

**This Opinion is Not a
Precedent of the TTAB**

Mailed: March 9, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Photogrefer.com Inc.
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Serial No. 85838184
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Matthew H. Swyers,
for Photogrefer.com Inc.

Brittney L. Cogan, Trademark Examining Attorney, Law Office 114,
K. Margaret Le, Managing Attorney.

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Before Quinn, Adlin and Gorowitz,
Administrative Trademark Judges.

Opinion by Gorowitz, Administrative Trademark Judge:

Photogrefer.com Inc. (“Applicant”) seeks registration on the Principal Register of
the mark PHOTOGREFER (in standard characters) for

Online advertising and marketing services; online
advertising services for others; providing online referrals
in the field of photography in International Class 35.¹

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

¹Application Serial No. 85838184 was filed on February 1, 2013, based upon Applicant’s
claim of first use anywhere and first use in commerce on November 27, 2012.

Applicant's mark is merely descriptive. When the Examining Attorney made the refusal final, Applicant appealed. We affirm the refusal to register.

A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *DuoProSS Meditech Corp. v. Inviro Medical Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1755 (Fed. Cir. 2012); *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). Whether a term is merely descriptive is determined not in the abstract, but in relation to the services for which registration is sought, the context in which it is being used in connection with the services, and the possible significance that the term would have to the average purchaser of the services because of the manner of its use; that a term may have other meanings in different contexts is not controlling. *In re Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219 (citing *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).

While correctly acknowledging the test for determining descriptiveness, Applicant asserts that its mark is not merely descriptive because “[i]n the context of the Lanham Act, ‘merely’ descriptive means ‘only’ descriptive.” Appeal Brief, p. 6, 4 TTABVue 7. Applicant misinterprets the Court of the Customs and Patent Appeals’ decision, *In re Quik-Print Copy Shops, Inc.*, 616 F.2d 523, 205 USPQ 505 (CCPA

1980), wherein the Court stated “[i]n this context, ‘merely’ is considered to mean ‘only.’” *Quik-Print Copy Shops*, at 507 including fn 7. In other words, the Court concluded that a mark is only descriptive if it immediately conveys to one seeing or hearing it knowledge of the ingredients, qualities, or characteristics of the goods or services with which it is used and not that to be merely descriptive a mark can only convey knowledge of the ingredients, qualities, or characteristics of the goods or services.

Applicant’s services include “providing online referrals in the field of photography.” The record establishes that in fact all of Applicant’s services relate to the field of photography and that the word “photographer” describes both a feature and purpose of the services, namely to promote photographers and to obtain the services of a photographer. The Examining Attorney introduced evidence from Applicant’s website, which clearly indicates the nature of the services:

PhotogRefer is an-easy-to-use online directory that connects photographers and clients.

Search and Find Photographers Online

PhotogRefer offers a simple way to search and find the best photographers in your area and across the nation. Our database includes a wide range of photographers, from portrait and wedding photographers to landscape and fashion photographers.

Marketing for Photographers—Clients Search for YOU

PhotogRefer's photographer directory is also a great marketing resource for photographers. If you are a freelance photographer or photography business, you can post a listing for your photography website on our national database.

Office Action dated May 10, 2013; and

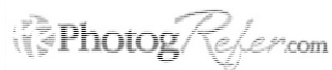
WELCOME TO PHOTOGREFER

Photogrefer.com online directory is the perfect location to find photographers for all your life's special moments. Our directory provides access to photographers around the country that specialize in almost every style of photography. Our directory has a nationwide reach and is expanding daily to provide a variety of choices to fit your needs.

Office Action dated January 28, 2014.

Applicant's mark PHOTOGREFER, which is a telescoping of the abbreviated term "photog" and the word "refer," is also a misspelling of the word "photographer," in which the letters "aph" are replaced by the similarly sounding "ef." The primary connotation of the mark is "photographer," or at least referrals to photographers. Applicant concedes that PHOTOGREFER "sound[s] similar to PHOTOGRAPHER." Appeal Brief, p. 8, 4 TTABVUE 9. It is settled that "[t]he mere misspelling of a descriptive word is not sufficient to change a merely descriptive term into an inherently distinctive trademark." *In re Carlson*, 91 USPQ2d 1198, 1200 (TTAB 2009) (and cases cited therein).

