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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Hunter Engineering Company

Serial No. 85593757

Lionel L. Lucchesi of Polster, Lieder, Woodruff & Lucchesi, L.C.,
for Hunter Engineer Company

Christopher Law, Trademark Examining Attorney, Law Office 103,
Michael Hamilton, Managing Attorney.

Before Bucher, Zervas and Ritchie, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Hunter Engineering Company ("applicant") seeks registration on the Principal Register of ECAL (in standard characters) for "Automated systems, namely, micro-processor based hardware and software used to monitor the status of and self-calibrate equipment, namely, wheel balancers for balancing the wheels of land vehicles," in International Class 9.[1]

[1] Application Serial No. 85593757 was filed on April 10, 2012, based on an allegation of first use and first use in commerce of March 15, 2012.

The Trademark Examining Attorney has refused registration of applicant's proposed mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), having determined that "ecal" describes a feature of Applicant's goods.

When the refusal was made final, Applicant appealed and filed a request for reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

Evidentiary Issue

Before proceeding to the merits of the refusal, we address the Examining Attorney's evidentiary objections. Specifically, the Examining Attorney objects to consideration of (i) Google search results for the term "ecal," and (ii) a U.S. patent application, both of which Applicant submitted with its brief. Trademark Rule 2.142(d) provides that the record should be complete prior to the filing of an appeal:

> The record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed. After an appeal is filed, if the appellant or the examiner desires to introduce additional evidence, the appellant or the examiner may request the Board to suspend the appeal and to remand the application for further examination.

We will not treat the evidence attached to Applicant's brief as being of record if such evidence was not made of record during the prosecution of the application. Because Applicant submitted the Google search results with its request for reconsideration, the Examining Attorney's objection to the search results is overruled. With regard to the patent application, because it was first submitted with Applicant's brief, the Examining Attorney's objection is well-taken and is

sustained. We have not considered the patent application and any arguments which refer to the patent application. In addition, Applicant's request that we take judicial notice of the patent application is denied – the Board typically does not take judicial notice of USPTO records. *See Beech Aircraft Corp. v. Lightning Aircraft Co.*, 1 USPQ2d 1290, 1293 (TTAB 1986) (judicial notice not taken of files of applications and/or registrations, where no copies thereof are filed, and where they are not the subject of the proceeding); TBMP § 704.12(a) (June 2014).

Applicable Law

A term is merely descriptive if it immediately conveys knowledge of a significant quality, characteristic, function, feature or purpose of the goods with which it is used. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). Whether a particular term is merely descriptive is determined in relation to the goods for which registration is sought and the context in which the term is used, not in the abstract or on the basis of guesswork. *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Remacle*, 66 USPQ2d 1222, 1224 (TTAB 2002). In other words, the issue is whether someone who knows what the goods are will understand the mark to convey information about the goods. *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-1317 (TTAB 2002); *In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998); *In re Home Builders Association of Greenville*, 18 USPQ2d 1313, 1317 (TTAB 1990); *In re American Greetings Corp.*, 226 UPSQ 365, 366 (TTAB 1985).

"On the other hand, if one must exercise mature thought or follow a multi-stage reasoning process in order to determine what product or service characteristics the

term indicates, the term is suggestive rather than merely descriptive." *In re Tennis in the Round, Inc.*, 199 USPQ 496, 497 (TTAB 1978). *See also, In re Shutts*, 217 USPQ 363, 364-365 (TTAB 1983); *In re Universal Water Systems, Inc.*, 209 USPQ 165, 166 (TTAB 1980).

Analysis

The Examining Attorney relies on the following evidence to show that ECAL is merely descriptive of a feature of Applicant's goods as an acronym for "electronic calibration."

