

This Opinion is Not a
Precedent of the TTAB

Mailed: January 4, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Land Sky Sea, LLC
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Serial No. 85923067
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Joseph Sutton of Law Offices of Ezra Sutton, P.A.,
for Land Sky Sea, LLC

Jacquelyn A. Jones, Trademark Examining Attorney, Law Office 120,
Michael W. Baird, Managing Attorney.

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Before Quinn, Adlin and Hightower,
Administrative Trademark Judges.

Opinion by Hightower, Administrative Trademark Judge:

Land Sky Sea, LLC (“Applicant”) seeks registration on the Principal Register of
E GAR (in standard characters) for the following goods:

Electronic Cigars, Namely, an electronic device to heat
liquids to create a vapor for a human to inhale by mouth
being a battery, an LED light source, a mouthpiece, and a
cartomizer, in the nature of a compartment for the fluid to
be heated, a heating coil, and a vaporizing chamber

in International Class 34 (as amended).¹

¹ Application Serial No. 85923067 was filed on May 3, 2013, based on Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

The Trademark Examining Attorney has refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the term is merely descriptive of Applicant's goods. After the refusal was made final, Applicant appealed to this Board. We affirm the refusal to register under Section 2(e)(1).

Registration also was refused under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground of likelihood of confusion with Registration No. 3627257. However, that registration was canceled on January 1, 2016, during the pendency of this appeal, for failure to file an affidavit of use under Section 71 of the Trademark Act, 15 U.S.C. § 1141k. The refusal to register pursuant to Section 2(d) therefore is dismissed as moot.

A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods with which it is used. *See In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). Descriptiveness determinations are made in relation to an applicant's identified goods or services, the context in which the proposed mark is being used, and the possible significance the term would have to the average consumer because of the manner of its use or intended use. *Chamber of Commerce*, 102 USPQ2d at 1219. Descriptiveness is not considered in the abstract. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007). Merely descriptive words must be left free for competitive use. *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217 (C.C.P.A. 1978); *In re Styleclick.com Inc.*, 58 USPQ2d 1523, 1527 (TTAB 2001).

Applicant’s identification of goods begins “Electronic Cigars, Namely,” A “namely” clause is often used in an identification of goods to clarify terminology. Using “namely” typically focuses the scope of the identification to those particular items following the word “namely.” *See* Trademark Manual of Examining Procedure (TMEP) § 1402.03(a) (October 2015). In the subject application, however, the wording after the “namely” clause merely provides a detailed description of the function and individual components of Applicant’s devices. Therefore, we find that Applicant’s goods are “electronic cigars” – which is listed in the USPTO Acceptable Identification of Goods & Services Manual (ID Manual)² in Class 34 and appears from the record evidence to be the common name for such goods – and assess whether the applied-for term is descriptive of “electronic cigars.”

During examination, the Examining Attorney asked Applicant to indicate the significance of the wording in the applied-for term; specifically, whether “E” stands for “electric” or “electronic” and whether “GAR” stands for “cigar” or “cigarette.” Applicant responded that:

E appearing in the mark means or signifies or is a term of art for electronic in the relevant trade or industry or as applied to the goods/services listed in the application. GAR appearing in the mark has no significance nor is it a term of art in the relevant trade or industry or as applied to the goods/services listed in the application, or any geographical significance.³

Thus, Applicant admits that the “E” in E GAR signifies “electronic,” but denies that “GAR” is an abbreviation for “cigar.” Applicant argues in its appeal brief that:

² The Board may take judicial notice of entries from the ID Manual.

³ January 31, 2014 Response to Office Action.

A substantial portion of U.S. consumers do not understand the term **E GAR** to refer to an *electronic non-tobacco inhaling device* which **does not contain tobacco**. Rather, the term **E GAR**, as used on an electronic, non-tobacco inhaling device, would be understood by a substantial portion of the public as being an arbitrary or coined term.⁴

It is apparent, however, that “GAR” is the second syllable of the word “cigar” and that E GAR thus is a readily understandable abbreviation of “electronic cigar.” Such an abbreviation is consistent with record evidence showing that electronic cigarettes are referred to as “E Cigarettes,”⁵ which may be abbreviated as “Ecig”:⁶



⁴ Appeal Brief at 4-5, 4 TTABVUE 5-6.

