

<p>This Opinion is Not a Precedent of the TTAB</p>

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Walmart Apollo, LLC

Serial No. 88040421

Erica N. Goven of Kutak Rock LLP for Walmart Apollo, LLC.

Tricia L. Brown, Trademark Examining Attorney, Law Office 121,
Richard White, Managing Attorney.

Before Kuhlke, Lykos and English, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Walmart Apollo, LLC (Applicant) seeks registration on the Principal Register of the standard character mark SUPER TECH for “Air filters for automobiles engines; Air filters for vehicle motors and engines; Particulate air filters for exhaust systems for internal combustion engines,” in International Class 7 and “Air filters for air conditioners in vehicle passenger compartment,” in International Class 11.¹

¹ Application Serial No. 88040421, filed on July 17, 2018, based upon Applicant’s allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

The Trademark Examining Attorney has refused registration under Trademark Act Section 6, 15 U.S.C. § 1056, based on Applicant's failure to comply with a requirement to disclaim the word TECH, which the Examining Attorney maintains is merely descriptive under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), when used in connection with Applicant's goods, and therefore must be disclaimed apart from the mark as shown.²

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

Disclaimer Requirement

An examining attorney may require an applicant to disclaim an unregistrable component of a mark otherwise registrable. 15 U.S.C. § 1056. *See also In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262 (Fed. Cir. 2015). In the absence of acquired distinctiveness, merely descriptive terms are unregistrable under Section 2(e)(1), and therefore are subject to disclaimer if the mark is otherwise registrable. Failure to comply with a disclaimer requirement is grounds for refusal of registration. *La. Fish Fry*, 116 USPQ2d at 1264 (citing *In re Stereotaxis, Inc.*, 429 F.3d 1039, 77 USPQ2d 1087 (Fed. Cir. 2005)) ("The PTO can condition the registration of a larger

² During prosecution Applicant sought, in the alternative, to register SUPER TECH under Section 2(f) of the Act, 15 U.S.C. § 1052(f), in part, as to the word TECH. This request was subsequently withdrawn and the only issue on appeal is mere descriptiveness under Section 2(e)(1).

mark on an applicant's disclaimer of an 'unregistrable component of a mark otherwise registrable.' 15 U.S.C. § 1056(a)"). *See also In re Omaha Nat'l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987).

A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it immediately conveys information of a quality, feature, function, or characteristic of the goods or services in connection with which it is used, or intended to be used. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012). *See also In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015). By contrast, a term is suggestive if it "requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods." *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). The determination of whether a term is merely descriptive must be made "in relation to the goods for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use." *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)).

The Examining Attorney contends that TECH "means 'technology'" and "air filter 'TECH' or 'technology' is often discussed as a feature of the goods." 18 TTABVUE 5. In support of her position that the term TECH is merely descriptive of the applied-for goods, the Examining Attorney relies on the dictionary definition of "tech" as being

“technology.” The definition submitted by the Examining Attorney shows the following meanings:³

tech. Abbr. 1. Technical 2. Technician

tech Informal n. 1. A technician. 2. Technology. 3. Technical work.

Adj. Technical.

In addition, the Examining Attorney submitted evidence in the form of third-party webpages displaying use of the word TECHNOLOGY discussing air filters. Excerpts from representative samples are set forth below:⁴

Modern Tire Dealer ... Air filter **technology** ... New **technology** brings changes to transmission filter service maintenance.;⁵

Air filter ... The **technology** of air intake filters of gas turbines has improved significantly in recent years...;⁶

Denso Air Filters ... With engineering and production facilities all over the globe, DENSO is a leading supplier of components to the world’s automakers. That engineering leadership includes air filter **technology**, which is shared with the automotive aftermarket in the full line of DENSO First Time Fit replacement air filters.;⁷

Here are some examples of advancements in automotive filter **technology**: Filter bags...Nanofiber coatings...Online monitoring for corrosively [sic] measurements...Hydrogen sulfide removal ... This new

³ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (www.ahdictionary.com), October 25, 2018 Office Action at 2.

⁴ October 25, 2018 Office Action at 4-18; May 14, 2019 Office Action at 11-19, 24-25; June 29, 2020 Req. for Recon. at 9-59, 65-98.

⁵ October 25, 2018 Office Action at 5-8 (www.moderntiredealer.com).

⁶ *Id.* at 14 (<https://en.wikipedia.org>).

