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January 9, 2005

TTAB

VIA HAND DELIVERY

Commissioner For Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

ATTN: BOX NO FEE

Re: U.S. Trademark Application Serial No.: **76/604,925**
Applicant: Electric Art, Inc.
Mark: **ELECTRIC ART**
Classes: 16 & 35
Our Reference No.: 35580/190632

Sir:

We enclose the following for filing in the U.S. Patent and Trademark Office:

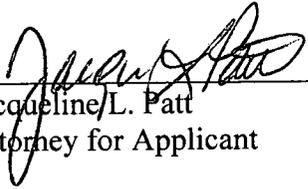
1. Applicant's Appeal Brief with Exhibits 1 and 2

Please charge any additional fees to the undersigned's Deposit Account No. 22-0261.

Please send all correspondence in connection with this matter to the undersigned's attention.

Respectfully submitted,

By: _____


Jacqueline L. Patt
Attorney for Applicant

Enclosure: As Stated
JLP/bmh
608935v1(167)



01-09-2006

U.S. Patent & TMOfc/TM Mail Rcpt Dt. #34

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: Electric Art, Inc.

Serial No.: 76/604925

Examining Attorney: Tracy Fletcher

Mark: ELECTRIC ART

Law Office: 115

Filed: July 30, 2004

35580-190632

BOX NO FEE

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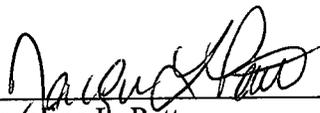
Alexandria, VA 22313-1451

APPLICANT'S APPEAL BRIEF

Applicant submits herewith its Appeal brief in response to the Examining Attorney's Final Refusal of registration based upon the section 2(e)1 of the Trademark Act.

Respectfully submitted,

Date: January 9, 2006



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I. Introduction

This matter is before the Board on Appeal by the Applicant from a final refusal of registration based upon the section 2(e)1 of the Trademark Act.

II. The Record

The record for this appeal consists of the application, and a number of Office Actions and responses.

III. The Examiner's Position

It is the Examiner's position that the mark ELECTRIC ART is descriptive of the identified goods.

IV. The Applicant's Position

It is the Applicant's position that the mark is not descriptive of the goods, but rather is at most suggestive of the goods.

V. Argument

The Examining Attorney has maintained her refusal of registration of the mark under Section 2(e)(1). Applicant respectfully requests that such refusal be withdrawn for the following reasons.

Applicant submits that the term ELECTRIC in the mark ELECTRIC ART is not descriptive of Applicant's goods and services. The term ART has been disclaimed.

A. Applicant's Mark is suggestive

A mark is considered to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it *immediately* describes a significant ingredient, quality, characteristic or feature thereof or if it directly conveys information regarding the nature,

function, purpose or use of the goods or services. See, e.g., In re Intelligent Instrumentation Inc., 40 U.S.P.Q. 2d 1792, 1974 (TTAB 1996) (to be considered descriptive mark must immediately describe ..., without conjecture or speculation, a significant purpose or function of applicant's goods..." (emphasis added).

Moreover, whether a mark is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services and the possible significance that the mark would have to the average purchaser of the goods or services because of the manner of its use. See In re Bright Crest, Ltd., 204 U.S.P.Q. 591, 593 (TTAB 1979). See also Plyboo America, Inc. v. Smith & Fong Co., 51 U.S.P.Q. 2d 1633, 1640 (TTAB 1999) (the mark PLYBOO was suggestive for bamboo laminate flooring and plywood made of bamboo); In re On Technology Corp., 41 U.S.P.Q. 2d 1475, 1477 (TTAB 1996) (AUDITTRACK for computer software for monitoring activity on a computer network was suggestive and not merely descriptive).

At most, Applicant's mark is suggestive. A mark is suggestive if, when the goods or services are encountered under the mark, a multistage reasoning process, or the utilization of imagination, thought or perception, is required in order to determine what attributes of the goods or services the mark indicates. See, e.g., In re Abcor Development Corp., 588 F.2d 811, 200 U.S.P.Q. 215, 218 (CCPA 1978); In re Mayer-Beaton Corp., 223 U.S.P.Q. 1347, 1349 (TTAB 1984).

