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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Grape Technology Group, Inc.

Serial No. 76578484

Joseph Sofer of Sofer and Haroun, LLP for Grape Technology Group, Inc.

Tanya L. Amos, Trademark Examining Attorney, Law Office 113 (Odette Bonnet, Managing Attorney)

Before Bucher, Walsh, and Bergsman, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Grape Technology Group, Inc. filed an intent-to-use trademark application for the mark TEXT DIRECT, in standard character format, for services ultimately identified as "wireless messaging services for directory assistance information."¹ During the prosecution of the application, applicant filed an amendment to allege use claiming March 19, 2004 as its dates of first use anywhere and first use in commerce.

¹ Application Serial No. 76578484, filed March 1, 2004.

The Trademark Examining Attorney refused registration on the ground that applicant's mark TEXT DIRECT, when used in connection with "wireless messaging services for directory assistance information," is merely descriptive. Section 2(e)(1) of the Trademark Act of 1946, 15 U.S.C. §1052(e)(1). The Examining Attorney contends that applicant's mark is merely descriptive because TEXT DIRECT features the direct transmission of text from one mobile phone to another. In other words, TEXT DIRECT "refers to a messaging service that allows one to submit text messages directly to devices such as cellular phones, PDAs and pagers."² The Examining Attorney submitted evidence that she asserts demonstrates that the term TEXT DIRECT is used to refer to text messaging services that are sent directly to wireless devices.³

Applicant argues that the descriptiveness refusal is based on the false premise that it provides a telecommunications service, rather than a directory assistance service. Accordingly, a consumer must use some level of imagination, thought, and perception to link the

² Examiner's Brief, unnumbered page 3.

³ Examiner's Brief, unnumbered pages 4-7.

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mark TEXT DIRECT with applicant's directory assistance services.⁴

As background, applicant explained that, through its exclusive licensee,⁵ it is a premier provider of directory assistance and other information services. Applicant uses the latest technology to provide information to wireless, landline, cable telephony, and VoIP providers. Applicant offers a suite of directory assistance services, including TEXT DIRECT in which the requested telephone number is sent directly to a customer's wireless handset.⁶

Text Direct[™] takes directory assistance to the next level. A short text message with the requested phone number can be sent directly to the mobile caller's handheld device for later access.⁷

The appeal has been fully briefed. For the reasons set forth below, we affirm the refusal.

In support of the descriptiveness refusal, the Examining Attorney submitted excerpts from a number of foreign websites. There is no *per se* rule that information originating from foreign websites or foreign news publications that are accessible to the public in the

⁴ Applicant's Brief, pp. 7, 9-11.

⁵ Applicant's Brief, p. 11.

⁶ Applicant's November 7, 2005 amendment to allege use; Applicant's Brief, p. 9

⁷ Applicant's November 7, 2005 amendment to allege use.

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United States are inadmissible. Such evidence may be relevant to show how United States consumers perceive a mark. The probative value, if any, of foreign information sources must be evaluated on a case-by-case basis. *In re Bayer Aktiengesellschaft*, ___ F.3d ____, 82 USPQ2d 1828 (Fed. Cir. 2007). See also *In re King Koil Licensing Co.*, 79 USPQ2d 1048, 1050 (TTAB 2006); *In re Remacle*, 66 USPQ2d 1222, 1224 n.5 (TTAB 2002).

For example, it is reasonable to assume that professionals in medicine, engineering, computers, telecommunications and many other fields are likely to utilize all available resources, regardless of country of origin or medium. Further, the Internet is a resource that is widely available to these same professionals and to the general public in the United States. Particularly in the case before us, involving sophisticated medical technology, it is reasonable to consider a relevant article from an Internet web site, in English, about medical research in another country, Great Britain in this case, because that research is likely to be of interest worldwide regardless of its country of origin.

In re Remacle, supra.

