

9/20/01

**THIS DISPOSITION  
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Paper No. 8  
CEW

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Tony Lutz

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Serial No. 75/685,069

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Ken J. Pedersen of Pedersen & Company for Tony Lutz.

Michael Webster, Trademark Examining Attorney, Law Office  
102 (Thomas Shaw, Managing Attorney).

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Before Hanak, Hohein and Walters, Administrative  
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Tony Lutz has filed a trademark application to  
register the mark SMART PLUG for the following goods:

electrical plug for a standard AC-plug housing  
that monitors the power line for voltage and  
electric current spikes or variations in voltage  
or electric current and records changes in the  
line, namely, the elapsed time of usage, maximum  
and minimum line voltage, and maximum current  
draw, and reads back the data to a personal  
computer through a user interface, for the  
purpose of monitoring energy consumption or to  
determine wear and tear on power tools; and  
computer software for use in converting data  
from electrical plug, which monitors the current

and voltage variations, to a computer readable and displayable form.<sup>1</sup>

The Trademark Examining Attorney has issued a final refusal to register, under Section 2(e)(1) of the Trademark Act, 15 U.S.C. 1052(e)(1), on the ground that applicant's mark is merely descriptive of his goods.<sup>2</sup>

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register.

The Examining Attorney contends that applicant's product is, essentially, "an electrical plug with computer software that monitors the power line and submits data to a computer"; that "smart" is defined as "of, relating to, or being a highly automated device, especially one that imitates human intelligence: *smart missiles*"<sup>3</sup>; that "plug" is defined as "a fitting, commonly with two metal prongs for insertion in a fixed socket, used to connect an appliance to a power supply"<sup>4</sup>; and that

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<sup>1</sup> Serial No. 75/685,069, in International Class 9, filed May 7, 1999, based on an allegation of a bona fide intention to use the mark in commerce.

<sup>2</sup> In his appeal brief, applicant sought to enter a disclaimer of PLUG. Such a request is essentially a request for reconsideration, which must be filed within a six-month period following the final refusal. This request, filed more than a year after the final refusal, is untimely and has not been considered. We add that, even if such a disclaimer was properly of record, our decision in this case would remain the same.

<sup>3</sup> *The American Heritage Dictionary of the English Language*, 3<sup>rd</sup> ed., 1992.

<sup>4</sup> *Ibid.*

applicant's "highly automated plugs and the computer software for use with the plugs combine to form a device that, relative to a standard AC plug, performs several highly sophisticated functions beyond the connection of an appliance to a power supply." The Examining Attorney concludes that "the combination of the terms does not create a unitary mark with a separate nondescriptive meaning" and, thus, the mark is merely descriptive of the identified goods. In addition to the noted dictionary definitions, the Examining Attorney submitted excerpts of articles, including the following, retrieved from the LEXIS/NEXIS database and copies of third-party registrations in support of his position:

These are essentially smart batteries that plug into the power line between the wall socket and your computer. They continually keep charged up from the wall juice and pass it right on to the computer and other gear. [*The San Diego Union-Tribune*, July 20, 1999.]

Before USB, setting up a scanner was an ugly experience. Now, thanks to these smart sockets, all you have to do is plug in the device, and scans happen. [*Home Office Computing*, February, 1999.]

I want automation products that instantly interact with all my other smart products when I plug them into the ac outlet. [*EDN*, July 8, 1999.]

The marks in the third-party registrations all consist of two terms, begin with the term SMART, and identify a

variety of goods and services. Each registration is either on the Supplemental Register, on the Principal Register under Section 2(f) of the Trademark Act, or includes a disclaimer of SMART.

Applicant contends that its mark is not merely descriptive because it "is inventive or evokes a unique commercial impression"; that applicant's mark "is the unexpected combination of the terms SMART and PLUG"; that SMART "suggests sophisticated capabilities," whereas PLUG, "as an electrical plug, refers to a completely passive electrical component ... [and] this combination ... evokes a unique commercial impression of incongruity."

The test for determining whether a mark is merely descriptive is whether the involved term immediately conveys information concerning a quality, characteristic, function, ingredient, attribute or feature of the product or service in connection with which it is used, or intended to be used. *In re Engineering Systems Corp.*, 2 USPQ2d 1075 (TTAB 1986); *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). It is not necessary, in order to find a mark merely descriptive, that the mark describe each feature of the goods or services, only that it describe a single, significant quality, feature, etc. *In re Venture Lending Associates*, 226 USPQ 285 (TTAB 1985).

Further, it is well established that the determination of mere descriptiveness must be made not in the abstract or on the basis of guesswork, but in relation to the goods or services for which registration is sought, the context in which the mark is used, and the impact that it is likely to make on the average purchaser of such goods or services.<sup>5</sup> *In re Recovery*, 196 USPQ 830 (TTAB 1977).

It is clear from the dictionary definition and the goods as identified, and applicant does not dispute, that the PLUG portion of applicant's mark is merely descriptive in connection with those goods.

It is equally clear that SMART is also merely descriptive in connection with the identified goods. In addition to the dictionary definition of record, we take judicial notice of the following dictionary definitions of "smart":

Synonym for *intelligent*; in relation to software or hardware, capable of processing information, typically beyond what is currently expected;<sup>6</sup>  
and

Having some computational ability of its own[;]  
smart devices usually contain their own  
microprocessor.<sup>7</sup>

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<sup>5</sup> Thus, applicant's argument that one cannot determine the goods from the mere combination of the two terms SMART PLUG is not persuasive because it does not employ the correct legal test.

<sup>6</sup> *Microsoft Press Computer Dictionary* (2<sup>nd</sup> ed. 1994).

<sup>7</sup> *Computer Dictionary* (3<sup>rd</sup> ed. 1992).

Based on the identification of goods, applicant's plug monitors various aspects of voltage and "reads" the data gathered to a personal computer. Applicant's software converts the data read by the plug to a computer readable and displayable form. These goods are "smart" as that term is defined and as used in the excerpted articles. The term SMART PLUG simply describes the nature of applicant's electrical plug; and SMART PLUG describes a significant aspect of applicant's software, namely, that it converts data gathered by the plug to computer readable and displayable form. *See In re Cryomedical Sciences Inc.*, 32 USPQ2d 1377 (TTAB 1994) [SMARTPROBE held merely descriptive for cryosurgical probes having electronic or microprocessor components due to meaning of "smart" as a computer term].

In conclusion, it is our view that, when applied to applicant's goods, the term SMART PROBE immediately describes, without conjecture or speculation, the nature, and a significant feature or function, of applicant's goods. Nothing requires the exercise of imagination, cogitation, mental processing or gathering of further information in order for purchasers of and prospective customers for applicant's services to readily perceive

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the merely descriptive significance of the term SMART PROBE as it pertains to applicant's goods. We are not convinced otherwise by applicant's argument that the combination of the two terms evokes a unique commercial impression or incongruity.

*Decision:* The refusal under Section 2(e)(1) of the Act is affirmed.