Applicant also argues that its "use of the mark indicates that the two words are meant to be understood independently from each other, 'Photog' and 'Refer' ..." Appeal Brief, p. 13, 4 TTABVUE 14. Applicant uses the term "PHOTOGREFER" as a single word (PHOTOGREFER) and as individual terms within one word, PhotogRefer. For example, in portions of its website, Applicant uses the mark in the



following manner:

. While the commercial impression of

this use is different from the impression created when the mark is depicted as **PHOTOGREFER**, both of the commercial impressions are merely descriptive of characteristics of Applicant's services. Here, the commercial impression is "photog" + "refer." "Photog" is defined as "one who takes photographs; photographer."² Applicant offers online referrals in the field of photography, which consists of referrals of photographers or "photogs." At a minimum, even when depicted as PhotogRefer, Applicant's mark is merely descriptive of Applicant's online referral services. In any event, because Applicant seeks registration of the mark in standard characters, it could depict the mark as **PHOTOGREFER** so any use of the mark's components as "two words" is not relevant.

Accordingly, we find the mark PHOTOGREFER to be merely descriptive of Applicant's services.

Applicant argues that the "Board has adopted a three-part test to determine whether a mark is descriptive or suggestive: (1) the degree of imagination necessary to understand the product; (2) a competitor's need to use the same terms; and (3) competitors' current use of the same or similar terms." Appeal Brief, p. 12, 4 TTABVue 13. Applicant bases this argument on *No Nonsense Fashions Inc. v.*

² As requested by the Examining Attorney, we take judicial notice of the definition of "photog" from Merriam-Webster's Dictionary Online, <http://www.merriam-webster.com/dictionary/photog>.

The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

Consolidated Foods Corp., 226 USPQ 502 (TTAB 1985). However, as discussed in *Carlson*:

these “tests” were set out in an inter partes case in a discussion of whether use of a term by third parties on their packaging detracted from the plaintiff’s trademark rights. Thus, to the extent that applicant is suggesting that the Office must prove all three points, Applicant is incorrect. Since this decision issued in 1985, there have been numerous decisions from the Court of Appeals for the Federal Circuit and the Board making clear that the test for descriptiveness is whether a term “immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.” *In re Bayer Aktiengesellschaft*, 82 USPQ2d at 1831, citing *In re Gyulay*, 820 F.2d 1216, 1217, 3 USPQ2d 1009 (Fed. Cir. 1987).

91 USPQ2d at 1203.

Applicant also argues that its proposed mark does not automatically cause a consumer to think of advertising, marketing and referral services. Applicant’s argument is unpersuasive. “[I]t is a well settled legal principle that where a mark may be merely descriptive of one or more [services] in an application but may be suggestive or even arbitrary as applied to other [services], registration is properly refused if the subject matter for registration is descriptive of any of the [services] for which registration is sought.” *In re Analog Devices Inc.*, 6 USPQ2d 1808, 1810 (TTAB 1988). Therefore, since Applicant’s mark is merely descriptive of Applicant’s online referrals in the field of photography, it is unnecessary for us to determine whether it is also merely descriptive of Applicant’s online advertising and marketing services, and online advertising services for others.

Further, Applicant's contention that no competitor has used, or will ever have need to use, the term PHOTOGREFER is not supported by any evidence. Moreover, it does not affect our decision in this matter as “[i]t is well established that even if an applicant is the only user of a merely descriptive term, this does not justify registration of that term.” *Carlson*, 91 USPQ2d at 1203; *See also In re BetaBattInc.*, 89 USPQ2d 1152, 1156 (TTAB 2008); *In re Sun Microsystems, Inc.*, 59 USPQ2d 1084, 1087 (TTAB 2001); *In re Acuson*, 225 USPQ 790, 792 (TTAB 1985).

Finally, Applicant argues that “an examination of registered marks on the Principal Register reveals that the term ‘PHOTGREFER’ in relation to services like those of the Applicant has consistently been treated as suggestive of the respective services.” Appeal Brief, 14, 4 TTABVUE 15. This argument is unpersuasive and irrelevant. None of the registrations upon which Applicant relies are for the mark PHOTOGREFER. Further, none of the marks are either phonetic equivalents of descriptive terms or combinations of descriptive terms which as a whole are descriptive. We must decide each case on its own merits and are not bound by the allowance of prior registrations, even if they have some characteristics similar to the application. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

Decision: The refusal to register Applicant’s mark PHOTOGREFER is affirmed.