Applicant, a provider of directory assistance services, "delivers customer-focused solutions . . . to wireless, landline, cable telephony, and VoIP providers, as

well as corporations and educational institutions.”⁸ In other words, applicant renders its TEXT DIRECT services to any company or institution that needs to provide directory assistance information. There is no explanation or rationale why applicant’s target companies or institutions need to research foreign websites and/or publications to learn about directory assistance services, nor is there any explanation regarding the effect of such websites on domestic consumers. Accordingly, while we do not entirely discount the impact of the foreign websites, we find them to be of little probative value in this case, and we will not discuss them further.⁹

The Examining Attorney also submitted evidence demonstrating that the term “direct text messaging” is used to describe text messages sent directly from one wireless device to another. This information was not particularly useful in our determination of whether TEXT DIRECT is merely descriptive although it did provide background

⁸ Applicant’s amendment to allege use (specimen).

⁹ Applicant has argued that some of the foreign websites display TEXT DIRECT used as a trademark and, therefore, show that the term may function as a trademark. That argument and the supporting websites address the issue of whether TEXT DIRECT is capable of functioning as a trademark, not whether the term is merely descriptive.

information regarding the transmission of text messages directly between wireless devices.¹⁰

On the other hand, we found the following evidence helpful in our analysis:

1. A definition of "text messaging" from Wëbopëdia, an online encyclopedia of computer technology:

Sending short text messages to a device such as a cellular phone, PDA or pager. Text messaging is used for messages that are no longer than a few hundred characters. The term is usually applied to messaging that takes place between two or more mobile devices.

(www.pcwebopedia.com);

2. A definition of the word "direct" as meaning "straight without diversion: straight from one place or person to another, without a stop or diversion."

(<http://encarta.msn.com>); and,

¹⁰ There was no useful evidence regarding the term "text direct." The reference in *Business Week Online* (October 10, 2003), attached to the May 4, 2005 Trademark Office Action, referenced a text, direct-marketing message. The reference to "text direct," in a chat room communication from a person in Rotterdam, Netherlands, in the *Cellular-News* website (www.cellular-news.com), attached to the September 23, 2004 Trademark Office Action, did not show use of the term by a U.S. citizen. Moreover, it did not reference "text direct" as a unitary term. It referenced the writer's desire to send text directly from one phone to another. Likewise, the *Textyper* website (www.textyper.com), attached to the May 4, 2005 Trademark Office Action ("Text direct from our Office or Home PC), showed use of "text direct" to reference sending text messages directly from your office or Home PC, rather than as a unitary term describing the transmission of wireless messages between portable devices.

3. Third-party registrations for marks consisting, in part, of the word "direct" used in connection with communications services. In these registrations, the exclusive right to use "direct" is disclaimed. Third-party registrations may be used to show that a particular term has descriptive significance as applied to certain services. *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-695 (CCPA 1976); *United Foods Inc. v. J.R. Simplot Co.*, 4 USPQ2d 1172, 1174 (TTAB 1987).

Representative registrations include the following:

Registration Number	Mark	Services
2095828	AT&T DIRECT	International long distance telephone service; operator assisted international long distance telephone service; international long distance telephone service provided by automated response system
2238164	networkMCI Direct	Telecommunications services, namely, the electronic transmission of voice, data, and information services, namely, long distance, local toll calling, and international calling
2606643	DIRECT TALK	Wireless telephone communication services featuring a rate plan
2823734	FRONTIERNET DIRECT	Telecommunications services, namely, connectivity services related to data traffic control on a global computer network

Registration Number	Mark	Services
2692280	DYNAMICS DIRECT	Electronic transmission of advertising messages and data to businesses and individuals through global computer networks, extranets, local computer networks, wireless devices and other hand-held electronic devices

A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act of 1946, 15 U.S.C. §1052(e)(1), if it directly conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-218 (CCPA 1978). Also, a mark that describes how a product is used or the method in which the services are rendered is merely descriptive. *In re International Spike, Inc.*, 196 USPQ 447, 450 (TTAB 1977).

Whether a term is merely descriptive is not determined 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 the 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).

In other words, the 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 (*i.e.*, whether someone familiar with applicant's "wireless messaging services for directory assistance information" will understand TEXT DIRECT to convey information about the services). *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1317 (TTAB 2002).

