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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Electric Visual Evolution, LLC

Serial No. 78868409

Robert L. Powley of Powley & Gibson, P.C. for Electric Visual Evolution, LLC.

Simon Teng, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

Before Bucher, Cataldo and Bergsman, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Electric Visual Evolution, LLC ("applicant") filed an intent-to-use application for the mark ELECTRIC, in standard character format, for goods ultimately identified as "watches and watch bands," in Class 14.

The Trademark Examining Attorney issued a final refusal to register the mark under Section 2(e)(1) of the Trademark Act of 1946, 15 U.S.C. §1052(e)(1), on the ground that the mark ELECTRIC is merely descriptive of watches because it directly conveys to consumers that the watches

run on electricity. The Examining Attorney submitted the following evidence to show that ELECTRIC is merely descriptive of watches:

1. A list of the first ten hits from an Internet search conducted through the GOOGLE search engine for "electric watches."¹ The hit list included, but was not limited to, the following website excerpts:
 - A. Vintage Hamilton Electric Watches By the Leading Authority;
 - B. led, electric and strange watches - Pulsar - Bulova - Acutron; and,
 - C. Collectibles - General (Modern: electric watches
Thanks for the inquiry. Hamilton made two models of electric wristwatches, 500 & 501.
2. An excerpt from the Rene Rondeau website "specializing in Hamilton Electric Watches since 1986."² The website touts "Quality Vintage Watch Sales & Repairs - by the World's Leading Authority on Hamilton mechanical and electric watches."
3. An excerpt from the Alibaba.com website for Weilida Plastic Manufactory, a Chinese company advertising the sale of electric watches in bulk.³

¹ October 2, 2006 Office Action.

² <http://hamiltonwristwatch.com> attached to the October 2, 2006 Office Action. There was also an excerpt from the www.faszination.ch website. Although this foreign website is accessible to the United States public, there is no reasonable basis for us to consider it a relevant reference from which to infer the commercial impression derived from the term ELECTRIC used in connection with watches. Accordingly, we have given this website excerpt no consideration in our decision.

³ <http://weilida.en.alibaba.com> attached to the October 2, 2006 Office Action. Applicant argued that we should not give this website any probative value because its sponsor is a Chinese

4. A dictionary definition of the word "electric" with, *inter alia*, the following meanings:
 1. pertaining to, derived from, produced by, or involving electricity . . .
 2. producing, transmitting, or operated by electric currents . . .
 3. electrifying; thrilling; exciting; stirring . . .⁴
5. An excerpt from the BoingBoing website providing a history of electric watches.⁵ The excerpt has the following information:

History of electric watches

The Watchismo blog has a great history of pre-quartz electrical watches, focusing on these wacky early Swiss watches with two huge external battery compartments.

6. An excerpt from "mitchshoppingonline.com" advertising the sale of Hamilton Electric Watches.⁶
7. An article from *The Cornell Daily Sun* (March 29, 2007) about the wristwatch market.⁷ The article provides that "[i]expensive electric watches are a great way to make a statement and, at a low

company and thus the website is not evidence of how U.S. consumers would view the term "electric watches." (Applicant's Brief, p. 8). Because the website is directed to consumers in the United States, we find that it is probative of how U.S. consumer may perceive the term "electric watches."

⁴ www.dictionary.com derived from The American Dictionary of the English Language (4th ed. 2000) attached to the October 2, 2006 Office Action.

⁵ www.boingboing.net attached to the April 5, 2007 Office Action.

⁶ April 5, 2007 Office Action.

⁷ www.cornellsun.com attached to the April 5, 2007 Office Action.

cost, you can stay up to date with the latest trends or dabble in different styles before committing to a pricier piece."

8. An excerpt from the history section of the Timex website providing, in relevant part, that in the 1960's "[t]echnological advances allowed the company to offer a wide range of products, including the first low-priced electric watches for men and women, as well as several other inexpensive jeweled models."⁸
9. An excerpt from Amazon.com advertising the sale of Miller's: Wristwatches: How to Compare and Value by Jonathan Scatchard.⁹ The book description reads as follows:

Electric watches, divers' watches, novelty watches, cool watches from the 60's, and elite watches like the Rolex V and Chronograph I; it's time for wristwatches to rule the market, and these fabulous examples are coveted as much for style as practicality.

10. A copy of U.S. Patent No. 4070821 entitled "Electric watch battery contact spring."¹⁰ It is a patent relating to the structure of an electric watch.
11. An excerpt from the Global Sources website advertising the sale of watches, including a variety of electric watches.¹¹

⁸ www.timex.com attached to the April 5, 2007 Office Action.

⁹ April 5, 2007 Office Action.

¹⁰ The patent application was filed on March 22, 1976 and was published on January 31, 1978. The patent was copied from www.freepatentsonline and attached to the April 5, 2007 Office Action.

¹¹ www.globalsources.com attached to the April 5, 2007 Office Action.

12. Excerpts from 11 newspaper articles retrieved from the LexisNexis database referencing electric watches.¹² A sampling of the references includes the following excerpts:

A. New rules bar "e-waste" from state landfills

Don't throw away that dead battery, old cell phone or broken digital camera. As of Feb. 9, it will be illegal to send household electronic waste - e-waste - to California landfills. . . . But San Diego County environmental officials say the category appears to cover anything that contains a circuit board - - from electric watches and alarm clocks to electronic toys, VCRs, even novelty greeting card that play a tune when opened.

