

**THIS OPINION  
IS NOT A PRECEDENT OF  
THE TTAB**

Mailed: September 10, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Medipacs, LLC

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Serial No. 78626047

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Norman P. Soloway of Hayes Soloway for Medipacs, LLC.

Carolyn V.C. Gray, Trademark Examining Attorney, Law Office  
111 (Craig D. Taylor, Managing Attorney).

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Before Walters, Holtzman and Drost, Administrative Trademark  
Judges.

Opinion by Walters, Administrative Trademark Judge:

Medipacs, LLC has filed an application to register on  
the Principal Register the mark DIGITAL PUMP in standard  
character format for "programmable metering pumps for  
industrial, medical and laboratory use, and parts and  
fittings therefor," in International Class 9.<sup>1</sup>

The examining attorney has issued a final refusal to  
register, under Section 2(e)(1) of the Trademark Act, 15

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<sup>1</sup> Serial No. 78626047, filed May 9, 2005, based on an allegation of a  
bona fide intention to use the mark in commerce.

U.S.C. 1052(e)(1), on the ground that applicant's mark is merely descriptive in connection with its goods.

Applicant has appealed. Both applicant and the examining attorney have filed briefs. We affirm the refusal to register.

Applicant contends that the mark is at most suggestive; that a multi-stage reasoning process is necessary to understand the nature of the goods identified by DIGITAL PUMP; and that, because of the multitude of meanings of the term "digital," the mark could be understood as identifying a virtual pump, a device that pumps digital signals in an electronic circuit or computer program, a fanciful name for an amplifier system, a shoe, or a shoe support based upon a digital signal. Applicant also argues that the term "pump" is usually used with another noun, such as "oil pump" or "air pump," and the examining attorney has not shown any other use of "pump" with a verb or an adjective. Thus, applicant concludes, the incongruous combination of the adjective "digital" with the noun "pump" can only be descriptive of a product that "pumps digits" or "use[s] digitals to pump."

Applicant states that its identified product is not "a pump that represents magnitudes in digits" as characterized by the examining attorney. Rather, applicant describes its product as "a programmable pump formed around any base or

magnitude." (Brief p. 8.) Applicant argues, further, that, in reaching her conclusion that the mark is merely descriptive, the examining attorney has improperly dissected the mark.

In her final office action of July 6, 2006, the examining attorney makes the following argument<sup>2</sup>:

Applicant's proposed mark merely describes a pump that represents magnitudes in digits. A digit is defined as "one of the elements that collectively forms a system." The derivative digital then is "merely to use or give a reading in digits." Applicant's assertion that its "pump is not designed to pump digits" clearly misinterprets what the public would understand by its mark. The average consumer would understand that applicant's goods are designed to measure digitally, that which is being pumped.

In her brief, the examining attorney concludes that the mark DIGITAL PUMP "would convey to the average consumer that applicant's goods are designed to measure digitally that which is being pumped." The examining attorney submitted a definition of the noun "pump" as a "mechanical device that moves fluid or gas by pressure or suction" ("quick definitions" from the website [www.onelook.com](http://www.onelook.com)). The examining attorney also submitted the following definition, in pertinent part, of "digital" from *The American Heritage Dictionary of the English Language*, 4th ed. 2000, as appearing on the website [www.dictionary.com](http://www.dictionary.com):

2. Operated or done with the fingers: a digital switch.
4. Expressed in numerical form, especially for use by a computer.
5. *Computer Science*. Of or relating to a device that can read, write, or store information that is represented in numerical form.
6. Using or giving a reading in digits: a digital clock.

Both applicant and the examining attorney submitted evidence with their briefs on appeal. The examining attorney's evidence consists of excerpts of company names and profiles from the website [www.ThomasNet.com](http://www.ThomasNet.com), showing use of the phrase "digital control pump." Applicant's evidence consists of excerpts of Internet websites showing definitions of "digital," a copy of a published patent application for a pulse actuated activator pump system, and the results of a search of the Google search engine for the term "digital." Neither applicant nor the examining attorney complied with the established rule that the evidentiary record in an application must be complete prior to the filing of the notice of appeal or with a request for reconsideration filed during the period for filing an appeal. See, 37 CFR 2.142(d); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994). Further, none of the non-

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<sup>2</sup> The quoted definition was submitted by the examining attorney from the website [www.onelook.com](http://www.onelook.com) and was listed under the heading "quick definitions."

dictionary evidence<sup>3</sup> submitted by either applicant or the examining attorney is proper for judicial notice.

While neither applicant nor the examining attorney objected to the improperly submitted evidence of the other and, in fact, the examining attorney discussed the patent submitted by applicant, we have not considered the late-filed evidence. The Board has a substantial interest in maintaining the orderly conduct of proceedings before it. Allowing either an applicant or an examining attorney to continue to submit evidence during the appeal in the absence of a request for remand undermines the orderly examination and appeal of trademark applications.<sup>4</sup>

The test for determining whether a mark is merely descriptive is whether it 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

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<sup>3</sup> To the extent that the dictionary evidence duplicates what is already in the record, there is no need to take judicial notice of it. To the extent that it consists of new definitions, these definitions do not differ substantively from those in the record. Thus, the Board has not taken judicial notice thereof.

<sup>4</sup> We add that even if we had considered the evidence submitted by applicant with its brief, our decision in this case would remain the same.

necessary, in order to find that a mark is merely descriptive, that the mark describe each feature of the goods or services, only that it describes a single, significant quality, feature, etc. *In re Venture Lending Associates*, 226 USPQ 285 (TTAB 1985).

Of particular relevance in this case is the well-established rule 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. *In re Recovery*, 196 USPQ 830 (TTAB 1977). For this reason, applicant's arguments about alternative meanings of the mark are unpersuasive when the mark is considered in connection with the identified goods.

Considering applicant's own explanation of its product as "a programmable pump" (supra), applicant's pump clearly incorporates computer technology for some of its functioning, i.e., it is not purely mechanical. Thus, the definition of "digital" as "*Computer Science* - of or relating to a device that can read, write, or store information that is represented in numerical form" (supra) is particularly relevant to the goods as characterized by applicant. In view thereof, we find

that there is no multistep reasoning involved when the relevant consumer views DIGITAL PUMP *in connection with* the identified goods, "programmable metering pumps for industrial, medical and laboratory use, and parts and fittings therefore." Consumers will immediately understand that applicant's pumps are programmable and that its parts and fittings are for a programmable pump.

Additionally, we find the definition of "digital" as "expressed in numerical form, especially for use by a computer" (*supra*) to be equally relevant. This second definition would pertain to a digital pump in which readings are given in digital, as opposed to analog, form. Regardless of applicant's contention that the actual pump it intends to manufacture is not "a pump that represents magnitudes in digits," this characterization of a "digital pump" by the examining attorney falls within the scope of the goods as *identified* in this intent-to-use application. As so understood, the mark remains equally merely descriptive of a significant feature of the identified goods.

We conclude that, when applied to applicant's services, the term DIGITAL PUMP immediately describes, without conjecture or speculation, a significant feature or function of applicant's goods, namely that it is a programmable pump.

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 the merely descriptive significance of the term DIGITAL PUMP as it pertains to applicant's programmable metering pumps.

We do not agree with applicant's argument that reaching this conclusion requires dissecting the mark. It is appropriate to consider the definitions of the individual terms prior to considering the mark as a whole, which is what we have done. Then, considering the mark as a whole, we have found it to be merely descriptive in connection with the identified goods. There is no question that "digital pump" is a combined term, where "digital" is an adjective modifying the noun "pump" and it describes a significant feature of the pump.

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