One of the definitions of the word "text" is to send text messages:

1. To send a text message to: *She texted me when she arrived.*
2. To communicate by text message: *He texted that he would be late.*

The American Heritage Dictionary of the English Language

(4th ed. 2006) (emphasis in the original).¹¹ Because applicant's services entail wireless messaging (*i.e.*, text messages), the word "text" is merely descriptive.

¹¹ The Board may take judicial notice of dictionary definitions. *B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 6 USPQ2d 1719, 1721 (Fed. Cir. 1988).

As indicated above, "direct" means "straight without diversion: straight from one place or person to another, without a stop or diversion." The *Encarta* dictionary at encarta.msn.com.¹² In this case, "direct" describes a feature of applicant's services: that is, directory assistance information is sent straight to the user or requestor.

As just discussed, the words "text" and "direct" used individually are descriptive in connection with applicant's services. The question we now face is whether the descriptive word "text" when combined with the descriptive word "direct" creates a trademark or merely describes how the directory assistance information is transmitted. We find that when TEXT DIRECT is used in connection with "wireless messaging services for directory assistance information," consumers will understand that term to mean that directory assistance information is sent directly to the requestor via text messaging. There is no unique or incongruous meaning created. Nothing requires the exercise of imagination or multistep reasoning to understand how applicant's services are rendered. The descriptive meaning of the words "text" and "direct" is not lost in the combined form.

¹² Attached to the May 4, 2005 Trademark Office Action.

Applicant's advertising provides evidence that the public would perceive TEXT DIRECT as descriptive. An excerpt from the INFONXX website at www.infonxx.com¹³ reads as follows:

INFONXX TextDirect is pioneering directory assistance services by allowing consumers to send a directory assistance inquiry directly from their wireless phone. Your wireless callers can join the revolution by sending and receiving their requested listings via SMS.¹⁴

In other words, consumers can text message directly to receive their directory assistance information.

While direct wireless messaging may be more commonly referred to as direct text or direct text messaging (as shown by the Examining Attorney's evidence), the mark at issue TEXT DIRECT is simply the transposition of the words "direct" and "text, and, in the context of this case, the transposed words retain the same meaning. *See In re Tedruth Plastics Corporation*, 179 USPQ 316 (TTAB 1973) ("Box Pallet" is the invert of the generic term "Pallet Box," and because it retains the same meaning, it is not

¹³ INFONXX is applicant's licensee.

¹⁴ SMS means short message service. It "permits the sending of short messages . . . between mobile phones, other handheld devices and, even, fixed-line phones." Short message service, Wikipedia, The Free Encyclopedia, <http://en.wikipedia.org/wiki/text-messaging> (visited May 4, 2005) (attached to the May 4, 2005 Trademark Office Action).

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capable of distinguishing applicant's pallets). *Cf In re Nationwide Industries, Inc.*, 6 USPQ2d 1882, 1884 (TTAB 1988) (transposition of words in the marks may serve as a basis of confusion only if transposed marks create distinctly different commercial impressions); *In re General Tire & Rubber Co.*, 213 USPQ 870, 871 (TTAB 1982) (the transposition of the words in the marks SPRINT STEEL RADIAL and RADIAL SPRINT does not change the commercial impression fostered by these marks).

The fact that TEXT DIRECT *per se* does not appear in a dictionary is not determinative. *In re Sun Microsystems Inc.*, 59 USPQ2d 1084, 1087 (TTAB 2001). Likewise, the fact that applicant may be the first and only user of the term TEXT DIRECT is not dispositive. *Id.* A term does not need to be in common usage in a particular industry before it can be found merely descriptive. *Id.* Anyone who provides information by direct text messaging might have occasion to use the term TEXT DIRECT to convey that fact.

In view of the foregoing, we find that, because the term TEXT DIRECT describes how applicant renders its "wireless messaging services for directory assistance information," TEXT DIRECT is merely descriptive.

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Decision: The refusal to register the mark as merely descriptive under Section 2(e)(1) of the Trademark Act of 1946 is affirmed.