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Mailed:
April 25, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Evans & Sutherland Computer Corporation

Serial No. 78800174

Peter M. De Jonge of Thorpe North & Western for Evans & Sutherland Computer Corporation.

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

Before Zervas, Walsh and Cataldo, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Evans & Sutherland Computer Corporation filed an application (Serial No. 78800174) on January 26, 2006 to register CONTINUOUS TEXTURE (in standard character form) for goods ultimately identified as "computer hardware and software for creating and modifying high resolution, three dimensional images in the nature of real time simulation visuals for use in the field of military and aviation training" in International Class 9. Applicant has claimed

a bona fide intention to use the mark in commerce under Trademark Act §1(b), 15, U.S.C. §1051(b).

The examining attorney has finally refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the ground that applicant's proposed mark, if applied to applicant's goods, would be merely descriptive of them.

Applicant has appealed the final refusals. Both applicant and the examining attorney have filed briefs. We affirm the refusal to register.

A mark is merely descriptive if it immediately describes the ingredients, qualities, or characteristics of the goods or services or if it conveys information regarding a function, purpose, or use of the goods or services. *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978). See also *In re Nett Designs*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001). To be merely descriptive, a term need only describe a single significant quality or property of the goods or services. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). Also, "[t]he perception of the relevant purchasing public sets the standard for determining descriptiveness. Thus, a mark is merely descriptive if the ultimate consumers immediately associate it with a quality or characteristic

of the product or service. On the other hand, if a mark requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods or services, then the mark is suggestive." *In re MBNA America Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003) (citations and internal quotation marks omitted).

The examining attorney maintains that "[t]he wording CONTINUOUS TEXTURE is merely descriptive of hardware and software goods used for creating and modifying three-dimensional images so that they have a continuous visual texture, or the appearance of a continuous texture or surface, to augment scene reality for realistic aviation and military training." Brief at p. 7. Applicant maintains that "[t]he three dimensional images created by Applicant's hardware and software are seen, not touched. Since the most commonly accepted definitions of 'texture' relate to physical touch, Applicant's use of this term in connection with goods having no relationship to physical touch is a non-descriptive use." Brief at pp. 3 -4.

Applicant has entered a definition of "texture" from encarta.msn.com which includes the following: "the feel and appearance of a surface, especially how rough or smooth it is." "Texture" hence is not limited to the "physical touch," but may also relate to visual texture, as the

examining attorney has argued in her brief. Applicant's argument that the "feel and appearance" definition of "texture" is "lesser known" or "not the most commonly understood and well-accepted definition of 'texture'" is not well taken - this definition is the first entry in the encarta.msn definition for "texture," one that was provided by applicant itself and also appears in the definitions of "texture" submitted by the examining attorney with her brief from the online version of *Compact Oxford English Dictionary of Current English* (2008) at askoxford.com and *Merriam-Webster's Online Dictionary* at m-w.com.¹ Further, applicant's EP-1000CT visual training system which uses applicant's software has been described in public.asu.edu as having "[a]dvanced texture modes and high-fidelity terrain for missions requiring low-altitude precision training." Additionally, applicant has not provided any evidence supporting its contention that this definition is "a lesser known definition of 'texture.'"

The ordinary meaning of "continuous texture" in the context of computer hardware and software for creating and

¹ The Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format. See *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1791 n.3 (TTAB 2002). See also *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).

modifying high resolution, three dimensional images is that the images have a continuous or uninterrupted visual texture. This indeed is a necessary objective for applicant's goods, in that it is a visual system for commercial pilot training, and necessarily would have to provide depictions of varying weather conditions and terrain (or texture) in a continuous uninterrupted manner. See applicant's webpage, submitted by applicant in its response to the first Office action ("EP features ... High fidelity digital terrain, 3D features, and aviation obstacles on approach.")

The following evidence of record - much of it technical in nature - submitted by the examining attorney demonstrates that "continuous texture" is used in the field of three dimensional imaging of surfaces:

From patentmonkey.com

U.S. Patent No. 7215340 regarding a method for rendering a 3D model of a graphics object, discussing image space elliptical weighted average (EWA) surface splatting, stating,

In the image space EWA splatting framework as described by Zwicker et al., objects are represented by a set of irregularly spaced points {P.sub.k} in three dimensional object space without connectivity information, in contrast with polygon or triangle models which do contain adjacency or connectivity information.