⁷ *Id.* at 24 (<http://densoautoparts.com>).

cleaning **technology** expects the removal of pollutants from various gas streams.;⁸

Camfil Clean air solutions ... Air Filter **Technology** ... Many new **technologies** have been employed in the effort to improve the quality and performance of air filters, and in some cases to reduce their cost. ... It is important to consider whether applying new **technologies** to air filter products is necessary and functional. ... This section offers an overview of air filtration **technology**, and provides a foundation from which you can converse with others about how air filters work. Remember: creating an air filter that is 100% efficient on the target contaminant, has zero pressure drop, and produces no by-products is the goal of all air filter researchers.⁹

Motor Day ... Being an identical OEM replacement means that installation could not be easier ... ECOGARD claims to have pioneered aftermarket engine air filter **technology** over 25 years ago ...¹⁰

Auto Quarterly ... **Technology**: there are different types of air purifiers to choose from. The main difference between these divides is often the type of **technology** that they rely on to purify the air inside the vehicle. So, we analyzed the mechanism behind each model to see how well it worked to improve air quality.¹¹

MZW Motor ... This Fram Air Filter highlight types has [sic] additional following advance **technology features** ... The quality of FILTRON air filters has been improved with the company years of expertise together with MANN+HUMMEL **filtration technology**. ... Puralator introduce[d] their first pleated paper oil filter which **technology** has been notable until today. Through years of expertise in **filtration technology**, Puralator filters is recommended and trusted. ... Donaldson is also recognized for innovations that has been contributed in **air filter technology**. ... This air filter brand is backed by the

⁸ May 14, 2019 Office Action at 11-13 (www.factmr.com).

⁹ *Id.* at 24 (www.camfil.us).

¹⁰ June 29, 2020 Recon. Denied at 12 (www.motorday.com).

¹¹ *Id.* at 34 (<https://autoquarterly.com>).

company's developed PowerCore **filtration technology**. ... Recommended key design requirements of all original equipment manufacturer – incorporate with Cummins patented OptiAir **technology** ... Sakura air filters highlight product features ..3 Layer Fiber with Laminated **Technology** ... They are a global leader in filtration **technology** ... The engineering leadership of DENSO includes the **air filter technology** which was shared in automotive market. ... ¹²

Additional examples include web pages from third-party websites attached to the October 25, 2018 and May 14, 2019 Office Actions showing the words TECH or TECHNOLOGY in marketing materials for air filters. A few examples are set forth below:¹³

That engineering leadership includes air filter **technology**, which is shared with the automotive aftermarket in the full line of DENSO First Time Fit replacement air filters¹⁴

Roma Living Styles ... HEPA-Charcoal **Tech** HEPA-Charcoal Combined Filter **Technology** ... Don't forget all odors and VOCs are gases which are so small that filtration **technologies** are limited.¹⁵

Tech Plus Automotive Cabin Air Filter From **Tech** Plus Automotive ... These high **tech** filters can block particles larger than 3 microns.¹⁶

Mann+Hummel ... Filter **technology** in detail ... Our filters separate the useful from the harmful ... And we are happy to offer you some insights into how filter

¹² *Id.* at 68, 69, 71, 72, 73, 83, 84, 87 (<https://mzwmotor.com>).

¹³ October 25, 2018 Office Action at 24-26; May 14, 2019 Office Action at 2-3, 6-7, 20-23.

¹⁴ October 25, 2018 Office Action at 24 (<http://densoautoparts.com>).

¹⁵ May 14, 2019 Office Action at 2 (www.aromalivingstyles.com).

¹⁶ *Id.* at 6 (<https://techplusautomotive.com>). In this example, "Tech" is used as part of a brand name.

technology works in detail in different applications. ...
Filter **Technology** in Detail¹⁷

The Examining Attorney also submitted examples of eleven third-party registrations for, inter alia, air filters in which the word TECH (six registrations) or TECHNOLOGY (five registrations) is disclaimed or registered on the Supplemental Register.¹⁸ The examples with TECH are set forth below.¹⁹

Reg. No. 4809029	G GENES TECH (TECH disclaimed)	air filters for mechanical purposes
Reg. No. 4715643	INNOO TECH (TECH disclaimed)	air filters for domestic use
Reg. No. 5276732	MXM NANO TECH (TECH disclaimed)	oil filters; and air filters for motors and engines
Reg. No. 5250155	AUTO 1 TECH (AUTO and TECH disclaimed)	air filters for automobile engines

“Such third party registrations show the sense in which the word is used in ordinary parlance and may show that a particular term has descriptive significance as applied to certain goods or services.” *Institut Nat’l Des Appellations D’Origine v. Vintners Int’l Co.*, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992); *In re Box Solutions Corp.*, 79 USPQ2d 1953, 1956 (TTAB 2006) (SOLUTIONS merely descriptive of computer hardware because it “is used to describe the purpose of the computer to resolve a problem”); *see also Jack Wolfskin Austrustung Fur Draussen*

¹⁷ *Id.* at 20 (www.mann-hummel.com).

