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A PRECEDENT OF THE
TTAB

Hearing:
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re DIRECTV, LLC

Serial Nos. 77967755; 77967758; 85082281; 85082282; 85082285;
and 85082287

Glenn A. Gundersen, Hal Borden and Jacob Bishop for DIRECTV,
LLC.

Renee Servance, Trademark Examining Attorney, Law Office 116
(Michael W. Baird, Managing Attorney).¹

Before Quinn, Bucher and Greenbaum,
Administrative Trademark Judges.²

Opinion by Quinn, Administrative Trademark Judge:

DIRECTV, LLC filed applications to register the following
marks:

N3D (in standard characters) (application serial nos. 77967755
(International Class 38) and 77976758 (International Class 41));

¹ The final refusals and appeal brief were handled by Michele-Lynn Swain. Ms. Servance did not make an appearance in these cases until her participation at the oral hearing.

² Judge Grendel sat on the panel at the oral argument, but has subsequently removed himself from the panel. Judge Bucher has been substituted for Judge Grendel on this decision. The change in composition of the panel does not necessitate a rehearing of the oral argument. *Hunt Control Systems Inc. v. Koninklijke Philips Electronics N.V.*, 98 USPQ2d 1558, 1560 (TTAB 2011). See also *In re Bose*, 772 F.2d 866, 227 USPQ 1, 4 (Fed. Cir. 1985).

**Serial Nos. 77967755; 77967758; 85028281; 85082282; 85082285;
and 85082287**

N3D and design (as shown below) (application serial nos. 85082281 (International Class 38) and 85082282 (International Class 41));



and

N3D DIRECTV (in standard characters) (application serial nos. 85082285 (International Class 38) and 85082287 (International Class 41)).

The services are recited as follows: "satellite television broadcasting; satellite transmission services; broadcasting programs via global computer network; video-on-demand transmission services; streaming of audio and video material via the Internet, other computer networks, wireless networks and electronic communication networks" (in International Class 38); and "distribution of television programs for others; television programming; programming on a global computer network; pay-per-view television programming; video-on-demand television programming" (in International Class 41). Application Serial Nos. 77967755 and 77967758, filed March 24, 2010, are based on a bona fide intention to use the mark in commerce; application Serial Nos. 85082281, 85082282, 85082285 and 85082287, filed July 12, 2010, are based on first use anywhere and first use in commerce on July 1, 2010.

The examining attorney refused registration of each mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C.

**Serial Nos. 77967755; 77967758; 85028281; 85082282; 85082285;
and 85082287**

§ 1052(e)(1), based on the mere descriptiveness of N3D. In this connection, the examining attorney refused registration of the marks N3D and N3D and design in Classes 38 and 41; and with respect to the mark N3D DIRECTV in Classes 38 and 41, the examining attorney refused registration based on applicant's failure to comply with a requirement to disclaim the term "N3D" apart from the mark as used in connection with applicant's services.

When the refusals were made final, applicant appealed. Pursuant to applicant's request, the Board consolidated the appeals. Applicant and the examining attorney filed briefs, and both appeared at an oral hearing.³

The examining attorney maintains that the letter "N" stands for "in" and the term "3D" means "three-dimensional." According to the examining attorney, the term "N3D" is both an abbreviation and a phonetic equivalent of "in 3-D," and is therefore merely descriptive of applicant's services featuring the presentation of television programming in a three-dimensional format. In support of the refusals, the examining attorney submitted dictionary entries, excerpts of applicant's

³The examining attorney, at the oral hearing, objected to the exhibits attached to applicant's reply brief. As the examining attorney correctly points out, this submission is untimely, and we have not considered the documents identified as Exhibit B. Trademark Rule 2.142(d). Exhibit A is a definition retrieved from an online dictionary that exists in printed form. We have exercised our discretion and have taken judicial notice of this definition. *In re Dietrich*, 91 USPQ2d 1622, 1631 n.15 (TTAB 2009).

**Serial Nos. 77967755; 77967758; 85028281; 85082282; 85082285;
and 85082287**

website and of third-party websites, third-party registrations, and articles retrieved from the Internet.

Applicant acknowledges that "the term '3D' is a common abbreviation for 'three-dimensional,' and that applicant's services involve the presentation of television programming in a three-dimensional format." (Brief, p. 4). Applicant argues, however, that the letter "N" is not an obvious abbreviation of the word "in," nor is it the phonetic equivalent of "in." Applicant urges that consumers would not perceive N3D as shorthand for "in 3D" and, thus, the term is not merely descriptive. Applicant also offers a detailed critique of the examining attorney's evidence, concluding that it falls short of showing that the term N3D is merely descriptive for applicant's services.

