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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Electric Art, Inc.

Serial No. 76604925

Jacqueline L. Patt of Venable LLP for Electric Art, Inc.

Tracy L. Fletcher, Trademark Examining Attorney, Law Office
115 (Tomas V. Vlcek, Managing Attorney).

Before Grendel, Drost and Zervas, Administrative Trademark
Judges.

Opinion by Grendel, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register
of the mark ELECTRIC ART (in standard character form) for
goods and services identified in the application as
"graphic art prints and reproductions" in Class 16, and
"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" in Class 35.¹ Applicant has disclaimed the exclusive right to use ART apart from the mark as shown.

At issue in this appeal is the Trademark Examining Attorney's final refusal to register applicant's mark on the ground that it is merely descriptive of the goods and services. Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1).

Applicant and the Trademark Examining Attorney have filed main appeal briefs. Applicant did not file a reply brief and did not request an oral hearing. We affirm the refusal to register.

A term is deemed to be merely descriptive of goods or services, within the meaning of Trademark Act Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. See, e.g., *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987), and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's

¹ Serial No. 76604925, filed November 10, 2005. The application is based on use in commerce under Trademark Act Section 1(a), 15 U.S.C. §1051(a). As to the Class 16 goods, 1990 is alleged as the date of first use anywhere and the date of first use in commerce. As to the Class 35 services, 1998 is alleged as the date of first use anywhere and the date of first use in commerce.

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. See *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973).

Whether a term 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 term would have to the average purchaser of the goods or services because of the manner of its use. That a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).

Moreover, 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." *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002). See also *In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537 (TTAB 1998); *In re Home Builders Association of Greenville*, 18 USPQ2d 1313 (TTAB 1990); and *In re American Greetings Corporation*, 226 USPQ 365 (TTAB 1985).

Applicant's specimens of use include a brochure/catalog entitled "ELECTRIC ART - Framed Art Decorated with Special Lighting Effects." Inside the brochure, under the heading "SPECIAL LIGHTING EFFECTS," the following text appears:

In addition to the World's largest selection of Neon Art Pictures, Electric Art also creates wall art highlighted with miniature incandescent lights, fiber-optics and L.E.D.s (i.e. light emitting diodes).

Enhancing images with light in this way creates a realistic and captivating composite effect - adding a touch of warmth & elegance to any room at home or business. Each illuminated artwork is framed in a decorative glossy or matte black picture frame and comes with a standard 110v AC plug-in wall adapter. Foreign adapters for use in other countries are also available. This catalog features 50 of our most popular images.

One of applicant's prints (entitled BRASSAI) is described in the brochure as follows:

Electric Art features this classic print with actual miniature incandescent light bulbs inserted into the picture face. The light bulb enhancements bring the image to life with a unique chemistry unlike any other art form. Each bulb screws in and is easily replaced.

Another of applicant's specimens is a product instruction sheet, which includes the following text:

"Operation: Plug wall adapter power-supply into jack on

back of picture and any standard household electrical wall outlet. Turn ON and OFF using push button switch on bottom side of frame. Always turn picture off at night or when left unattended."

The record includes dictionary definitions of "electric" and "art" from The American Heritage Dictionary of the English Language (3d ed. 1992), submitted by the Trademark Examining Attorney. "Electric" is defined in pertinent part as "of, relating to, or operated by electricity: *electric current; an electrical appliance*"; other listed definitions are "emotionally exciting; thrilling: *gave an electric reading of the play,*" and "exceptionally tense; highly charged with emotion: *an atmosphere electric with suspicion.*" "Art" is defined in pertinent part as "the conscious production or arrangement of sounds, colors, forms, movements, or other elements in a manner that affects the sense of beauty, specifically the production of the beautiful in a graphic or plastic medium."

Applicant has disclaimed ART apart from the mark as shown, and does not dispute its mere descriptiveness. We find that the dictionary definition quoted above clearly establishes the mere descriptiveness (and indeed

genericness) of ART as applied to applicant's goods and services.

However, applicant contests the Trademark Examining Attorney's contention that ELECTRIC, and the composite ELECTRIC ART, are merely descriptive of applicant's goods and services. Applicant makes three arguments in this regard.