¹⁸ December 10, 2019 Office Action at 2-37.

¹⁹ *Id.* at 5-7, 10-12, 17-19, 23-25.

GmbH & Co. KGAA v. New Millennium Sports, S.L.U., 797 F.3d 1363, 116 USPQ2d 1129, 1374 (Fed. Cir. 2015) (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015)).

Applicant responded with its own set of representative use-based third-party registrations for marks that include the word TECH without disclaimer for a variety of auto-related goods in International Classes 7 and 11. A few of the 52 examples are set forth below.²⁰

Reg. No. 3561124	BRAKE TECH (BRAKE disclaimed)	Brake fluid flushing machine
Reg. No. 3538300	COLD TECH (COLD disclaimed)	Motorized machines for applying de-icer to walkways
Reg. No. 5561608	CROWN TECH	Dust and fume cartridge collectors; modular vertical cartridge collector housings for industrial air pollution control applications; cartridge collector housings for filter cartridges for industrial dust collection systems for use in pulse-jet cleaning
Reg. No. 5788192	DESIGN TECH	Child safety devices, namely, protective barriers in the nature of metal shields adapted for use on cooking stoves to protect children from bodily injury
Reg. No. 5039321	DIP TECH and design	Printers, namely, printing machines for digital in-glass printing, and digital ceramics in-glass printing machines
Reg. No. 2675582	DYNA TECH	Electric discharge machines for use in cutting metals and forming holes in metals

²⁰ November 14, 2019 Response at 39-123. The example where the word TECH is part of a compound word has not been considered. TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 1213.05(a) (Oct. 2018).

Reg. No. 3732753	INFRA TECH	Electric hair curling irons and hair flat irons; hair styling irons, namely, electric hair styling irons; and hair straightening irons, namely, electric hair straightening irons
Reg. No. 4316235	HOT TECH and design (HOT disclaimed)	Heat exchangers being parts of machines
Reg. No. 1982509	KWIK TECH	Machine parts and other machinery items, namely – shafts; gears; flywheels; pulleys; engine testing fixtures; drive train testing fixtures; machinery for engine and drive train prototypes, namely couplers for connecting engines to dynometers; pallets for transporting engines in a testing facility; fluid manifolds
Reg. No. 3818752	MAG TECH (MAG disclaimed)	Drilling machine parts, namely, tools for collecting drilling debris within a well bore
Reg. No. 5443708	ONO TECH and design	Electric fans for household and commercial purposes; ceiling fans for household and commercial purposes; indoor lighting, namely, chandeliers, desk lamps, table lamps, floor lamps, etc.
Reg. No. 2661718	PREMIER TECH	Fertilizer, etc.; packaging machines, namely mixing lines, etc.; water treatment systems comprised of ... effluent filters, etc.
Reg. No. 1948607	PT TECH	Clutches and brakes for use in power transmissions for machinery
Reg. No. 3444714	SPAN TECH	Conveyors and parts therefor
Reg. No. 2377065	SPIN TECH	Internal combustion engine mufflers and exhaust system components, namely, exhaust and tail pipes and tail pipe tips

Reg. No. 2080024	STEAM TECH (STEAM disclaimed)	Electric steam cookers, used for cooking food
Reg. No. 3153698	TECH LIGHTING (LIGHTING disclaimed)	Electrical lighting fixtures
Reg. No. 2960315	TECH MOTOR PARTS (MOTOR PARTS disclaimed)	Auto parts, namely; automobile engine components in the nature of timing belts, timing gears, etc.
Reg. No. 4369221	TECH PRO	New and replacement parts for hvac and commercial rapid food chilling...namely, couplings, fittings...filter driers, etc.
Reg. No. 4088415	TECH SMART (SMART disclaimed)	Fuel injectors, internal combustion engines land vehicle parts, namely, fuel pump strainers,
Reg. No. 2960316	TECH TIMING (TIMING disclaimed)	Auto parts, namely automobile engine components in the nature of timing belts, timing gears, etc.
Reg. No. 3644387	WATER TECH POOL BLASTER BATTERY POWERED POOL VACS and design (WATER, POOL, BATTERY POWERED POOL VACS disclaimed)	Pool and spa water cleaning devices, namely, pool and spa vacuums

In addition Applicant provided its three prior registrations for SUPER TECH without a disclaimer of TECH:

Reg. No. 5237732 SUPER TECH in standard characters for windshield wiper blades;²¹

Reg. No. 3278264 SUPER TECH in typed format²² for chemical engine treatments and additives for engine oils,

²¹ April 23, 2019 Response at 6.