- dictionary definitions of "ecal" as "electronic calibration," from *Acronyms, Initialisms & Abbreviations Dictionary* (33rd ed. 2004); *The American Heritage Abbreviations Dictionary* (2nd ed.); dictionary.com (referencing *The American Heritage Abbreviations Dictionary* (3rd ed. 2005)); and all-acronyms.com; and

- third-party uses of "ecal", e.g.:

  (a) In discussing the LeCroy SPARQ Signal Integrity Network Analyzers for making "fully calibrated measurements," stating "[t]his enables measurements to be made without multiple connection steps and removes the need for additional electronic calibration (ECAL) modules." Google cache of www.lecroy.com/sparq/;

  (b) "Some of the technical innovations ATN brought to the RF measurement would include invention of Electronic Calibration (ECAL) for automatic calibration of network analyzers." www.atesystems.com;

  (c) "85062B 2-port MW Electronic Calibration (ECal) Module, 1 to 26 GHz," stating "The Agilent 85062B MW electronic calibration module provides repeatable, accurate measurements while bringing convenience and simplicity to your daily calibration routine." www.home.agilent.com;

(d) BX17 Weighting Indicator "designed for industrial weighing applications," "Features … Electronic calibration (eCAL) …." www.baykon.com;

(e) "The electronic calibration (ECal) modules consist of connector-specific calibration standards that measure the known devices of the system over the frequency range of interest to detect systematic errors." Google cache of http://abtechtest.com/calibration-services;

(f) "Use of electronic calibration (ECal) modules is the simplest and fastest non-insertable calibration method in existence and this is the recommended calibration method." http://www.skyworksinc.com; and

(g) "Electronic Calibration (ECal) System. The electronic calibration system consists of a control until and a connector specific calibration module. ECal modules are used as transfer standards. Electronic calibrations have the fewest connections and least operator interaction, while providing extremely repeatable measurements." http://www.libertytest.com.

The Examining Attorney finds that "the term ECAL describes electronic calibration technology and is commonly used to describe products that incorporate electronic calibration or ECAL technologies"; and that "Applicant uses the applied-for mark with an automated system that uses hardware and software to self-calibrate wheel balancers. Therefore, the goods, as described by applicant, consist of wheel balancers that are calibrated through electronic components, i.e., hardware and software. … The above cited evidence and applicant all offer a product that

incorporates an electronic component to calibrate a specific piece of machinery."[2] Indeed, Applicant's website submitted into the record with the final Office action shows:

Hunter News

Intro Archive

Hunter's new Road Force Touch balancer provides superior wheel service with record efficiency

Bridgeton, MO – Built on Hunter's GSP9700 legacy, the Road Force Touch® produces exceptional balancing results and performs a Road Force® diagnostic test faster than a traditional wheel balancer performs a typical balance.

During the balancing process, the Road Force Touch automatically applies Hunter's patented load roller against the wheel and tire assembly to simulate how a wheel performs under the weight of a vehicle to find hidden causes of vibration and vehicle pull. The automated Road Force test enhances the quality of service and opens the door to more revenue-generating opportunities without adding valuable service time.

The Road Force Touch also features a new intuitive touchscreen interface that simplifies operation and shortens the learning curve for new technicians. Technicians can activate any balancing function from one screen by touching the appropriate button or icon, saving time over scrolling through a grid of menu buttons. Live 3D graphics and animations display real-time wheel conditions and illustrate easy-to-understand instructions to resolve vibration and pull problems.

New software tools include eCal™ auto-calibration, on-demand videos, and a powerful enhancement to StraightTrak® lateral force measurement:

- Patent-pending eCal electronically and automatically calibrates the balancer without any input from the operator, making the Road Force Touch the only true "self-calibrating" balancer.
- On-demand videos provide convenient training on a variety of balancing and tire changing topics to enhance operator skills.
- Patented StraightTrak, which measures pull forces in tires and recommends wheel placement to cancel vehicle drift, now measures pulls on individual tires.

Other improvements include a stronger, wear-resistant balancer shaft for long-lasting service, an Auto-Up Hood that saves time by automatically lifting the hood for the operator, and a standard 10-piece mounting collet set with storage to optimize wheel centering.

Hunter Engineering is the leader in alignment systems, wheel and tire service, brake service and inspection lane equipment. Hunter equipment is approved and used by vehicle manufacturers, automobile and truck dealers, tire dealers and service facilities around the world.

