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Mailed: October 16, 2006

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Fong

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Serial No. 78504723

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Mark B. Garred of Stetina Brunda Garred & Brucker for Peter Sui Lun Fong.

David Collier, Trademark Examining Attorney, Law Office 104 (Chris Doninger, Managing Attorney).<sup>1</sup>

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Before Seeherman, Kuhlke and Cataldo,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Peter Sui Lun Fong, an individual and citizen of China, has applied to register on the Principal Register the mark SMART SENSOR in standard character form for the following goods, as amended: "electric action toys, namely

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<sup>1</sup> During the course of prosecution, this application was reassigned to the above-noted trademark examining attorney.

interactive electric action toys," in International Class 28.<sup>2</sup>

The trademark examining attorney refused registration under Section 2(e)(1) of the Trademark Act on the ground that applicant's mark is merely descriptive of a feature or quality of applicant's goods.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed main appeal briefs, and applicant filed a reply brief.

Applicant contends that his mark is at most suggestive of his goods. Specifically, applicant argues that the examining attorney selected definitions of "smart" and "sensor," both of which have numerous meanings, from a variety of definitions in order to support the descriptiveness refusal; that because the component terms have multiple meanings, the composite mark does not communicate, without further analysis, a clear understanding of applicant's goods; that the applied-for mark has numerous connotations; and that the mark SMART SENSOR thus is not merely descriptive of the goods. Applicant further argues that the examining attorney's

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<sup>2</sup> Application Serial No. 78504723 was filed October 22, 2004, based upon applicant's assertion of a bona fide intent to use the mark in commerce on the goods.

proffered evidence fails to establish that the mark is merely descriptive as applied to applicant's goods; and that any doubt as to the registrability of the mark must be resolved in applicant's favor. In support of his arguments in favor of registration, applicant submits with his brief a listing of third-party registrations.<sup>3</sup>

The examining attorney maintains that applicant's mark is a combination of two descriptive terms forming a composite that merely describes a feature of the identified goods; that due to the prevalence of computer technology in daily life, consumers are accustomed to encountering technology-based terms and understanding the meaning thereof; and that upon encountering the mark SMART SENSOR in relation to applicant's goods, consumers immediately would understand that the goods are interactive electric action toys containing automated sensors. The examining attorney further argues that the composite terms "smart" and "sensor" may have other definitions in other contexts; that, however, such definitions are not determinative of the question of mere descriptiveness of SMART SENSOR as

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<sup>3</sup> Normally, evidence submitted with a main brief on the case would be untimely and, therefore, given no consideration. However, in this case the examining attorney did not object to applicant's evidence on that ground, but rather addressed the list of registrations on its merits. Accordingly, we deem them to have been stipulated into evidence.

applied to applicant's goods; that in addition, the third-party registrations listed by applicant in his brief are not conclusive upon the instant question of mere descriptiveness; that every case must be considered on its own merits; and that the evidence submitted by the examining attorney demonstrates that the mark SMART SENSOR merely describes the goods recited in the involved application. In support of the refusal, the examining attorney has relied upon dictionary definitions of the words "smart" and "sensor." According to these definitions, "sensor" may be defined, *inter alia*, as "a device, such as a photoelectric cell, that receives and responds to a signal or stimulus;" and "smart" may be defined, *inter alia*, as "of, relating to, or being a highly automated device, especially one that imitates human intelligence: *smart missiles*" (emphasis in original).<sup>4</sup>

In addition, the examining attorney submitted copies of registrations owned by applicant, as well as third-party registrations for a variety of goods and services, in which the terms "smart" or "sensor" are disclaimed apart from the mark as shown. The examining attorney notes, in

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<sup>4</sup> The examining attorney cites to The American Heritage Dictionary of the English Language, Third Edition (1992) for his definitions. We note that copies of the proffered definitions were submitted with the examining attorney's first Office action.

Ser No. 78504723

particular, the following registrations owned by applicant herein:

Registration No. 2722068, issued on June 3, 2003 on the Principal Register for the mark JUST SMART in standard character form for "interactive electronic action toys," and with a disclaimer of "SMART" apart from the mark as shown; and

Registration No. 2946340, issued on May 3, 2005 on the Principal Register for the mark SMART REPUBLIC in standard character form for "interactive electronic action toys," and with a disclaimer of "SMART" apart from the mark as shown.

The examining attorney also points to the following third-party registration:

Registration No. 2674493, issued on January 14, 2003 on the Principal Register for the mark shown below



for "electronic systems, namely, sensors, computer hardware, operating software and cables, visual displays, audible alarms, and automatic vehicle steering, braking and throttle controls that provide object detection, collision warning, collision avoidance, and adaptive cruise control for vehicles," and with a disclaimer of "SMART SENSOR" apart from the mark as shown.