²² A typed mark is the legal equivalent of a standard character mark. *In re Vittera Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012) (explaining that in 2003 there was a non-substantive change in nomenclature from a “typed mark” to a “standard character mark”).

gasoline and diesel fuels, transmission fluids and cooling systems; and automotive lubricants and fuels;²³ and

Reg. No. 1500117 for the stylized mark SUPER TECH for fuel injector cleaner.²⁴

Applicant relies on these third-party registrations and its prior registrations in the following manner:

The above-cited marks are just a few representative examples of the numerous federal registrations on the Principal Register that include “TECH” but do not disclaim it and therefore indicate Applicant’s mark should likewise again register without a disclaimer of TECH. The above examples are among those that are particularly notable and most clearly make the point because they include goods which are in the same international classes as Applicant’s mark and that could be said to be technology at least to the same degree (in many cases to a greater degree) as the applied-for goods. Notably, there is also a very large number of marks that include TECH without a disclaimer of the word currently on the Principal Register in connection with goods or services in other classes. If the above-cited marks and other SUPER TECH registrations owned by Applicant are inherently registrable on the Principal Register without any disclaimer, because Applicant’s mark is at least as distinctive and unitary and arguably even more distinctive and unitary due to, for example, the multiple possible interpretations of TECH within the Proposed Mark then Applicant’s mark should again register without any disclaimer. Again, the above examples are only representative of the many pertinent registrations that help make and support the point.²⁵

The Examining Attorney correctly explains that each case must be decided on its own facts and the Board is not bound by prior decisions involving different records.

²³ November 14, 2019 Response at 38

²⁴ November 14, 2019 Response at 36.

²⁵ November 14, 2021 Response at 22.

However, even recognizing the third-party registrations are not for Applicant's exact goods, the large number of third-party registrations for various types of industrial goods, including automotive goods that include the word TECH without disclaimer and in some cases carrying the mark (e.g., BRAKE TECH) is notable.

The Examining Attorney asserts that:

[T]he evidence of record demonstrates that 'TECH' is a specific feature of "air filters" and it does not follow that all automobile products, including oil filters, motor oil, and transmission fluid contain 'TECH' or technology that is notable to the way the product works and what consumers recognize as a feature of the goods.

18 TTABVUE 13.

In response, Applicant asserts that:

Technology is not a feature of the goods. At most, it merely relates to some amorphous activities the Examining Attorney assumes to have taken place well behind the scenes, many, many steps removed from the final product and well outside of the purview of the consuming public.

15 TTABVUE 8.

Applicant contends "that 'tech' is primarily an abbreviation for 'technical' or 'technician'" and in the context of Applicant's goods "conveys that purchasers of the underlying goods are 'super technicians' or, more specifically, super automotive technicians." 15 TTABVUE 9.

In our analysis of the proposed term TECH we must consider "the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use." *Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219. The fact that "a term may have other

meanings in different contexts is not controlling.” *In re Franklin Cnty. Historical Soc’y*, 104 USPQ2d 1085, 1087 (TTAB 2012); *In re Chopper Indus.*, 222 USPQ 258, 259 (TTAB 1984). Here, in the context of the applied-for goods, air filters, the word TECH would perhaps more commonly be viewed as meaning “technology,” as a reference to the goods, rather than reaching to reference a person who may install the goods; although it is possible the “technician” meaning could be perceived as well as the meaning “technical.” Applicant argues that the Examining Attorney has not provided evidence that TECH points exclusively to technology; however, as discussed above the Examining Attorney has presented evidence of use of the term technology in connection with air filters and Applicant has not provided any evidence of use of the terms technical or technician with air filters.

