

This Opinion is not a  
Precedent of the TTAB

Hearing: September 29, 2015

Mailed: October 29, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Do Something!, Inc.*  
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Serial No. 85696594  
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Anne M. Coyle of Gibson Dunn & Crutcher LLP,  
for Do Something!, Inc.

Shaila Lewis, Trademark Examining Attorney, Law Office 114,  
K. Margaret Le, Managing Attorney.

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Before Quinn, Kuczma and Greenbaum,  
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

Do Something!, Inc. (“Applicant”) seeks registration on the Principal Register of the applied-for mark PREGNANCY TEXT (in standard characters) for:

Education and entertainment services, namely, providing audio, video, and prose presentations featuring a simulated pregnancy experience in mobile wireless form in both SMS and MMS formats in International Class 41.<sup>1</sup>

The Trademark Examining Attorney has refused registration of Applicant’s mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the

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<sup>1</sup> Application Serial No. 85696594 was filed on August 6, 2012, based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as May 14, 2012.

ground that the applied-for mark merely describes a feature, purpose and/or function of Applicant's services.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney entered an amended identification of services, the appeal was resumed. Upon careful consideration of the evidence in the record and of the arguments of counsel, we affirm the refusal to register.

#### Descriptiveness

A term is merely descriptive within the meaning of § 2(e)(1) if it immediately conveys knowledge of a quality, characteristic, function, feature, purpose or use of the goods and services with which it is used. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) and *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). Whether a particular term is merely descriptive must be determined not in the abstract, but in relation to the goods and services for which registration is sought, the context in which the term is used, and the possible significance that the term is likely to have to the average prospective purchaser encountering the goods and services in the marketplace. *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Phoseon Technology Inc.*, 103 USPQ2d 1822, 1823 (TTAB 2012). It is settled that “[t]he 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.” *DuoProSS Meditech Corp. v. Inviro Medical Devices, Ltd.*, 695 F.3d 1247,

103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (citing *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002)).

Because PREGNANCY TEXT is a composite mark, we examine the meaning of each component individually, and then determine whether the mark as a whole is merely descriptive. See *DuoProSS Meditech Corp. v. Inviro Medical Devices Ltd.*, 103 USPQ2d at 1758.

In support of the descriptiveness refusal, the Examining Attorney submitted the dictionary definitions of “text” which means “text message;” and of “text message” which is “a short message that is sent electronically to a cell phone or other device.”<sup>2</sup> Thus, the Examining Attorney argues that Applicant’s identification of services encompasses sending texts, or text messages, because it clearly states that Applicant is “sending messages . . . in mobile wireless form,” which is the very nature of a text message.<sup>3</sup>

The Examining Attorney argues that the word “pregnancy” in Applicant’s mark immediately conveys to consumers that Applicant’s text messages are about pregnancy, noting the identification of services and Applicant’s specimens which

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<sup>2</sup> “Text”: <http://www.merriam-webster.com/dictionary/text> 10/08/2014, and “Text message”: <http://www.merriam-webster.com/dictionary/text%20message> 10/08/2014, from *Merriam-Webster.com*, Merriam-Webster (2014), submitted with Examining Attorney’s Appeal Brief. Pursuant to TBMP §1208.04 (2015), the Examining Attorney requested the Board to take judicial notice of the dictionary definitions for “text” and “text message.” It is well settled that the Board may take judicial notice of dictionary definitions. See *In re Azteca Restaurant Enterprises Inc.*, 50 USPQ2d 1209, 1210 n.6 (TTAB 1999) (dictionary definition submitted with examining attorney’s brief); *In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537, 1537 (TTAB 1998) (well settled that dictionary listings comprise matter of which Board can take judicial notice).

<sup>3</sup> Examining Attorney’s Appeal Brief at 14 TTABVUE 5.

state that Applicant is sending text messages regarding pregnancy.<sup>4</sup> The identification of services states that the text messages provide a “simulated pregnancy experience,” which immediately conveys that “pregnancy” is an integral feature of the text messages, according to the Examining Attorney. The specimens of record likewise state “Almost 50,000 signed up to receive phone babies, and after spending just 24 hours with one, 50% are more likely to talk about the issue of teen pregnancy.”<sup>5</sup>

Thus, when consumers view the wording “PREGNANCY TEXT” in connection with the service of “sending messages to provide a simulated pregnancy experience in mobile wireless form,” the Examining Attorney concludes they will immediately understand the word “PREGNANCY” to refer to the subject matter of the services and “TEXT” to refer to the type of messages being sent because these exact words are also used to describe the nature and subject matter of the services. Thus, no imagination, thought or perception is necessary to reach a conclusion as to the nature of the services provided under the PREGNANCY TEXT mark.