First, applicant argues that even as to the definition of "electric" which reads "of, relating to, or operated by electricity: *electric current; an electrical appliance,*"

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.

We are not persuaded by this argument. It is clear from applicant's specimens that applicant's artworks utilize and prominently feature electricity. They are meant to be plugged in, and turned on and off, just like an electric appliance. That the electricity takes the form of or is displayed as decorative light effects in the artworks does not diminish the mere descriptive significance of ELECTRIC as applied to the artworks.

Second, applicant argues that the record shows that the word "electric" has other definitions, i.e., "emotionally exciting; thrilling: *gave an electric reading of the play,*" and "exceptionally tense; highly charged with emotion: *an atmosphere electric with suspicion.*" Applicant contends that the term "electric," when combined with other terms, may create an impression other than that of "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!"

Given this other meaning of "electric," applicant argues, the term ELECTRIC ART does not signify merely "art operated by electricity," but rather it creates a double entendre: "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."

We are not persuaded by this argument. For a designation to be deemed a double entendre, both alleged

meanings must be readily apparent and readily perceived by purchasers. See *In re The Place, Inc.*, 76 USPQ2d 1467 (TTAB 2005); *In re Wells Fargo & Co.*, 231 USPQ 95 (TTAB 1986). We find that the second meaning of "electric art" suggested by applicant simply is too nebulous and obscure to be readily perceived by purchasers encountering applicant's artwork products. Instead, given the electrical nature of applicant's artworks, we find that the only readily perceived meaning of "electric art" as applied to applicant's goods and services would be that of "art operated by electricity."

Applicant's third argument regarding the meanings of the words "electric" and "art" is somewhat of a combination of the first two arguments. Applicant contends that even if the words considered separately are merely descriptive of applicant's goods and services, the composite of the two words is incongruous and therefore distinctive:

...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."

We are not persuaded by this argument. As discussed above, a prominent feature of applicant's artwork products (and presumably those of applicant's competitors), indeed perhaps the prominent feature, is their electrification. The words "electric" and "art" directly and immediately describe artworks that utilize electricity to enhance their decorative or artistic effect. Moreover, the evidence of record establishes that purchasers would perceive nothing incongruous about the term ELECTRIC ART as applied to artworks which utilize or employ electricity. The record includes excerpts of articles obtained from the NEXIS database, and printouts of Internet webpages, submitted by the Trademark Examining Attorney. Certain of these excerpts, along with applicant's arguments and our findings with respect thereto, are as follows.

(1) From the website of the Museum of Neon Art (MONA), in Los Angeles, California - text includes (emphasis added):

Statement of Purpose: The Museum of Neon Art is a non-profit, cultural and educational organization which exhibits, documents and preserves contemporary **fine art in electric media** and outstanding examples of neon signs. ... MONA conducts night time bus tours of neon signs,

movie marquees and permanent installations of contemporary neon art in the city. ... Highlights & Collections: Neon, **electric and kinetic fine art**; permanent collection of historic neon signs and **fine art in electric media**. ... Mission Statement - The Museum of Neon Art (MONA) 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**. MONA acts as a forum and a catalyst for persons interested in exploring, enjoying and producing artwork which uses light and/or motion as its expressive language.

Applicant acknowledges in its brief that this Internet webpage "could arguably show the term 'electric art' as describing a type of art." We agree, and find as well that its references to, e.g., "fine art in electric media" are evidence of the mere descriptiveness of "electric art."

(2) From The San Francisco Chronicle, November 23, 2003 (emphasis added):

...Neon signs weren't invented in Los Angeles (Paris gets credit), but in the 1920s and '30s they were embraced here as if they had been. The small but fun Museum of Neon Art pays tribute to neon and other **electric art**, both historic and contemporary. You'll find the neon sign from the original Brown Derby restaurant, some fascinating modern creations and a current display of Los Angeles streetlights from the late 1920s and early 1930s.

