

**Choose Your Words Carefully:
In Telecom Law and Life, in General**

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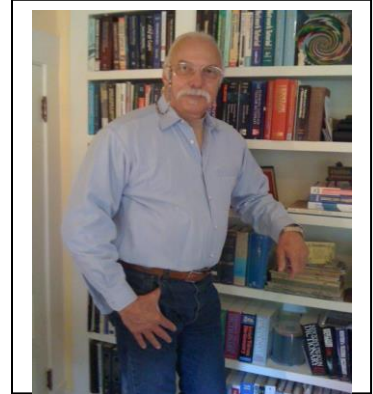
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Communications is a science, an art, and a field of study, depending on the context. In simplest terms, communications is the means by which people express ideas or information. Communications is elevated to an art form by poets and authors of prose who seem to know just how to weave words together into a colorful fabric that can create images and even emotions in the mind of the reader. Communications is a science or assemblage of sciences that come together to create and apply the technologies that underlie the systems and networks that support the sending, transmission, switching and receiving of messages. If *communications* take place across a distance, it becomes *telecommunications*.

Completing the loop, communications is the means by which people express the ideas behind and otherwise convey information about the technology. That's where we can get into trouble. In business, including most especially the business of science, words must be chosen carefully to convey precise meaning...or not. As Mark Twain once said, "The difference between the almost right word and the right word is really a large matter—it's the difference between the lightning bug and the lightning."

All of us who have been around long enough have both enjoyed the benefits of choosing the right words and paid the price for choosing the wrong ones. Now, it's not as though I haven't paid the price for having chosen the wrong words on occasion, but I have made a reasonably nice living over the past 30 years or so as a telecommunications consultant, lecturer, writer, columnist and author, all of which require excellent communications skills. As a lexicographer (i.e., writer of dictionaries) for a dozen or more years, I have developed a high level of respect and even an affinity for words and their precise meanings. I also do a considerable amount of litigation support work as a consulting expert and testifying expert in telecommunications related lawsuits involving contract disputes, product/service misrepresentations, the Telephone Consumer Protection Act (TCPA), and intellectual property (patents, trademarks and service marks). It is this work that has underscored for me, at least, the incredible value of the right word. Please allow me to illustrate the point.

Patent Litigation: Words Matter

Some years ago, I was involved in a legal battle between Nextel Communications and Verizon Wireless over the use of the term *push-to-talk (PTT)*. Nextel claimed that, through the unique use of the term in its advertising, it had essentially redefined a term

that had been in continuous use since at least 1935, according to my research, and made *push-to-talk* its own. Nextel trademarked the term and then sued Verizon for misappropriating the mark. I was retained to support Verizon's position, which prevailed, but not before a lot of money had been spent on attorneys and experts.

Over the past few years I have studied hundreds of patents, many of which are overly complicated and confusing almost beyond belief. As if it weren't tough enough to deal with technical terminology, patent writers seem to delight in increasing the degree of difficulty as they move back and forth between conversational and technical English. I can't begin to tell you the number of times I have had to opine on the differences between the definitions of *circuit*, *line*, *loop*, *trunk* and *channel*, each of which has multiple definitions sensitive to semantics and technical context. I have been called upon innumerable times to define *digital* and *analog*, and to draw comparisons between them. In times past, these definitional issues were argued before a judge and jury. In its *Markman v. Westview Instruments, Inc.* decision in 1996, however, the United States Supreme Court unanimously held that judges, rather than juries, should decide the meaning of terms used in patent claims. So, a great deal of effort and buckets of money now go into the process of claim construction, which is the legal art of translating the patent claim language into plain English. The attorneys for the plaintiffs and defendants, alike, prepare definitional arguments for presentation to a judge in what has become known as a *Markman hearing*. In fact, a case can easily (Hmmm, *easily* may not be exactly the right word.) be won or lost depending on the rulings a judge makes with respect to the definitions of critical technical terms. This phase of the legal process often determines whether a plaintiff has a legal claim and whether the defendant infringed the patent.

Once upon a time, issues of patent infringement affected only inventors of processes, machines, manufactured products or other tangible goods, or significant improvements to them. In the United States and many other countries, patent law has since extended to biology, chemistry, methods and software. Just in case you think that none of this applies to you, it lately it has become fashionable...and highly profitable...for patent holders to sue end users, rather than manufacturers, of technology. It seems as though end users are much easier to bully and that they, therefore, are much more likely to settle out of court simply as a matter of risk management. After all, if Troll Technology sues Unsuspecting Inc. for patent infringement and the Unsuspecting CEO can make the lawsuit go away for \$5 million, it can seem like a bargain as compared to even the slight risk of a \$50 million judgment if the case were to go to trial. That doesn't include, of course, the \$3-5 million in legal fees that might accrue if the case were to go to trial, not to mention the bad publicity, the loss of customer confidence or the loss of internal business focus caused by the distraction of a lawsuit. Forget that fact that a patent troll may have a portfolio of unworthy patents granted by inexperienced, overworked patent examiners and that a concerted legal effort by a single thoroughly agitated defendant with deep pockets can put an end to the madness. Sometimes CEOs and Boards of Directors reckon it's just easier to roll over, write a check and put the matter behind them, or so I am told.