The examining attorney bears the burden of showing that N3D is merely descriptive of applicant's services. *In re Merrill, Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987). A term is descriptive if it "forthwith conveys an immediate idea of the ingredients, qualities or characteristics of the goods [and/or services]." *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 189 USPQ 759, 765 (2d Cir. 1976) (emphasis added). See *In re Abcor Development Corp.*, 616 F.2d 525, 200 USPQ 215 (CCPA 1978). Moreover, in order to be descriptive, the term must immediately

**Serial Nos. 77967755; 77967758; 85028281; 85082282; 85082285;
and 85082287**

convey information as to the qualities, features or characteristics of the goods and/or services with a "degree of particularity." *Plus Products v. Medical Modalities Associates, Inc.*, 211 USPQ 1199, 1204-1205 (TTAB 1981). *See In re Diet Tabs, Inc.*, 231 USPQ 587, 588 (TTAB 1986); *Holiday Inns, Inc. v. Monolith Enterprises*, 212 USPQ 949, 952 (TTAB 1981); *In re TMS Corp. of the Americas*, 200 USPQ 57, 59 (TTAB 1978); and *In re Gourmet Bakers, Inc.*, 173 USPQ 565 (TTAB 1972). Whether a particular term is merely descriptive is determined in relation to the services for which registration is sought and the context in which the term is used, not in the abstract or on the basis of guesswork.

The examining attorney may require an applicant to disclaim an unregistrable component of a mark otherwise registrable. Section 6 of the Trademark Act, 15 U.S.C. § 1056. This section of the statute was amended in 1962 to allow the exercise of greater discretion by examining attorneys in determining whether a disclaimer is necessary. *See* TMEP § 1213.01(a) (8th ed. 2011). Merely descriptive or generic terms are unregistrable under Section 2(e)(1), and therefore are subject to disclaimer if the mark is otherwise registrable. Failure to comply with a disclaimer requirement is grounds for refusal of registration. *See In re Omaha National Corp.*, 819 F.2d 1117, 2 USPQ2d 1859

**Serial Nos. 77967755; 77967758; 85028281; 85082282; 85082285;
and 85082287**

(Fed. Cir. 1987); and *In re Box Solutions Corp.*, 79 USPQ2d 1953 (TTAB 2006).

The letter "N" is defined as "the 14th letter of the English alphabet" and, according to the dictionary, is pronounced as "en." The American Heritage Dictionary of the English Language (5th ed. 2011). The letter "N" appears as an abbreviation for over forty different terms, including "in." (www.acronymfinder.com). TMEP § 1209.03(h) is instructive in considering the refusal:

As a general rule, an acronym or initialism cannot be considered descriptive unless the wording it stands for is merely descriptive of the goods or services, *and* the acronym or initialism is readily understood by relevant purchasers to be "substantially synonymous" with the merely descriptive wording it represents. Thus, without additional evidence, an applicant's proprietary use of an acronym is not sufficient to establish that the acronym is readily understood to be substantially synonymous with the descriptive wording it represents. *Modern Optics Inc. v. The Univis Lens Co.*, 234 F.2d 504, 110 USPQ 293 (CCPA 1956) (finding the record unconvincing that CV is a generally recognized term for multifocal lenses and lens blanks); *In re Harco Corp.*, 220 USPQ 1075 (TTAB 1984) (record insufficient to establish that CPL would be commonly understood as no more than an abbreviation of "computerized potential log"). (emphasis added).

The examining attorney has submitted additional evidence in support of the refusal. The examining attorney points to applicant's own uses as shown on its website (www.directv.com):

Serial Nos. 77967755; 77967758; 85028281; 85082282; 85082285;
and 85082287

DIRECTV is working closely with major studios and networks to bring the most HD 3D content to your home. This brand new dedicated HD 3D channel offers the best in 3D sports, music, nature, arts, and more.
Ch. 103
What you'll see in 3D.

The Ultimate 3D Variety Channel, only from DIRECTV 3D
Nature, sports, arts, music and so much more, all in three crystal clear dimensions. Welcome to n3D, channel 103, the ultimate 3D variety channel, only from DIRECTV. With around the clock adventures from extreme sports to deep-water exploring, there's something in 3D for every member of the family.