The examining attorney's definition indicates that the term ELECTRIC has more than one meaning: "(a). Emotionally exciting; thrilling: gave an electric reading of the play. (b) Exceptionally tense; highly charged with emotion: an atmosphere electric with suspicion." *See* Office Action dated March 14, 2005. Consequently, the term ELECTRIC as applied to

Applicant's goods and services gives the impression of art that is fun, exciting or even whimsical; in this way, the term ELECTRIC is suggestive and not descriptive. Therefore, the word ELECTRIC has a double connotation as applied to Applicant's goods and services. In this case, the term ELECTRIC when combined with the term ART as applied to Applicant's goods and services gives the impression of art that is fun, exciting or even whimsical. Therefore, the term ELECTRIC is suggestive, not *merely* descriptive, of Applicant's goods and services. See TMEP § 1213.05(c); see also In re Colonial Stores Inc., 394 F.2d 549, 157 U.S.P.Q. 382 (C.C.P.A. 1968) (held SUGAR & SPICE suggestive for bakery products invoking the memory of the nursery rhyme "sugar and spice and everything nice"); In re Simmons Co., 189 U.S.P.Q. 352 (TTAB 1976) (THE HARD LINE suggestive for mattresses and bed springs, reversing the refusal of the Examining Attorney and affirming Applicant's contention that the term comprises a vernacular expression which describes an attitude of toughness or obduracy by one party or country in its relationship to others); In re Delaware Punch Co., 186 U.S.P.Q. 63 (TTAB 1975) (held THE SOFT PUNCH is not a phrase that would be commonly used to describe a non alcoholic beverage, it has a suggestive meaning more likely to be conveyed to the purchasing public than the one ascribed to it by the Examiner, namely, that the drink has an impact like a soft punch or a pleasing hit, and it possesses a degree of ingenuity in its phraseology which is evident in the double entendre that it projects); In re National Tea Co., 144 U.S.P.Q. 286 (TTAB 1965) (NO BONES ABOUT IT for fresh pre-cooked ham has a double connotation or significance as applied to hams which might well attract the attention of a prospective customer).

The Examining Attorney contends that "the fact that a term may have more than one meaning *in other contexts* is not controlling on the question of descriptiveness." See Office Action dated May 11, 2005, emphasis added.. However, the Examining Attorney appears to miss the point:

the term ELECTRIC has more than one meaning *in this context*. Consequently, Applicant's mark fits squarely in the cases cited above in which the marks were deemed suggestive, and not merely descriptive due to double connotations and double entendres. In contrast, the cases cited by the Examining Attorney relate to alternate definitions that were not relevant to the goods or services identified in the applications and are inapposite. See In re Chopper Industries, 222 U.S.P.Q. 258 (TTAB 1984) (the term CHOPPER though descriptive had acquired secondary meaning); In re Bright Crest, Ltd., 204 U.S.P.Q. 591 (TTAB 1979) (COASTER CARDS descriptive of a coaster suitable for direct mailing; alternate definitions have no relation to the goods or services for which registration was sought); In re Champion International Corp., 183 U.S.P.Q. 318 (TTAB 1974) (BLANCO descriptive of the color of panels for doors, walls, partitions and furniture; alternate definitions have no relation to the goods or services for which registration was sought).

Further, the Examining Attorney's definition of the term ELECTRIC states that "of relating to or operated by electricity: electric current; an electrical appliance." See Office Action dated March 14, 2005. The term ELECTRIC does not describe ART as the term ELECTRIC would describe APPLIANCE in the example provided by the dictionary definition. If Applicant's mark were LIGHT ART, the term LIGHT might describe some of the artistic elements used in the goods provided by Applicant; and some of the evidence provided by the Examining Attorney might support the descriptiveness of the mark LIGHT ART.

Similarly, even if the term ELECTRIC and ART are independently descriptive as the Examining Attorney contends, their combination creates a fanciful mark which is not *merely* descriptive. Art is not the typical product that an average customer would expect to be electrified; therefore, the combined terms are incongruous. When a customer encounters the term ELECTRIC ART, the customer must enter into a multistage reasoning process to determine

what attributes of the goods or services the mark indicates. As such, the term ELECTRIC does not immediately call to mind a feature of the goods or services, but rather the combination of the terms ELECTRIC ART as applied to Applicant's goods and services gives the impression of art that is fun, exciting or even whimsical.