Each zero-dimensional point is associated with a location, a surface normal, a radially symmetric basis function $r_{\text{sub}.k}$, and scalar coefficients $w_{\text{sub}.r.\text{sup}.k}$, $w_{\text{sub}.g.\text{sup}.k}$, $w_{\text{sub}.b.\text{sup}.k}$ that represent continuous function for red, green, and blue color components. The basis functions $r_{\text{sub}.k}$ are reconstruction filters defined on locally parameterized domains. Hence, the functions define a **continuous texture** function on the model's surface as represented by the discrete points.

From graphicon.ru

Article entitled "3D Flow visualization using GPU [graphic processing unit]-driven particle system," in the field of "texture visualization,"² stating

² We reject applicant's challenge to the article from *graphicon.ru*, i.e., that "the term in a Russian article is [not] relevant to a determination of whether a mark is descriptive in the U.S." Brief at p. 7. Foreign publications may be considered in determining how a term can be perceived in the United States. See *In re Remacle*, 66 USPQ2d 1222, 1224 n.5 (TTAB 2002):

[I]t 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.

More recently, the Federal Circuit has explained that "[i]nformation originating on foreign websites or in foreign news publications that are accessible to the United States public may be relevant to discern United States consumer impression of a

"This technique[] for **continuous texture** advection of whole texture cube are not well suited for 3D flow animation in real-time scale. This fact becomes particularly apparent while visualizing unsteady velocity vector field[s]."

From rainwarrior.thenoos.net,

discussing "texture generation" in 3D, and stating

To attain a **continuous texture**, I had to be wary of the fact that when you go over a seam (at which one side of the texture's coordinates is 1 and the other side is 0), if you do not account for this you can have a single triangle try to contain the entire range of the texture from 1 back to 0.

From ldp.ludost.net

Article entitled "POVRAY IV: The Use of Textures in Povray"

on how to use textures. In the context of creating walls

using the computer program POVray, stating,

Instead of it we have an image that we use. In order to be able to use an image as **continuous texture** you limit the size of the image to be indetectabl[y] small. ... There are many images that can be used as textures and it is very convenient to have a good catalogue of them available."

proposed mark." *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1835 (Fed. Cir. 2007). Thus, in view of the technical content of the article, we have considered the article.

Similarly, in discussing applicant's goods, an article in the record from aviationtoday.com states as follows regarding applicant's aviation visual simulation product,

A **continuous texture** feature augments scene readily with high-resolution, textured backdrops. Effects include detailed terrain and airport content; weather features such as variable-density layered clouds, fog, storm cells, and blowing and falling snow; and calibrated reduced visibility.

This evidence, although not extensive, when considered with the dictionary definitions of "texture," suffices to establish that creating a "continuous texture" is a significant feature of visual imaging through computer hardware or software.

Applicant has argued that a certain amount of careful thought or imagination is needed "to associate the mark with the underlying goods," and that even those familiar with applicant's business will not immediately understand the nature of applicant's goods used in connection with its mark. Brief at p. 5. According to applicant, "upon hearing or seeing the mark CONTINUOUS TEXTURE, consumers are likely to think of the way something feels when physically touched, since the term 'texture' is likely to immediately bring the sense of touch to mind." We are not persuaded by applicant's argument because consumers will

consider the CONTINUOUS TEXTURE in the context of applicant's goods, which are hardware and software for real time simulation visuals for use in the field of military and aviation training. Such consumers would be concerned with the quality of the imaging created by the hardware and software, and not with the feel of the goods.

Applicant has also pointed out that it owns a prior registration for SENSOR TEXTURE (Registration No. 2866990) for "computer hardware and software for creating and generating high-quality graphic images for use in connection with flight simulation and replicating one's visual experience while operating aircraft," which issued on July 27, 2004. Applicant has submitted a copy of its registration certificate with its response to its first Office action. The registration contains a disclaimer of the term SENSOR, and not the term TEXTURE. However, as the examining attorney has noted, this Board must decide each case on its own merits and is not bound by the decisions of examining attorneys in approving marks for registration. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). Thus, we are not persuaded by applicant's argument.

In view of the above, we find that the examining attorney has established prima facie that applicant's mark

is at least merely descriptive of a feature of applicant's goods and that applicant has not rebutted the examining attorney's prima facie case. Additionally, we find that the combination of "continuous" and "texture" does not evoke a unique commercial impression, and is not incongruous or bizarre as applied to the goods. See *In re Shutts*, 217 USPQ 363 (TTAB 1983). Accordingly, we find that applicant's mark is merely descriptive of a significant feature of "computer hardware and software for creating and modifying high resolution, three dimensional images in the nature of real time simulation visuals for use in the field of military and aviation training" and that applicant's mark is unregistrable under Section 2(e)(1).

Decision: The refusal to register under Section 2(e)(1) is affirmed.