The examining attorney also highlighted in her brief the following third-party uses to show "that the term N3D is commonly used in connection with products and services featuring 3-D images or content":

Aircord Lab's N-3D concept turns an iPad into world's least practical 3D display.
(www.engaget.com)

Lafayette Peach Festival-N(3D)
Use the red-cyan 3D (anaglyph) glasses to view.
(www.flickr.com)

iPad projector concept displays objects in 3D
N-3D demo from aircord on Vimeo
Tonight seems to be the night for 3D. A design team released a proof of concept video showing how it's possible to use an iPad to project a 3D image to the naked eye.
(www.crunchgear.com)

Our company was founded in 2004 by four architects with a passion for visualizing

**Serial Nos. 77967755; 77967758; 85028281; 85082282; 85082285;
and 85082287**

architectural designs in 3D. Our focus has been high-quality and reliable production of 3D renderings and cinematic animations. Think N 3D Studio award-winning creative team and highly professional support staff is devoted to meeting the goals of our clients....
(www.think3d.com)

3D Entertainment proudly announced today its acquisition of the worldwide distribution rights for "Sea Rex 3"....The film is slated for release in 3D and 2D at IMAX® theatres in the US in Spring 2010.
(www.prnewswire.com)

The examining attorney also has relied upon several third-party registrations showing "N" formative marks. The examining attorney points to them as illustrating her point that the letter "N" can serve as an abbreviation or substitute for "in." The marks are: NCOGNITO; N-TIMIDATOR; NSIGHT; N-TACT; NFLIGHT; NFUSION; NSIDE REALTY GROUP; N'TENSE; N'GENUITY; and N-JECT.

We find that the examining attorney's evidence falls short of establishing that the term N3D is merely descriptive of applicant's services. We are not convinced that consumers are likely to perceive the letter "N" as meaning "in," or even pronounce it as "in" such that N3D would be understood as "in 3D"; thus, consumers would have no expectation that N3D stands for "in 3D," even when they encounter the mark in connection with applicant's services rendered in three-dimensional format. We agree with applicant's assessment this is so mainly because it is not a useful abbreviation: "Acronyms and other

**Serial Nos. 77967755; 77967758; 85028281; 85082282; 85082285;
and 85082287**

abbreviations are created for the sake of convenience, because they condense a longer phrase into a shorter string of letters or syllables. However, there is no particular reason why anyone would abbreviate 'in 3D' as N3D. N3D has the same number of syllables as 'in 3D,' and only one additional letter. It saves no space or time." (Brief, p. 5).

The websites of applicant and third parties showing uses of N3D and "in 3D" in the same article or paragraph do not demonstrate that N3D means "in 3D"; and nowhere is N3D used descriptively. The fact that applicant uses "in 3D" to describe an aspect of its channel, while using the mark N3D as the name of the channel, shows that the terms are not substantially synonymous. Moreover, as shown by some of the evidence of third-party uses not highlighted by the examining attorney, N3D as used for tablet computers is short for "Naked 3D Display," and N3D for Nintendo products signifies "Nintendo 3D."

We are not persuaded by the examining attorney's third-party registration evidence because in each case the letter "N" takes the place of "IN" as the first portion of a commonly recognized and understood word. We recognize that registrations can be used as a form of a dictionary definition to illustrate how a term is perceived in the trade or industry. See *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987) ("Said third-party registrations are of use only if they tend to

**Serial Nos. 77967755; 77967758; 85028281; 85082282; 85082285;
and 85082287**

demonstrate that a mark or a portion thereof is suggestive or descriptive of certain goods....Used in this limited manner, 'third-party registrations are similar to dictionaries showing how language is generally used.'"). In these registered marks, however, it is much easier for a consumer to perceive the substitution of the letter "N" for "IN," as compared to applicant's mark wherein the letter "N" is not the obvious first portion of a word beginning with "IN-." In any event, third-party registrations are not conclusive on the issue of mere descriptiveness as each case must stand on its own merits. See *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

We agree with applicant that there is no threat that applicant's registrations will remove a merely descriptive term from the public domain. As applicant stated in its brief, and reiterated at the oral hearing, "applicant's competitors are obviously free to use the descriptive phrase 'in 3D,' but there is no reason why they would need to use the term N3D to describe their services." (Brief, p. 9).

We conclude that N3D is not merely descriptive when used in connection with applicant's services.

Decision: The refusals to register are reversed.