Applicant relies on *In re Hutchison Tech. Inc.*, 852 F.2d 552, 7 USPQ2d 1490 (Fed. Cir. 1988), arguing that the word “technology” is not merely descriptive because the Examining Attorney “has not cited any evidence that the term ‘technology’ is the common descriptive or generic name of the goods listed in Applicant’s application or conveys an immediate idea of the ingredients, qualities, or characteristics of Applicant’s air filters.” 15 TTABVUE 11. *Hutchinson Technology* involved a refusal that the mark HUTCHINSON TECHNOLOGY for electronic components was primarily merely a surname. The Court reversed the Board’s decision finding that having relied solely on a concession by the applicant that the word technology is used on goods similar to its own, the “board never considered what the purchasing public would think when confronted with the marks as a whole.” *Hutchinson*, 7 USPQ2d at

1492. Further, the Court determined that the evidence was insufficient to support a finding that the word technology was merely descriptive:

“A mark is ‘merely descriptive’ [of a product] if it ‘would immediately convey to one seeing or hearing it the thought of appellant’s [product].’” As Hutchinson points out, “technology” is a very broad term which includes many categories of goods. The term “technology” does not convey an immediate idea of the “ingredients, qualities, or characteristics of the goods” listed in Hutchinson’s application.

Id. at 1492-93 (quoting *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818, 819 (Fed. Cir. 1986)). The Court then remanded the application for entry of the required disclaimer, an incongruity that has plagued brief and decision writers alike. To the extent that *Hutchinson Technology* is relevant outside the context of a surname refusal, Applicant’s reliance on it is misplaced because the facts in the present case are very different. Here, the Examining Attorney has presented evidence of possible consumer perception in the form of dictionary definitions, third-party registrations and third-party websites. See *In re Yarnell Ice Cream, LLC*, 2019 USPQ2d 265039 (TTAB 2019); *In re Finisar Corp.*, 78 USPQ2d 1618 (TTAB 2006).

Finally, Applicant argues that the mark SUPER TECH “comprises a unitary phrase and is therefore not subject to a disclaimer requirement.” 15 TTABVue 11. Applicant argues that based on its use of SUPER TECH with its other products in a manner that never separates SUPER or TECH from one another, consumers will not parse the words but rather will take them as a whole. In addition, Applicant contends it is a double entendre as evidenced by the dictionary definition that includes the words “technical” and “technician.” *Id.* Specifically Applicant argues that “[b]oth

‘technician’ and ‘technology’ are plausible interpretations of ‘Tech’ within Applicant’s Mark and as applied to Applicant’s goods. ‘Technology’ being suggestive of any automobile consumable product all of which presumably benefitting from or having some relation to technology and ‘technician’ being suggestive of automotive technicians whose job it is to work on automobiles and stating the purchasers of Applicant’s good are ‘super (automotive) technicians’ or implying that Applicant’s goods are for ‘super (automotive) technicians.’” 19 TTABVUE 10.

The manner in which Applicant uses its other SUPER TECH marks is not dispositive here, in particular, in the context of a standard character mark.²⁶ However, while we do not find SUPER TECH to be unitary in the sense that it is incongruous or is a double entendre, the combination of SUPER with this somewhat general term in this industry, has the effect of binding them together. To find TECH merely descriptive we must go through the steps of finding “tech” means “technology” (not technician or technical) and then “technology” is used in making or developing the air filter and this makes it a feature of the good. This does not appear to have the immediacy required to find it merely descriptive. 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*

²⁶ Applicant points to a non-precedential decision (*In re Sears Brands, LLC*, 77558337 (TTAB 2010)) in which the Board reversed the disclaimer requirement for “SERVICE CREW” in the mark SEARS BLUE SERVICE CREW for retail store services. There the Board found SERVICE CREW to be incongruous in the context of retail store services and unitary in that the words function as a unit and rhyme. Such facts are not present in this case.

Development Corp., supra at 218, and *In re Mayer-Beaton Corp.*, 223 USPQ 1347, 1349 (TTAB 1984).

In view of the above, and based on this record, the alternative plausible meanings in the context of the mark SUPER TECH for air filters, a super technician, super technical or super technology, which adds to the amorphous meaning, and the steps to understand technology is used to make air filters, and as such is a feature of the goods, we have doubt that it immediately describes a feature of the goods and must resolve that doubt in favor of Applicant. *In re Stroh Brewery Co.*, 34 USPQ2d 1796, 1797 (TTAB 1994) (when “doubts exist as to whether [the] term is descriptive as applied to the . . . [services] for which registration is sought, it is the practice of this Board to resolve doubts in favor of the applicant and pass the mark to publication with the knowledge that a competitor of applicant can come forth and initiate an opposition proceeding in which a more complete record can be established”); *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016).

Decision: The refusal to register is reversed.