The San Diego Union-Tribune (January 22, 2006)

B. Savage On Wheels: Pontiac takes big leap in style, quality with G6; Drive train lags behind Japanese stable mates

The drive train represents the major difference. The Pontiac's 3.5-liter V-6 is a typical noisy pushrod GM engine as opposed to the overhead-cam design seen in Japanese makes. That means this one growls while it runs up to speed and through the gears, while Camry and Accord are quiet. Think of it as the difference between a noisy grandfather clock and an electric watch.

Milwaukee Journal Sentinel (January 15, 2005)

C. "Goldfinger" Finds That Time Is On His Side

In this throwaway world, people still bring watches in for repairs and not just new batteries. . . . The technology, set on its ear by quartz watches, keeps expanding.

¹² Attached to the November 19, 2007 Office Action.

There are mechanical watches, quartz watches and electric watches.

Orlando Sentinel (July 18, 2004).

Based on this evidence, the Examining Attorney contends that "[t]he word 'electric' immediately conveys to consumers that Applicant's watches run on electricity."¹³ On the other hand, applicant contends that ELECTRIC is not merely descriptive because (1) consumers are unlikely to associate the term "electric" with watches and watchbands and (2) the word "electric" has multiple meanings, including "emotionally charged" or "exciting."¹⁴

A term is deemed to be merely descriptive of goods or services, within the meaning of Trademark Act Section

¹³ Examining Attorney's Brief, p. 2.

¹⁴ Applicant's Brief, pp. 4-5 and 6-7. Applicant attached copies of advertisements to its brief from watch companies to show that "several well-known watch brands" do not use the term "electric." (Applicant's Brief, p. 8 and Exhibit 2). The Examining Attorney objected to the evidence attached to applicant's brief pursuant to Trademark Rule 2.142(d). That rule provides, in part, that the record should be complete prior to the appeal and that the Board will ordinarily not consider evidence after the appeal is filed. In response, applicant argues that the rule is not mandatory and urges the Board to exercise its discretion to consider the evidence. Because this evidence was not recently discovered or otherwise unavailable, we decline to admit the late-filed evidence and therefore grant the objection of the Examining Attorney. Even if we admitted applicant's late-filed advertisements, it would not change our decision because a mark may be descriptive regardless of the number of competitors, if any, use it. See *In re National Shooting Sports Foundation*, 219 USPQ 1018, 1020 (TTAB 1983) ("The fact that applicant may be the first and only user of this highly descriptive or generic designation does not justify registration if the term projects only merely descriptive significance").

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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 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).

Applying these principles in the present case, and based on the evidence submitted by the Trademark Examining Attorney, we find that ELECTRIC is merely descriptive as applied to "watches."¹⁵ It directly tells consumers that applicant's watches are powered by electricity. That interpretation is amply supported by the websites and news articles referencing electric watches.

Applicant makes the following argument:

The average consumer is unlikely to associate the term "electric" with watches and watch bands. The average consumer associates watches with mechanical wind-up operation,

¹⁵ It is well settled that where a mark is merely descriptive of one or more items identified in the description of goods but may be suggestive or even arbitrary as applied to other items, registration is properly refused if the mark sought to be registered is descriptive of any of the goods. *In re Cannon, Inc.*, 219 USPQ 820, 821 (TTAB 1983); *Electro-Coatings, inv. Precision National Corporation*, 204 USPQ 410, 420 (TTAB 1979); *In re Brain Research Foundation*, 171 USPQ 825, 826 (TTAB 1971). Accordingly, we cannot consider applicant's request that even if we find ELECTRIC descriptive of watches, we should not find it descriptive of watch bands. (Applicant's Reply Brief, p. 5).

batteries, motion or even solar power, but not electricity. If asked what powers their watch, consumers are more likely to answer "battery" not "electric" or "electricity." The term "electric" is not commonly used by the general public to describe a source of power for watches, nor is the term "electricity." When further questioned, consumers would secondarily concede that batteries are electric.¹⁶

One problem with applicant's analysis is that it starts with the term ELECTRIC and asks whether the purchaser can conclude what applicant's goods are. As indicated above, the proper analysis should start with the products "watches and watch bands" and inquire whether the term ELECTRIC describes a significant feature or subject of the "watches and watch bands." The evidence shows that watches may be electric watches. Thus, the mark directly describes a feature of applicant's goods.

Another problem with applicant's analysis is that it is not supported by any evidence. All applicant has provided is argument regarding what a proposed purchaser would conclude when confronted with applicant's mark. We have been given no evidence to support the argument. See *In re Vsesoyuzny Ordena Trudovogo Krasnogo Znameni*, 219 USPQ 69, 70 (TTAB 1983) (assertions in briefs are not evidence). See also *In re Minnetonka*, 212 USPQ 772, 777

¹⁶ Applicant's Brief, p. 4.

(TTAB 1981) (determining whether a mark has acquired distinctiveness is based on the facts as they exist and are revealed by the evidence in the record at the time the application is acted upon).

We are also not persuaded by applicant's argument that the Examining Attorney's evidence is outdated or makes only historical references to electric watches. First, the excerpts from the websites are from 2006 and 2007 and the newspaper articles retrieved from the LexisNexis database include articles published in 2006, 2005 and 2004. In addition, the websites show companies advertising for the sale and repair of electric watches and the newspaper articles show references by the authors to electric watches.

Based on the evidence of record, we find that ELECTRIC is merely descriptive of "watches and watch bands," the goods identified in the application, and that registration therefore is barred by Trademark Act Section 2(e)(1).

Decision: The refusal to register is affirmed.