Applicant maintains that the services provided under PREGNANCY TEXT are a simulated pregnancy experience in mobile form.<sup>6</sup> Applicant notes that its specimen describes how a “phone baby” shows teens that becoming parents can change their lives. Applicant says the purpose of its services is to educate and entertain teens regarding the significance of teen pregnancy by sending teens text messages

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<sup>4</sup> Examining Attorney’s Appeal Brief at 14 TTABVUE 5.

<sup>5</sup> Examining Attorney’s Appeal Brief at 14 TTABVUE 5-6.

<sup>6</sup> Applicant’s Appeal Brief at 12 TTABVUE 2.

relating to feeding, changing and dealing with a crying “phone baby” (*i.e.*, a simulated “baby”). As set forth in the application and confirmed by the specimen, Applicant’s services do not relate to any actual pregnancy. Nor are they in the nature of providing information to pregnant or possibly pregnant women, or health care services.<sup>7</sup> According to Applicant, a “Pregnancy Test” is a physiological test to determine the existence of pregnancy in an individual;<sup>8</sup> it is not some sort of a psychological test to determine if a teen is well prepared for the condition of pregnancy.<sup>9</sup> Applicant’s services are not, of course, a “Pregnancy Test,” as that term has a conventional meaning of biologically determining pregnancy. Applicant contends its services do, however, serve by analogy as a “test” in educating adolescent users whether they are ready for pregnancy.

But for the fact that a salient aspect of its mark is that “Pregnancy Text” is nearly identical to the common expression “Pregnancy Test” “Applicant may concede that the Mark lacks inherent distinctiveness.” Applicant argues however, that to ignore this near identity is to ignore the entire point of the commercial impression of the mark.<sup>10</sup>

Applicant notes that the similarity between “Pregnancy Text” and “Pregnancy Test” is obvious. The first word of each compound expression is identical. Turning to

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<sup>7</sup> Applicant’s Appeal Brief at 12 TTABVUE 3.

<sup>8</sup> Merriam-Webster, Copyright © 1986 by Merriam-Webster Inc.; submitted with Applicant’s Appeal Brief. As set forth in footnote 2 *supra*, it is well settled that the Board may take judicial notice of dictionary definitions.

<sup>9</sup> Applicant’s Appeal Brief at 12 TTABVUE 4.

<sup>10</sup> Applicant’s Appeal Brief at 12 TTABVUE 3.

the second word, Applicant notes they are both four letter words beginning with “Te” and ending with the letter “t.” The only difference between the two terms is in the third letter of the second word which is either an “x” or an “s,” which Applicant contends are phonetically similar.<sup>11</sup> Although the letters “s” and “x” are somewhat similar in sound, they are not identical.

Applicant contends the evidence shows that the term “Pregnancy Text” evokes “Pregnancy Test.” In support, Applicant cites to the Google search engine response for “Pregnancy Text” which elicited a response page that reads “Did you mean pregnancy **test**?” (emphasis in original). Applicant maintains that in addition to the obvious near identity between “Pregnancy Text” and “Pregnancy Test,” this further shows that the two terms are treated similarly, with “Pregnancy Test” being the expected term.<sup>12</sup> Applicant’s reliance on Google’s search engine reference to “Did you mean: pregnancy *test*” when “pregnancy text” is entered as a search on Google, without more, is misplaced. At most, it merely indicates that the terms differ in spelling and perhaps that “pregnancy test” is a more frequently searched term.

Based on its foregoing arguments, Applicant contends that its mark creates a double entendre or pun, which in turn creates an incongruity showing that PREGNANCY TEXT is not merely descriptive. Applicant argues that its services are not a “Pregnancy Test” since they do not determine if anyone is pregnant. Nor are they used in connection with a pregnancy test or otherwise descriptive of a

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<sup>11</sup> Applicant’s Appeal Brief at 12 TTABVUE 4.