⁵ *E.g.*, March 10, 2014 Office Action at 20 (a product category on smokersoutletonline.com).

⁶ *Id.* at 29 (excerpt of page from smokersoutletonline.com/ecigarette.html); *see also* October 21, 2014 Final Office Action at 5 (several references to “e-cig” and “e-cigs” from the site howtovape.com), 8-12 (numerous uses of “e-cig” and “e-cigs” on site ecigsforbeginners.weebly.com), 49 (“E-cigs” on ecigsopedia.com/types-of-e-cigarettes/e-cigars).

Similarly, the record demonstrates that third parties have referred to electronic cigars as “E Cigars.” Below is one example, from the site cigarbar360.com:⁷



More importantly, the Examining Attorney also submitted evidence that third parties have used Applicant’s proposed mark descriptively in association with electronic cigars, as follows:

- From the website howtovape.com, under the heading “What is a Personal Vaporizer (Electronic Cigarette)?” the statement that: “There also exist an E-Cigar (sometimes called an E-Gar), and an E-Pipe.”⁸
- A review of an e-Swisher cigar titled “BEST LITTLE E-GAR AROUND!”⁹
- In a discussion forum of the DSE-701 E-Cigar on the site vapeatron.com, a participant’s reference to the product as “my e-gar.”¹⁰

⁷ October 21, 2014 Final Office Action at 15; *see also, e.g., id.* at 49-50 (ecigsopedia.com/types-of-e-cigarettes/e-cigars/) (“Smoking electronic cigars or e-cigars is the most novel way of smoking cigars.”), 51-54 (numerous uses of “e-cigar” on info-electronic-cigarette.com/electronic-cigars); March 10, 2014 Office Action at 47 (listing for “Disposable eCigar Group Pack (5 x Electronic Cigar) on shopwiki.com, stating: “Each e-Cigar (electronic cigar) has over 1000 puffs of high quality vapour. . . .”).

⁸ October 21, 2014 Final Office Action at 5; *see also id.* at 9 (same reposted at e-cigsforbeginners.weebly.com), 15 (same at cigarbar360.com).

⁹ *Id.* at 6-7 (from bzzagent.com/pc/e-swisher/gallery/item/best-little-e-gar-around).

¹⁰ March 10, 2014 Office Action at 51. The record also contains references to the “E-Gar Grande from E-Lites.” October 21, 2014 Final Office Action at 2-3 (from electrocigarette.com/e-gar-grande-from-e-lites-review/); March 10, 2014 Office Action at 43 (from e-lites.org/electronic-cigar.html), 47 (from shopwiki.com/l/E~Gar-Electronic-Cigar-5x-Pack). Applicant makes several arguments concerning this product, including that “E-Gar Grande” is used as a mark and infringes Applicant’s marks. Appeal Brief at 3-5, 4 TTABVUE 4-6. We find this evidence to be ambiguous and have not relied on it in reaching our decision.

Even had there been no record examples of third-party use of E GAR, a term may be merely descriptive if an applicant is the first or only user of it. *See In re Phoseon Tech. Inc.*, 103 USPQ2d 1822, 1826 (TTAB 2012); *In re Nat'l Shooting Sports Found., Inc.*, 219 USPQ 1018, 1020 (TTAB 1983).

Based on careful consideration of all the record evidence, we find that consumers viewing the term E GAR would recognize it as an abbreviation of “e cigar” or electronic cigar. Therefore, E GAR is merely descriptive in association with Applicant’s goods in that it immediately conveys knowledge of features or characteristics of those goods, that is, that they are electronic cigars.

Decision: The refusal to register pursuant to Section 2(e)(1) is affirmed. The refusal to register pursuant to Section 2(d) is dismissed as moot.