Contract Disputes: Words Matter

I have been involved as a consulting and testifying expert in several contract disputes between local exchange carriers and public agencies and municipalities in which many millions of dollars hinged on the definition of the word *line*, which, of course, is not to be confused with *trunk*, *channel*, *circuit* or *loop*. I have since been involved in several other lawsuits also involving many millions of dollars that hinged on the meaning of a single word.

TCPA Litigation: Words Matter

More recently, I have been involved in dozens of lawsuits involving alleged violations of the *unsolicited fax advertisement (junk fax)* and *automatic telephone dialing system (ATDS)* aspects of the Telephone Consumer Protection Act (TCPA). Once again, words matter, especially as Congress did an awful job of defining terms in the statute and the FCC's attempts to clarify definitional issues failed miserably. With respect to junk faxes, terms like *fax machine*, *regular telephone line*, and *send vs. receive*.

The U.S. Supreme Court (SCOTUS) is currently considering the matter of PDR Network, LLC v. Carlton & Harris Chiropractic Inc. The chiropractor brought the suit based on an unsolicited fax that PDR sent, offered a free physicians' desk reference. PDR moved to dismiss the complaint, arguing the e-book was free, therefore the fax did not offer anything for sale and therefore wasn't an unsolicited *advertisement*.

That position is in direct conflict with a 2006 FCC Rule that states "facsimile messages that promote goods or services even at no cost ... are unsolicited *advertisements*." The district court challenged the FCC, granting a motion to dismiss the suit. The U.S. Court of Appeals reversed that decision, based on the Hobbs Act, which requires that the courts defer to the FCC. PDR does not agree. So, the definition of the word *advertisement* is now before SCOTUS. (Note: I told you that words matter.)

That little bit of definitional fax drama aside, most of the TCPA action these days is with respect to the ATDS elements of the statute, where terms like *automatic*, *dial*, *capacity*, *human intervention*, *random*, *sequential* and *system* are the stuff of much debate. (I don't make this stuff up.) Note: For more on this subject, see the article [Rumplestiltskin, LLP](#).

Law, Regulations and Lawyers

There are ways to limit your liability, of course. You may not like this bit of advice, but retaining the services of a good attorney would be a good start.

As generally is the case in matters of government, laws and regulations are not developed quickly. Like standards, they develop slowly, based on human experience and setting the stage for the next cycle of experience. Generally written by groups of lawyers, they are characteristically lengthy and complex to the extent that it takes other groups of lawyers to interpret them. Where there are disagreements or disputes, lawyers appeal to the regulators and all too often litigate those matters through the courts, where judges, who

usually are lawyers, make the final decisions, which often are appealed to higher courts, where eventually some judge or panel of judges makes the final decision. As noted by Karl Shapiro in *Reports of My Death* (1990), *Lawyers love [words on] paper. They eat, sleep and dream paper. They turn paper into gold, and their files are colorful and their language neoclassical and calligraphically bewigged.* So, when the need arises, I suggest you find a good lawyer, bewigged or otherwise, who can parse the relevant words on your behalf.

Pet Peeve

In closing, I must draw you into my personal crusade against the misuse of two words—*premise* and *premises*. The official definitions are in *Webster's New World Telecom Dictionary* by Ray Horak, which would be me:

premise: An assumption, proposition or presupposition that serves as the basis for an argument. The word is often confused with premises. For example, CPE is the initialism for Customer Premises Equipment, which is equipment physically located on the customer premises, at least that is the premise. [See *Webster's New World Telecom Dictionary* to understand the differences between *abbreviation*, *acronym*, *backronym*, *contraction*, *initialism* and *portmanteau*.]

premises: A building, or part of a building, including its grounds.

For the record, there is no such thing as customer premise equipment, a premise-based PBX or premise-based VoIP and, therefore, there is no basis for comparison between cloud and premise-based telephony.

As Mark Twain once said, “The difference between the almost right word and the right word is really a large matter—it’s the difference between the lightning bug and the lightning.”

Disclaimer: Ray Horak is not an intellectual property attorney or any other form of attorney, for that matter. He is an independent telecommunications consultant, lecturer, writer, editor, columnist and author who is internationally recognized for his ability, both in print and in person, to translate complex technical matter into plain-English, commonsense terms. In the context of litigation support, attorneys frequently retain Ray as a consulting/testifying expert in cases involving a broad range of telecommunications technologies. Much of that work currently involves the words in the TCPA. His books include [Telecommunications and Data Communications Handbook](#) and [Webster's New World Telecom Dictionary](#), both published by John Wiley & Sons. See the dictionary, in particular, for multiple authoritative definitions of *analog*, *digital*, *channel*, *circuit*, *line*, *loop*, *trunk*, *system* and more than 4,600 other telecom terms. In the words of Led Zepplin “sometimes words have two [or more] meanings” (*Stairway to Heaven*). Specific meanings, by the way, are sensitive to *context*, which explains why Ray Horak (which would be me) chose the name [Context Corporation](#).

This article initially appeared in the June 2019 issue of *Telecom Reseller*. Although contemporary English language has taken a sharp turn for the worse in recent times words still have consequences, particularly in matters of law, or so I am told.

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