<sup>12</sup> Applicant’s Appeal Brief 12 TTABVUE 4; also see Applicant’s June 11, 2013 Response to Office Action.

pregnancy test. Applicant maintains its services do, however, have a suggestive connotation in connection with the term “Pregnancy Test.” A teen receiving Applicant’s services “may gather insight as to the effect of teenage parenthood on the life of the teen and consider whether parenthood is appropriate at that stage of life.” In that sense, by an analogy, Applicant argues its “services could be said to ‘test’ whether intended users of the services are prepared for pregnancy. Of course, that usage is *not* what the term ‘Pregnancy Test’ actually means; it is merely a suggestive analogy and pun.”<sup>13</sup>

Because “Pregnancy Text” is capable of more than one interpretation, according to Applicant, consumers and the public will readily associate “Pregnancy Text” with the term “Pregnancy Test.” And according to Applicant, “Pregnancy Test” is at most suggestive of Applicant’s services which do not in fact determine, or help anyone determine, if a female is pregnant.<sup>14</sup>

The descriptive meanings of the individual terms PREGNANCY and TEXT with respect to Applicant’s services are established by the evidence. However, combinations of merely descriptive terms are registerable if their combination results in a new and different commercial impression and/or the term created imparts a unique, incongruous or otherwise non-descriptive separate meaning as used in connection with the goods or services. *In re Colonial Stores, Inc.*, 394 F.2d 549, 157 USPQ 382, 384 (CCPA 1968) (SUGAR & SPICE considered unitary “double

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<sup>13</sup> Applicant’s Appeal Brief 12 TTABVUE 5.

<sup>14</sup> Applicant’s Appeal Brief 12 TTABVUE 5.

entendre” for bakery products); *In re Shutts*, 217 USPQ 363 (TTAB 1983) (SNO-RAKE found not merely descriptive of hand tool for snow removal).

Applicant contends that “Pregnancy Text” is not a common term or expression. The significance of “Pregnancy Text” being uncommon is that the public will more likely appreciate it as a double entendre and pun than if “Pregnancy Text” was a common expression that the public is accustomed to perceiving. Applicant concludes that the uncommon expression “Pregnancy Text” is nearly identical to the extremely common expression “Pregnancy Test” and would be perceived as a double entendre or pun in connection with Applicant’s services. Thus, Applicant argues, “Pregnancy Test” is not merely descriptive of Applicant’s services, but rather creates an incongruous twist of the actual meaning of “Pregnancy Test.”<sup>15</sup>

According to the Examining Attorney, a “double entendre” is an expression that has a double connotation or significance as applied to the goods or services. TMEP § 1213.05(c) (July 2015). A “double entendre” must be an association that the public would make fairly easily, and must be readily apparent from the mark itself. *Compare In re RiseSmart Inc.*, 104 USPQ2d 1931, 1934 (TTAB 2012) (TALENT ASSURANCE does not present as a double entendre such that “the merely descriptive significance of the term [TALENT] is lost in the mark as a whole.”) and *In re National Tea Co.*, 144 USPQ 286 (TTAB 1965) (NO BONES ABOUT IT considered unitary “double entendre” for fresh pre-cooked ham). Here, however, the terms “Pregnancy Text” and “Pregnancy Test” are distinct phrases that have

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<sup>15</sup> Applicant’s Appeal Brief at 12 TTABVUE 6.



entirely different meanings. The word “text” is commonly used and understood by the public. When this term is used in connection with the service of sending text messages, consumers, including teenagers, are more likely to understand the basic meaning of the word “text” in determining the connotation of the applied-for mark. We agree with the Examining Attorney that it is highly unlikely that consumers would ignore the meaning of the word “text” and replace it with the meaning of the word “test” when it is clear from Applicant’s website that Applicant’s services include sending “text” messages. To be a double-entendre, the actual words in the mark PREGNANCY TEXT should have an alternate meaning and, as noted above, that meaning must be readily apparent to purchasers from the mark itself. However, there is no alternate meaning or connotation; PREGNANCY TEXT means exactly what it says, namely a text message about pregnancy-related matters, including new born babies.

Applicant argues that its services do not send a text message related to anyone’s pregnancy or even about pregnancy in general, but rather related to a “simulated pregnancy experience,” that is essentially a form of a video game that relies upon “phone babies.” Applicant contends it is simply wrong to equate a “simulated pregnancy experience” (*i.e.*, phone babies) with information about an actual pregnancy. It requires imagination, perception, and thought to equate a “phone baby” to an actual baby and to equate the experience of receiving phone texts to simulate certain aspects of having a baby to an actual pregnancy, Applicant

argues.<sup>16</sup> We obviously do not disagree that a “simulated pregnancy experience” is not the same thing as an actual pregnancy. However, both deal with the subject of “pregnancy” and are therefore appropriately described by the word “pregnancy” in the term PREGNANCY TEXT.

