Judge:

Exponential Interactive, Inc. (applicant) has applied
to register the mark Dynamic Ads in standard characters on
the Principal Register for services identified as
"advertising and marketing services, promoting the goods
and services of others through placement, targeting, and
distribution of advertising via the Internet and other

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means of communication" in International Class 35.¹

Applicant has disclaimed "Ads."

The Examining Attorney has finally refused registration on the grounds that Dynamic Ads merely describes the identified services. Applicant has appealed. Applicant and the Examining Attorney have filed briefs. We affirm.

Before addressing the merits of the case we must address objections applicant has raised with respect to certain evidence. In its main brief applicant objected to several pieces of evidence the Examining Attorney provided on the grounds that the evidence was not relevant. In its reply brief applicant again argues that we should exclude the evidence on the same grounds, and also because the Examining Attorney failed to address the objections in her brief. Applicant's objections on the ground of relevance go to the weight of the evidence rather than its admissibility, and we will therefore consider the evidence for whatever probative value it may have. Furthermore, in this ex parte proceeding we decline to exclude evidence because the Examining Attorney may not have addressed the objection specifically in her brief.

¹ Application Serial No. 77264037, filed August 24, 2007, asserting first use of the mark anywhere and first use of the mark in commerce on March 23, 2007.

Applicant objected to one specific article from Brunico Communications attached to the Final Office Action of April 4, 2008, on the grounds that it concerns the market in Canada; it also appears to be a publication from Canada. This objection is well taken. On this record, we have no basis to conclude that this publication reflects the public understanding of the significance of Dynamic Ads in the United States. Accordingly, we have not considered this article in reaching our decision here.

We now turn to the merits. A term is merely descriptive of goods or services within the meaning of 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, 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 or function of the goods or services. See *In re H.U.D.D.L.E.*, 216 USPQ 358, 359 (TTAB 1982); and *In re MBAssociates*, 180 USPQ 338, 339 (TTAB 1973).

Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services identified in the application, and the possible significance that the term would have to the average purchaser of the goods or services. *In re Polo International Inc.*, 51 USPQ2d 1061, 1062 (TTAB 1999); *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).

The Examining Attorney argues, "The term DYNAMIC ADS or DYNAMIC ADVERTISING is commonly used to refer to a form of advertising that feature interactive or 'live' ads that can be updated for a particular audience or changed so that the consumer does not see duplicate ads - in other words targeted interactive advertising." Examining Attorney's Brief at 3.

Applicant acknowledges that "Ads," which it disclaimed, is shorthand for advertising. Applicant argues that Dynamic Ads is not a term of art in the online advertising industry because it lacks a singular, defined meaning. Applicant points out that during the prosecution of the application the Examining Attorney posited two different meanings - in the Office Action of December 12, 2007, "targeted Internet-based advertising campaigns," and in the Office Action of April 4, 2008, "updated commercial messaging from a live advertising campaign." Applicant's

Brief at 6. Applicant then argues that Dynamic Ads is suggestive because it has no specific, merely descriptive meaning, particularly as applied to the services applicant provides.

The Examining Attorney provided evidence in support of her position, including the following:

- An article from the *Lowell Sun* (Mass.) discusses "smart," sophisticated, computer-enabled shopping carts, which include a screen display. The article describes various features of the technology and states, "As one might guess, smart carts feature content-rich **dynamic advertising**, based not only on the day's purchases, but also a customer's saved data from previous visits." Attachment to December 12, 2007 Office Action (emphasis added).
- An entry from the *Wikipedia* online encyclopedia displayed through google.com discusses both static and dynamic in-game advertising in the online computer-game field. It states, "Increasingly Internet connectivity has led to the growth of **dynamic in-game advertising**. Unlike the fixed adverts found in static, in-game ads, **dynamic adverts** can be altered..." *Id.* (emphasis added).
- An article from *Consumer Electronics Daily* also discusses online video games and the use of dynamic in-game advertising. It states, "**Dynamic ads** can be changed remotely via an in-game ad agency, unlike fixed in-game ads. ... '**Dynamic in-game advertising** is an important growth area for our business, and is one of the many opportunities we are pursuing in growing the advertising market.'" Attachment to April 4, 2008 Office Action (emphasis added).

- An article from the *Detroit Free Press* also discusses the use of "**DYNAMIC ADS**" in online video games. *Id.* (emphasis added).
- An article from clicz.com entitled "Creating **Dynamic Ads** on the Fly" states, "On-the-fly content personalization and user behavior profiling have enjoyed a fair share of Internet hype, but how can agencies use these techniques to create real world campaigns. ... Both technologies have their pros and cons, but do offer advertisers the ability to create **dynamic ads** on the fly. ... Freestyle put together an example to show how a fictitious airline might use a **dynamic ad.**" Attachment to December 12, 2007 Office Action (emphasis added). The article then proceeds to explain how a dynamic ad, in banner form, can be set up to display the current ticket price and to change the price, as appropriate.
- An article from *Business Week Online* states, "On its corporate blog late yesterday, Google YouTube Unit says it has started to work with select partners to offer new video advertising. Semi-transparent and sometimes **dynamic ads** in the bottom portion of some videos. The ads are displayed about 15 seconds after the videos begin and disappear about 10 seconds later, unless users click on them." Attachment to April 4, 2008 Office Action (emphasis added).