Applicant has submitted the July 29, 2005 declaration of its Marketing Director, Jay Andre, who declares, inter alia, that he spoke with the author of this San Francisco Chronicle article, John Flinn, on July 5, 2005. "Mr. Flinn informed me that he spontaneously made up the expression 'electric art' which appeared in his article as part of an effort to be creative for his readers. He also informed me that he does not believe the term 'electric art' is a common term." Attached to the Jay Andre declaration is a July 6, 2005 letter from Mr. Flinn which reads: "To whom it may concern - The phrase I used in my article of Nov. 23, 2003, 'electric art,' is just something that popped into my mind. I don't believe it is in common use." However, we do not find Mr. Flinn's statements to be particularly credible, in light of the fact that the institution about which he is writing, the Museum of Neon Art, itself uses the term "electric art" generically on its website to describe the subject matter of its exhibits. See website excerpt *infra*. Moreover, notwithstanding the article's author's subsequent statement of his intention and his understanding as to the meaning of the term "electric art," it is clear that the term appears in the article (as it does on the museum's website) as a merely descriptive or even generic designation. The article's readers would not

be privy to the author's intention; they would have seen only the face of the article and its descriptive or generic use of the term "electric art."

(3) From The San Diego Union-Tribune, November 23, 2003 (emphasis added):

...Resort Superstore is holding its grand opening at 2500 Vista Way from 11 a.m. to 6 p.m. today. The store carries game tables, billiards, spas, barbecue islands, waterfalls, patio furniture and **electric art**.

In his declaration, Jay Andre states that "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." However, regardless of whether The Resort Superstore is an authorized dealer of applicant's, the manner in which "electric art" is used in this article, and the manner in which it would be perceived by readers, is clearly descriptive or even generic. It appears in lower case letters as part of a list of generic products carried by the store, along with "game tables, billiards, spas, barbecue islands, waterfalls, patio furniture."

(3) From the Toledo Blade (Ohio), June 2, 2005 (emphasis added):

American Gallery, 6600 Sylvania Ave., Sylvania, presents Dream in Neon, an exhibition presenting the new work of Philip Hazard. On display will be **electric pop art**, neon, and mixed-media collage painting.

In its appeal brief, applicant argues that this excerpt does not support the mere descriptiveness refusal. We disagree. Although the term used in the article is "electric pop art" rather than "electric art," we find that it nonetheless is probative evidence of the descriptiveness of "electric" when used in connection with "art." Exact usage of the term in question is not required, because the issue in this case is not genericness, but rather is mere descriptiveness.

(4) From the website of PoolDawg.com (emphasis added):

Pool Dawg :: Pool Accessories :: Game Room
Accessories :: **Electric Art** - Framed Art
Decorated with Special Lighting Effects.

In his declaration, Jay Andre states that "PoolDawg.com is an authorized dealer of Electric Art, Inc. and sells applicant's products under the ELECTRIC ART trademark." However, the manner of use of "Electric Art" on this website clearly is descriptive if not generic; "Electric Art" is presented as a product category, along with "Pool Accessories" and "Game Room Accessories."

(5) From the website of Zenithgallery.com - the resume of Philip Hazard, "an internationally recognized artist working with neon since 1975." Text includes (emphasis added):

[He describes his work as] "an assemblage of **electric pop-art** neon and mixed media collage-painting." ... His custom commercial neon art has been displayed in Bloomingdales... [One of his exhibitions (appearing in 1986 in Montgomery, AL, Tulsa, OK, Pittsburgh, PA and Pontiac, MI) was entitled] "**Electric Art**" - Neon Art National Tour.

In its brief, applicant argues with respect to this excerpt that "the Artist uses the term NEON ART as the term to describe his art pieces..., and the term "Electric Art" as a suggestive trademark for his exhibit." We disagree, and find instead that the artist uses "Electric Art" to describe the subject matter of his show. Moreover, the reference to "electric pop-art" supports a finding of mere descriptiveness of "electric" as used in connection with "art."

Based on this evidence, as well as the dictionary definitions of record and also applicant's own specimens, we find that ELECTRIC ART merely describes a key feature or characteristic of applicant's goods. There is nothing incongruous or ambiguous about the designation; instead, it

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immediately and directly informs purchasers that applicant's artworks utilize electricity to create their artistic or decorative effects. The mark therefore is merely descriptive and unregistrable on the Principal Register.

Decision: The refusal to register is affirmed.