Generally, if each component of a mark retains its descriptive significance in relation to the services, as is the case with respect to Applicant’s applied-for mark, the combination results in a composite that is itself descriptive. *See DuoProSS Meditech Corp. v. Inviro Medical Devices, Ltd.*, 103 USPQ2d at 1758-59 (SNAP SIMPLY SAFER merely descriptive for medical devices); *see also, In re Petroglyph Games Inc.*, 91 USPQ2d 1332, 1341 (TTAB 2009) (BATTLECAM merely descriptive for computer game software); *In re King Koil Licensing Co.*, 79 USPQ2d 1048, 1052 (TTAB 2006) (THE BREATHABLE MATTRESS held merely descriptive of beds, mattresses, box springs, and pillows where BREATHABLE retained its ordinary dictionary meaning when combined with MATTRESS and the resulting combination was used descriptively in the relevant industry); *In re Associated Theatre Clubs Co.*, 9 USPQ2d 1660, 1663 (TTAB 1988) (GROUP SALES BOX OFFICE is merely descriptive of theater ticket sales services because it combines the two common descriptive terms most applicable to applicant’s services which remains a common descriptive compound expression).

Based on the definitions of the terms used in the applied-for mark and the fact that Applicant itself has described its services as “featuring a simulated pregnancy

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<sup>16</sup> Applicant’s Reply Brief at 15 TTABVUE 2-3.

experience in mobile wireless form,” consumers would understand that the applied-for mark describes the purpose and/or a feature of the services, namely, that text messages are sent that relate to the subject of pregnancy. Thus, when used in combination, the combined terms do not evoke any new or unique commercial impression. Because the terms retain their merely descriptive significance in relation to the services, the combination results in a composite that is itself merely descriptive. *See In re Phoseon Technology*, 103 USPQ2d at 1823. 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, function or property of the goods or services. *In re H.U.D.D.L.E.*, 216 USPQ 358, 359 (TTAB 1982); and *In re MBAssociates*, 180 USPQ 338, 339 (TTAB 1973).

Applicant argues that the absence of evidence of descriptive usage of “Pregnancy Text” by third parties undercuts the rationale for the Examining Attorney’s refusal and supports Applicant’s position that the applied-for mark is not descriptive.<sup>17</sup> It is well established, however, that even if Applicant may have been the first or only user of the merely descriptive designation PREGNANCY TEXT this does not render the term PREGNANCY TEXT incongruous or distinctive. As shown by the dictionary definitions and Applicant’s specimens, the only significance conveyed by the term as a whole is that it is merely descriptive. *See In re Phoseon Technology*,

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<sup>17</sup> Applicant’s Appeal Brief at 12 TTABVUE 7-8.

103 USPQ2d at 1826; *In re Alpha Analytics Investment Group LLC*, 62 USPQ2d 1852, 1856 (TTAB 2002).

Applicant notes that the Board has found marks that form a pun to be inherently distinctive, citing to *In re Delta Light N.V.*, 2013 TTAB LEXIS 358 (2013), where the Board found the mark “LEDS GO” for LED lights was a “clever pun, playing on the expression ‘let’s go.’” Applicant argues that *In re Delta Light N.V.* illustrates that a pun need not contain the exact word in the non-descriptive meaning; that is, “LEDS” would readily be understood as a pun for the expression “let us.” Likewise, Applicant suggests PREGNANCY TEXT would be understood as a pun on “Pregnancy Test.” As Applicant acknowledged, *In re Delta Light N.V.* is not a precedential decision of the Board.<sup>18</sup> Moreover, there has been no showing that the descriptive term PREGNANCY TEXT would be perceived as a clever pun that plays on the expression “Pregnancy Test.”

Finally, Applicant notes that when deciding the issue of descriptiveness, it is the Board’s policy to resolve doubts in favor of the applicant and allow the mark to be published. *See In re Morton-Norwich Products, Inc.*, 209 USPQ 791, 791 (TTAB 1981); *In re Gourmet Bakers, Inc.*, 173 USPQ 565 (TTAB 1972).<sup>19</sup> Here, however, there is no such doubt about the descriptiveness of the applied-for mark.

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<sup>18</sup> Although parties may cite to nonprecedential decisions, the Board does not encourage the practice. *In re Morrison & Foerster LLP*, 110 USPQ2d 1423, 1427, n.6 (TTAB 2014); *see also In re Luxuria s.r.o.*, 100 USPQ2d 1146, 1151 n.7 (TTAB 2011) (parties may cite to nonprecedential decisions, but they are not binding on the Board and because they have no precedential effect, the Board generally will not discuss them in other decisions).

<sup>19</sup> Applicant’s Appeal Brief at 12 TTABVUE 9.

### Conclusion

Based on the foregoing, the evidence shows that the components of the applied-for mark are descriptive and retain their descriptive meaning when combined such that the overall composite is descriptive. We therefore find that Applicant's applied-for mark as a whole is merely descriptive.

**Decision:** The refusal to register Applicant's applied-for mark PREGNANCY TEXT is affirmed.