Applicant explains that its service "... allows the advertiser to tailor its message to audiences in different geographic locations." Applicant's Brief at 3. Applicant argues further that none of the examples provided by the Examining Attorney do this.

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We find applicant's arguments unpersuasive. The totality of the evidence here is more than sufficient to show that Dynamic Ads merely describes a broad and expanding type of advertising service offered over the Internet or through other technologies where the content of the ad is tailored to the user or otherwise changes to fit the requirements of the advertiser. The targeted advertising services identified in the application, and discussed in applicant's specimen, are well within the general type of service which Dynamic Ads has come to describe. *Goodyear Tire & Rubber Co. v. Continental General Tire Inc.*, 70 USPQ2d 1067 (TTAB 2003) (INTELLIGENT held merely descriptive of tires); *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1317 (TTAB 2002) (SMARTTOWER merely descriptive of commercial and industrial cooling towers); *In re Cryomedical Sciences Inc.*, 32 USPQ2d 1377 (TTAB 1994) (SMARTPTOBE held merely descriptive of one-time use, disposable cryosurgical probes). Like "intelligent" and "smart," "dynamic" is a term which lends itself to broad descriptive application in a field, such as online or electronic advertising, or even in multiple fields.

Applicant argues that the absence of a dictionary definition for Dynamic Ads suggests that it is not merely descriptive. Of course, the mere absence of a dictionary

definition for a term does not lead to the conclusion that the term is not merely descriptive. *In re Dahlquist, Inc.*, 1932 USPQ 237 (TTAB 1976); *In re Orleans Wines, Ltd.*, 196 USPQ 516 (TTAB 1977). Furthermore, we have consulted relevant dictionaries and found in *Advertising Media A - Z* (2004) definitions of the following terms:

Dynamic ad placement - The Process of inserting an advertisement into a web page in response to the user's request - that is, the user clicked on something on the web page to request the advertisement.

Dynamic Content - Content on a website or Web page that changes often whereby successive clicks on the site or page (for example, daily) will reveal revised or different content.

Dynamic Rotation - The delivery of ad banners on a rotating or random basis as opposed to static placement of an ad on the same page all the time. This offers the potential for each user to see a different message and for ads to be seen in more than one place on a website.²

These definitions, dating from no later than 2004, illustrate that "dynamic" had been used and understood by advertisers to describe online ads with changing content. Applicant's use of "dynamic" in relation to its services, and those uses shown in the evidence here, reflect the

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

evolving and expanding use of "dynamic" to describe a broad type of advertising. Accordingly, we reject applicant's argument regarding the asserted absence of dictionary entries.

We also reject applicant's argument that some degree of imagination is required to discern the descriptive meaning of Dynamic Ads as applied to applicant's particular services. On the contrary, the meaning is readily apparent in view of the other uses of "dynamic," "dynamic advertising" and "dynamic ads" as applied to online or electronic ads which are targeted, tailored or otherwise changing. *In re Hunter Fan Co.*, 78 USPQ2d 1474 (TTAB 2006) (ERGONOMIC held merely descriptive of ceiling fans). The fact that applicant uses the device to target different ads to particular geographic locations is entirely consistent with the other descriptive uses. It is not reasonable to expect that potential advertisers will view "Dynamic Ads," as applied to Applicant's services, as a source indicator in view of this evidence. More importantly, the evidence shows that "Dynamic Ads" has been used to describe targeted advertising as identified in the application, whether or not it has been applied to ads targeted to geographic locations, a limitation not specified in applicant's identification of services.

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Applicant also argues there is no competitive need to use Dynamic Ads because competitors, such as Google and Microsoft, which offer similar advertising programs, do not use Dynamic Ads in describing their services. We reject this argument. Even if applicant were the first to use Dynamic Ads for its specific service, we would not conclude, on that basis, that Dynamic Ads was not merely descriptive. *In re Acuson*, 225 USPQ 790 (TTAB 1985) (COMPUTED SONOGRAPHY held merely descriptive of ultrasonic imaging instruments); *In re National Shooting Sports Foundation, Inc.*, 219 USPQ 1018 (TTAB 1983) (SHOOTING, HUNTING, OUTDOOR TRADE SHOW AND CONFERENCE held generic for conducting and arranging trade shows in the hunting, shooting and outdoor sports products field).

Applicant also provided examples of uses of "dynamic advertising" in relation to advertising programs where "dynamic" is simply used to indicate that the program is energetic, active, vigorous or forceful. These laudatory uses of "dynamic," which may also be descriptive, in no way contradict our conclusion here that Dynamic Ads, as used in the context of applicant's identified services, is merely descriptive. *In re IP Carrier Consulting Group*, 84 USPQ2d 1028, 1034 (TTAB 2007). Accordingly, we find this evidence unpersuasive.

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Finally, after considering all of the evidence and arguments presented, including those we have not discussed specifically, we conclude that DYNAMIC ADS is merely descriptive of "advertising and marketing services, promoting the goods and services of others through placement, targeting, and distribution of advertising via the Internet and other means of communication."

Decision: We affirm the refusal to register DYNAMIC ADS on the grounds that it is merely descriptive under Trademark Act Section 2(e)(1).