The term ELECTRIC when combined with other terms may create an impression other than "operated by electricity." For example, when the term ELECTRIC is combined with a common term for a line dance, the SLIDE, the combination ELECTRIC SLIDE does not immediately call to mind something operated by electricity. Rather, the impression is of fun and excitement. To be sure, as stated in the ELECTRIC SLIDE by the artist Grandmaster Slice, "You can't see it, It's electric!, You gotta feel it, It's electric!, Ooh, it's shakin' It's electric!".

In In re Colonial Stores Inc., the U.S. Court of Customs and Patent Appeals determined that although the individual terms SUGAR and SPICE are generic terms which describe the commodities sugar and spice, the combination into an arbitrary or fanciful term makes the mark SUGAR & SPICE a distinctive mark when used with bakery goods. "[W]e think [SUGAR & SPICE] may function as an indication of more than a mere description of the ingredients of the goods on which the mark is used and, on the record made below, are not "merely descriptive" of such goods within the meaning of section 2. On the record below, the mark clearly does not tell the potential purchaser *only* what the goods are, their function, their characteristics or their use, or, of prime concern here, their ingredients." See also Blisscraft of Hollywood v. United Plastics Co., 131 U.S.P.Q. 55, 59-60 (2d Cir. 1961) (held "POLY PITCHER" was not "merely descriptive" of polyethylene pitchers because "Poly Pitcher" is reminiscent or suggestive of Molly Pitcher of Revolutionary time and when used as an incongruous expression has the characteristics of a coined or fanciful mark); Ex parte Barker, 92 U.S.P.Q. 218 (Com. Pat. 1952)

(held that "CHERRY-BERRY-BING" applied to "fruit and berry preserves" "while it may be true that each of the individual words in the present applicant's mark are generic and thus independently unregistrable, it seems to me that their unusual association or arrangement in the applicant's mark results in a unique and catchy expression which does not, *without some analysis* and rearrangement of its components suggest the contents of applicant's goods").

B. The Examining Attorney's Evidence Is Insufficient

The Examining Attorney has provided insufficient evidence to support the allegation that the mark is descriptive. See TMEP § 1209.02 ("If registration is refused, the Examining Attorney should support the refusal with appropriate evidence.").

In her Office Action of May 11, 2005, the Examining Attorney relied on several Lexis-Nexis excerpts and web pages to support her contention that the term ELECTRIC ART is descriptive. However, the Examining Attorney's evidence belies her contention that Applicant's mark is descriptive. The Applicant responded to each of the articles attached and provided information proving that each of the six articles did not support the Examining Attorney's contention. See Response dated August 24, 2005. Specifically, 4 out of the 6 articles and webpages attached to the office action show the use of applicant's mark by authorized dealers; another article appeared in a London paper and with respect to the final article, the author admitted that the words were creative and not common terms.

1. The excerpt dated September 1, 2004 titled "Review: Art: A Light Crescendo: St. Mary's York 3/5" appeared in The Guardian, a newspaper published and distributed in London. This article is inapposite and can not be used to support the Examining Attorney's contention that Applicant's mark is descriptive in the U.S. Notwithstanding the fact that the article originates from a different country, commonly used words used in England do not have the same meaning

as the same words in the U.S. For example, the word "pants" as used in England means underwear. What is meant by "pants" in the U.S. is called "trousers" in England. Therefore, use of any phrase in London can not be interpreted as evidence of what that phrase would mean in the U.S.

2. In the November 23, 2003 article appearing in the San Francisco Chronicle titled "Downtown Found in L.A." by John Flinn, the expression "electric art" which appeared in the article was part of the author's effort to be creative. The author does not believe the term "electric art" is a common term. *See* Declaration of Jay Andre, ¶ 5, and Exhibit 1 letter from John Flinn, attached to Applicant's Response August 24, 2005.

3. In the November 23, 2003 article appearing in The San Diego Union-Tribune titled "Business Briefs", the Resort Superstore mentioned in the article is an authorized dealer of Electric Art, Inc. which is reselling applicant's products under the ELECTRIC ART trademark. *See* Declaration of Jay Andre, ¶ 6, attached to Applicant's Response August 24, 2005.