Applicant's wheel balancer, depicted and described above, includes a feature that electronically and automatically calibrates the wheel balancer, and Applicant touts this feature on its webpage.

The Examining Attorney's evidence indeed demonstrates that "ecal" is a recognized abbreviation for "electronic calibration" and that a feature of Applicant's "micro-processor based hardware and software used to monitor the status of and

[2] Brief unnumbered pp. 8-9.

self-calibrate equipment, namely, wheel balancers for balancing the wheels of land vehicles" is electronic self-calibration. Indeed, as stated on Applicant's webpage, Applicant's balancer offers electronic calibration or ecal. Other electronic devices or machines, such as weighing devices, offer the same. Thus, the Examining Attorney has established *prima facie* case that a feature of Applicant's goods is electronic calibration or ecal, and that the proposed mark is merely descriptive.

Applicant argues that the evidence demonstrates "a plurality of meaning[s]" of "ecal" and hence "does not 'convey any immediate or precise significance' with respect to Applicant's goods";[3] that the acronym must be "substantially synonymous" with the merely descriptive wording it represents; and that without additional evidence, Applicant's use of "ecal" is not understood to be substantially synonymous with the descriptive wording it represents. In addition, Applicant maintains:

> A Google search of the term ecal results in over a million hits for the term, for subjects ranging from schools to calorimeters. It is relatively impossible to determine to what the term ecal relates unless one employs a highly selective choice not expected of a relevant consumer of wheel balancing machines. Without some hindsight knowledge of Applicant's product, the mark does not "immediately convey" knowledge of the "ingredients, qualities or other characteristics of the goods in connection with which it is used."[4]

As stated above, mere descriptiveness is determined in relation to the goods for which registration is sought and the context in which the term is used. *In re Abcor Development Corp.*, 200 USPQ at 218; *In re Remacle*, 66 USPQ2d at 1224. "That a

[3] Brief at 4.

[4] Brief at 5.

term may have other meanings in different contexts is not controlling." *In re Franklin Cnty. Historical Soc'y*, 104 USPQ2d 1085, 1087 (TTAB 2012) (citing *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979)). Thus, that there are over a million hits in Google search results for "ecal" in subjects unrelated to Applicant's goods "is not controlling."

Additionally, Applicant argues that some imagination, thought or perception is required to reach a conclusion concerning the nature of Applicant's goods. According to Applicant, the mark "may suggest the general nature of Applicant's goods, i.e., accomplishing something by means of a computer, it does not *immediately* describe Applicant's goods, and in fact is mis[]-descriptive of the actual process, i.e., automatic calibration employed in those goods."[5] (Emphasis in original.) We are not persuaded by this argument for two reasons. First, even if another term may be used to identify the feature of the goods which the Examining Attorney maintains is described by the term sought to be registered, that other term may also be used in a descriptive manner; multiple terms may be used to describe the same feature. Second, Applicant's webpage states that Applicant's goods "electronically and automatically calibrate[] the balancer without any input from the operator." Applicant essentially represents that the balancer has the capability to undertake two functions - electronic calibration and automatic calibration. This belies Applicant's representation that the common term for "the actual process" is automatic calibration. When considered with the other evidence of record, i.e., that

[5] Brief at 8-9.

the term "electronic calibration" or "ecal" is used to identify the calibration feature of other electromechanical devices, Applicant's argument that there is another term to describe the calibration feature of Applicant's invention, and that "ecal" hence does not "immediately" describe this feature, is untenable.

Applicant's remaining arguments regarding competitor need and competitor use have been considered but are not persuasive. Further, Applicant's admonition to resolve doubts in its favor is not applicable here – we have no doubt that the proposed mark is merely descriptive of a feature of Applicant's goods.

Thus, we find no error in the Examining Attorney's determination that the proposed mark is merely descriptive of a feature of the identified goods, and that Applicant has not overcome the Examining Attorney's *prima facie* case of mere descriptiveness.

Decision: The refusal to register the proposed mark under Section 2(e)(1) of the Trademark Act is affirmed.