The examining attorney further submitted the summary of a search of the Google Internet search engine as well as printed "screen shots" from Internet web pages retrieved therefrom for the terms "'smart sensor' and toys". We note that "search results" pages provided by an Internet search engine are of limited probative value in that use in a search summary may indicate only that the two words in an

overall phrase appear separately in the website literature. See *In re Fitch IBCA, Inc.*, 64 USPQ2d 1058 (TTAB 2002). In this case, however, in at least the following excerpt, a sufficient amount of unabridged text has been provided for us to understand the context in which the words "smart sensor" appear. Excerpts from these search results are reproduced below (emphasis added):

I-Cybie evolves from a puppy to a mature dog...Just like a real dog I-Cybie can be programmed to only respond to his owner's voice...I-Cybie is capable of sensing movement and changes in ambient light. His sensors are even sophisticated enough to determine the direction of a noise, even TV noise. Touch sensors help I-Cybie to determine when he is being petted or stroked. After about 20 to 30 minutes of inactivity, I-Cybie drops into sleep mode. When I-Cybie senses that it needs to be recharged, it lowers its body down in a yoga position with its legs splayed out so that you know it [sic] running low on power. I-Cybie also has **smart sensor** technology that enables I-Cybie to find its charging station and plug itself in to be recharged when it realizes it is tired and needs more energy...  
(www.amazon.com)

Applicant argues in reply that the examining attorney characterizes his goods as containing automated or electronic sensors; that, however, applicant's identification of goods does not reference such sensors; and that the examining attorney thus "has taken certain liberties in his characterization of the goods description included in the subject application" (reply brief, p. 2).

It is well settled that a term is considered to be merely descriptive of goods and/or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it immediately describes an ingredient, quality, characteristic or feature thereof or if it directly conveys information regarding the nature, function, purpose or use of the goods and/or services. See Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052. See also *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods and/or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or feature of them. Moreover, whether a term is merely descriptive is determined not in the abstract, but in relation to the goods and/or services for which registration is sought. See *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). Thus, "[w]hether consumers could guess what the product is from consideration of the mark alone is not the test." *In re American Greetings Corp.*, 226 USPQ 365 (TTAB 1985).

We turn now to our determination of whether the mark SMART SENSOR merely describes the goods identified thereby.

In addition to the dictionary definitions submitted by the examining attorney, we also take judicial notice of the following definition of "smart":

*Informal:* equipped with, using, or containing electronic control devices, as computer systems, microprocessors, or missiles: a smart phone; or smart copier.<sup>5</sup>

Based upon the above-noted dictionary definitions of the terms "smart" and "sensor," when these terms are combined as SMART SENSOR we find that applicant's mark merely describes a characteristic of interactive electric action toys, namely that the toy features highly automated electronic controls that imitate human intelligence by receiving and responding to a signal or stimulus, i.e., a "smart sensor." It is settled that "evidence [that a term is merely descriptive] may be obtained from any competent source, such as dictionaries, newspapers, or surveys." See *In re Stereotaxis, Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, (Fed. Cir. 2005); and *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986). We note applicant's argument that because the terms comprising his mark have multiple meanings, the composite mark has numerous connotations and thus is not merely descriptive of

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<sup>5</sup> The Random House Unabridged Dictionary (2d. ed. 1993). The Board may take judicial notice of dictionary definitions. See *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*,



his goods. However, we must consider the definitions of "smart" and "sensor" within the context of the goods for which registration is sought. See *In re Chopper Industries*, 222 USPQ 258 (TTAB 1984); and *In re Bright Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). As the Board has previously noted, "It is undeniable that computers have become pervasive in American daily life. The 'computer' meaning of the term 'smart,' as is the case with many 'computer' words, is making its way into the general language." See *In re Cryomedical Sciences Inc.*, 32 USPQ2d 1377, 1378 (TTAB 1994). In this case, when the mark SMART SENSOR is used in connection with applicant's electric, interactive action toys, consumer would view the component words as having the above-noted "computer" definitions of "smart" and "sensor." Thus, we are persuaded by the evidence of record that when the terms SMART and SENSOR are combined as SMART SENSOR, the mark is merely descriptive of a feature of applicant's identified goods; the combination of terms does not present a unique or incongruous meaning. See *In re Tower Tech, Inc.*, 64 USPQ2d 1314 (TTAB 2002).

We also note applicant's argument that his identification of goods does not refer to automated or

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213 USPQ 594,596 (TTAB 1982); *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

electronic sensors. However, the goods as identified are broad enough to include electric, interactive action toys featuring automated and electronic sensors. Certainly there is no limiting language in the identification of goods that would serve to exclude such goods.

The excerpt from the Google search summary, quoted above, provides confirmation that the term "smart sensor" is used to describe the technology used in interactive electronic toys for automated electronic controls that allow the toys to receive and respond to signals or stimuli, thus showing that SMART SENSOR merely describes a feature of such goods. As such, the examining attorney's evidence, at a minimum, corroborates what is already established by the dictionary definitions. See *In re Finisar Corporation*, 78 USPQ2d 1618 (TTAB 2006).

As noted above, the examining attorney made of record registrations owned by applicant as well as third parties, in which the terms SMART or SENSOR and, in one case SMARTSENSOR, are disclaimed apart from the mark as shown. Applicant, for his part, submitted a listing of third-party registrations in which no disclaimers were submitted. None of the third-party registrations is for goods or services similar to those at issue herein, and they are of little probative value in our determination of whether SMART

**Ser No. 78504723**

SENSOR merely describes the goods recited in the instant application. However, both of applicant's prior registrations, for the marks JUST SMART and SMART REPUBLIC, include a disclaimer of "SMART" and recite goods that are nearly identical to the goods at issue herein, namely, "interactive electronic action toys." We are not privy to the circumstances giving rise to applicant's disclaimer of "SMART" in these registrations. Nonetheless, we note that these disclaimers tend to provide further corroboration that the term "SMART" in the mark SMART SENSOR merely describes applicant's goods as identified in the involved application.

We conclude that the mark SMART SENSOR merely describes a feature or characteristic of applicant's "electric action toys, namely interactive electric action toys." Accordingly, we find that applicant's mark is merely descriptive as contemplated by Section 2(e)(1) of the Act.

Decision: The refusal to register is affirmed.