4. In the May 20, 2003 article appearing in PR Newswire titled "Five Star Billiards.com Suggests Top Gifts for the Player", Five Star Billiards is an authorized dealer of Electric Art, Inc. and sells applicant's products under the ELECTRIC ART trademark. The "Dec" the Walls mentioned in the article appears to be a reference to "Deck the Walls" retail stores which are authorized dealers of Electric Art, Inc. and which is reselling applicant's products under the ELECTRIC ART trademark. *See* Declaration of Jay Andre, ¶ 7, attached to Applicant's Response August 24, 2005.

5. On the web page titled "D&K's Electric Art," Midwest Plaza d/b/a D&K Gifts is an authorized dealer of Electric Art, Inc. and sells applicant's products under the ELECTRIC

ART trademark. See Declaration of Jay Andre, ¶ 8, attached to Applicant's Response August 24, 2005.

6. On the web page titled PoolDawg.com, PoolDawg.com is an authorized dealer of Electric Art, Inc. and sells applicant's products under the ELECTRIC ART trademark. See Declaration of Jay Andre, ¶ 9, attached to Applicant's Response August 24, 2005.

Therefore, the Examining Attorney has not shown that the term ELECTRIC ART has any descriptive connotation in the field. Rather, the evidence submitted by the Examining Attorney shows Applicant's mark being used to refer to Applicant's products.

In her Reconsideration Letter dated October 26, 2005, because the Applicant successfully struck down each of the Examining Attorney's evidence submitted with the May 11th Office Action, the Examining Attorney has attempted to submit additional "evidence" to support her contention that the term ELECTRIC ART is descriptive of Applicant's goods. Applicant respectfully request that the Board grant Applicant leave to address the additional evidence as follows.

1. In the June 2, 2005 Article in the Toledo Blade, "Audubon: Botanical Prints on View", the relevant text reads "On display will be electric pop art, neon, and mixed-media collage painting." The other highlighted word in the article was "lighthouses." Applicant submits that none of these terms in the Article support the Examining Attorney's contention that the mark ELECTRIC ART is descriptive of Applicant's goods.

2. In the March 15, 2005 Article in the Houston Chronicle, "Rocket men; Engineer's daughter looks at dad, masculinity, aerospace field", the relevant text reads "In the early 1950s Malina began to harness his engineering expertise in the service of "kinetic art," incorporating electric lights and motion into his paintings." Applicant submits that none of these terms in the

Article support the Examining Attorney's contention that the mark ELECTRIC ART is descriptive of Applicant's goods.

3. With respect to the November 30, 2004 Article in Herald Express (Torquay), "Stores stock up with classy gifts", this newspaper is from the United Kingdom and has no bearing on whether or not Applicant's mark is descriptive in the United States. See webpage from Herald Express (Torquay) attached as Exhibit 1. Commonly used words used in England do not have the same meaning as the same words in the U.S. Therefore, use of any phrase in London can not be interpreted as evidence of what that phrase would mean in the U.S. Not only is the article from the United Kingdom, but it is also a reference to Applicant's own products. The relevant text reads "About 30cm tall, they come with flashing **lights** and talk in that frightening Dalek accent. Kevin said: 'They are very realistic and scary. They are appealing to the age bracket which grew up with the original series.' Also good sellers are **electric light art** pictures which plug into mains sockets and feature LED displays and neon tubing. City landscapes, London Bridge and Venice are just some of the selection, price £ 39.95." Applicant submits that this article is a review of Applicant's product line shown at a trade show exhibition at the Torquay Fair, a wholesale trade show for Art and Gift stores in the United Kingdom.

4. In the September 27, 2004 Article from the Associated Press, National Gallery to show life work of artist whose medium was fluorescent tubes, the relevant text reads "It was another three years before he had a show of **art** made with **electric lights**, and then there were two shows in the same year." Applicant submits that none of these terms in the Article support the Examining Attorney's contention that the mark ELECTRIC ART is descriptive of Applicant's goods.

5. With respect to the September 1, 2004 Article in The Guardian (London), this newspaper is from the United Kingdom and has no bearing on whether or not Applicant's mark is descriptive when used in the United States.

6. With respect to the webpage, www.electricartgallery.com, this site is Applicant's website and features Applicant's products and marks. See, e.g., Application Serial No. 76/604,898 for ELECTRIC ART GALLERY filed by the Applicant, TARR pages attached as Exhibit 2.

7. With respect to the resume of Philip Hazard, the relevant text reads "He describes his work as 'an assemblage of electric pop-art neon and mixed media collage painting'" or "neon art." In his listing of exhibitions, there are four out of 45 references to "Electric Art—Neon Art National Tour." Applicant submits that the Artist uses the term NEON ART as the term to describe his art pieces, and this is evidenced by the language quoted above, and the term "Electric Art" as a suggestive trademark for his exhibit.

8. With respect to the Museum of Neon Art (MONA) webpage, the relevant text reads "The Museum of Neon Art was founded to exhibit fine art in electric and kinetic media; to document, preserve, restore and collect outstanding examples of neon signs; and to educate the public about the cultural, historical, aesthetic and technical aspects of **electric art**."

Consequently, out of the 239 articles from two Lexis/Nexis searches in two office actions as well as Internet searches of which the Examining Attorney attached 14 articles, only one article could arguably show the term "electric art" as describing a type of art. This does not even take into account that the one article was found after an exhaustive Internet Search and searches in the Lexis/Nexis databases both of which contain billions of articles and references. The fact that the Examining Attorney was only able to find one descriptive reference to the phrase

ELECTRIC ART after such a search is proof that Applicant's mark is not descriptive. Applicant submits that this evidence is simply not enough to support her contention that Applicant's Mark ELECTRIC ART is descriptive of its goods. See TMEP § 1209.02

If there is any question at all as to whether or not a term is merely descriptive, all doubt should be resolved in favor of approving the mark for Publication. Hormel & Company, 218 U.S.P.Q. 2d 86 (TTAB 1983); In re American Hospital Supply Corporation, 219 U.S.P.Q. 949 (TTAB 1983); Morton-Norwich Products, Inc., 209 U.S.P.Q. 949 (TTAB 1983); In re Gourmet Bakers, Inc., 173 U.S.P.Q. 565 (TTAB 1972).

In sum, it is respectfully submitted that there is sufficient doubt about the descriptiveness of the applicant's mark in the present case so that the mark should be approved for publication.

VI. CONCLUSION

In view of the foregoing, it is respectfully requested this application be forwarded to publication in the Official Gazette.

Respectfully submitted,

Date: January 9, 2006



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Attorneys for the Applicant

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Registration Number: (NOT AVAILABLE)

Mark

ELECTRIC ART GALLERY

(words only): ELECTRIC ART GALLERY

Standard Character claim: Yes

Current Status: An office action making FINAL a refusal to register the mark has been mailed.

Date of Status: 2005-11-01

Filing Date: 2004-07-30

Transformed into a National Application: No

Registration Date: (DATE NOT AVAILABLE)

Register: Principal

Law Office Assigned: LAW OFFICE 115

Attorney Assigned:
SMITH BRIDGETT G Employee Location

Current Location: M6X -TMO Law Office 115 - Examining Attorney Assigned

Date In Location: 2005-11-01

LAST APPLICANT(S)/OWNER(S) OF RECORD

1. Electric Art, Inc.

Address:
Electric Art, Inc.
1930 Village Center Circle, Suite 3-700
Las Vegas, NV 89134
United States
Legal Entity Type: Corporation
State or Country of Incorporation: Nevada

GOODS AND/OR SERVICES

Latest Status Info

International Class: 016

Graphic art prints and reproductions

First Use Date: 1990-00-00**First Use in Commerce Date:** 1990-00-00**Basis:** 1(a)**International Class:** 035

On-line retailing and wholesale distributorship services, catalog mail order services and telephone order services, all in the field of graphic art prints and reproductions and sculptures

First Use Date: 1998-00-00**First Use in Commerce Date:** 1998-00-00**Basis:** 1(a)

ADDITIONAL INFORMATION

Disclaimer: "ART GALLERY"

MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

2005-11-01 - Final refusal mailed

2005-11-01 - Final Refusal Written

2005-09-14 - Amendment From Applicant Entered

2005-09-02 - Communication received from applicant

2005-09-02 - PAPER RECEIVED

2005-03-11 - Non-final action mailed

2005-03-10 - Non-Final Action Written

2005-03-04 - Case file assigned to examining attorney

2004-08-11 - New Application Entered In Tram

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