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DATE: 4/15/02 BY: HOANG-CHI TRUONG

04-18-2002
U.S. Patent & TMOfc/TM Mail Rcpt Dt. #11

Trademark Serial No.: 75/746,284
Attorney Docket No.: 021775-086

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Trademark Application of	:	
Proxim, Inc.	:	Box: TTAB - NO FEE
Serial No.: 75/746,284	:	
Filed: July 8, 1999	:	
Mark: HARMONY	:	

TRADEMARK TRIAL AND APPEAL BOARD
02 APR 25 AM 3:28

BRIEF FOR APPELLANT

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Trademark Serial No.: 75/746,284
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I. NATURE OF PROCEEDINGS

This is an appeal by Proxim, Inc., hereinafter "Appellant," from a final refusal to register by the U.S. Patent and Trademark Office Examining Attorney. The Examining Attorney has refused registration of Appellant's mark HARMONY based on a likelihood of confusion with U.S. Trademark Registration No. 2,368,383 for HARMONI. This is Appellant's main brief on final hearing.

II. STATEMENT OF FACTS

On July 8, 1999, Appellant filed with the U.S. Patent and Trademark Office an application to register the mark HARMONY for cordless networking products for use in homes, home offices and small offices to share computer resources and to provide access to the Internet and to corporate Intranets, in International Class 9.[1] On December 10, 1999, a first Office Action issued. In the Office Action, the Examining Attorney raised several issues, including a potential refusal of registration of Appellant's mark based on a likelihood of confusion with prior-pending Application No. 75/729,053 for HARMONI for computer software, namely, programmable software which monitors and diagnoses network and network traffic problems, in International Class 9. Appellant filed a timely response traversing the potential likelihood of confusion refusal with the prior-pending application for HARMONI and addressing the other issues raised in the Office Action.

On August 7, 2000, a second Office Action issued in which the Examining Attorney refused to register Appellant's mark because the prior-pending application for HARMONI had

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[1] The identification of goods was subsequently amended in Appellant's Request for Reconsideration filed December 4, 2001, to "a wireless networking system of products, namely, modems, PC adaptors, gateways, access bridges and related operating and driver software for sharing computer resources and access to a global computer information network and access to a local computer network, in International Class 9." This amendment was accepted by the Examining Attorney in the Office Action dated February 8, 2002.

matured into a registration, Registration No. 2,368,383. Appellant filed a timely response traversing the likelihood of confusion rejection.

On June 4, 2001, a third Office Action issued in which the refusal to register Appellant's mark based on a likelihood of confusion with the HARMONI registration was made final. Appellant filed a timely Request for Reconsideration along with a Notice of Appeal. The appeal was suspended so that the Examining Attorney could consider the Request for Reconsideration. By an Office Action dated February 8, 2002, the Examining Attorney maintained the final refusal to register. Accordingly, the appeal was reinstated.

III. ISSUE PRESENTED

This appeal is directed to the issue of whether Appellant's mark is confusingly similar to U.S. Registration No. 2,368,383 for HARMONI.

IV. ARGUMENT

In a likelihood of confusion analysis, the marks themselves must be compared for similarities in appearance, sound, connotation and commercial impression. In re E. I. duPont de Nemours & Co., 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973). Additionally, the goods and services must be compared to determine if they are related or if the activities surrounding their marketing are such that confusion as to origin is likely. In re August Storck KG, 218 U.S.P.Q. 823 (T.T.A.B. 1983).

Even though both marks at issue are phonetically similar, this fact alone is not dispositive of a likelihood of confusion. "*Per se*" rules relating to likelihood of confusion have been struck down as being too inflexible as contrary to trademark law, where each case must be decided based on its own facts and circumstances. See In re Quadram Corp., 228 U.S.P.Q. 863 (T.T.A.B. 1985); In re Sydel Lingerie Co., Inc., 197 U.S.P.Q. 629 (T.T.A.B. 1977) and cases cited therein. It is quite possible for no likelihood of confusion to exist even

between marks which may appear to be identical in the abstract where the respective goods or services are such that prospective consumers are not likely to assume that those goods or services share a common source. In this case, differences in the marks, goods, purpose of the goods, sophistication of prospective buyers, product costs and trade channels make confusion between the two marks unlikely.

The similarity or dissimilarity of the marks as to appearance, sound, connotation and commercial impression must be viewed in their entireties. Appellant seeks to register the mark HARMONY whereas the registered mark is HARMONI. Although the two marks are similar in sound, prospective purchasers are likely to encounter the marks visually rather than orally and, as such, the marks differ significantly in appearance. See Information Resources, Inc. v. X*Press Information Services, 6 U.S.P.Q. 2d 1034 (T.T.A.B. 1988), where the Board held, among other things, that the opposer's mark EXPRESS and applicant's mark X*PRESS were different. The marks in question here are visually different and such difference would be readily noticed by the discerning consumers of the respective products.

Additionally, the registrant's mark is an acronym for "Hierarchical Autonomous Remote Monitoring Instrument," as evidenced by registrant's product information sheet, a copy of which was on the registrant's website. See Exhibit A. Moreover, registrant's use of the mark as "HaRMONi" accentuates the acronym "RMON," which means "remote monitoring." Remote monitoring is a standard monitoring specification that enables various network monitors and console systems to exchange network-monitoring data and, accordingly, provides network administrators with more freedom in selecting networking-monitoring probes and consoles with features that meet their particular networking needs. See Exhibit B. These embedded meanings will be obvious to the knowledgeable purchasers of the goods, and influence the meaning and commercial impression conveyed by this mark to the relevant consumers. Appellant's mark does not convey any similar message since its products are not RMON, i.e., remote monitoring, products.

Aside from creating a different meaning and commercial impression from Appellant's HARMONY mark, the use of "RMON" in the HARMONI mark makes the registered mark highly suggestive, if not descriptive or generic, of the goods of the cited registration. Such highly suggestive marks are generally accorded a limited scope of protection. See, e.g., Stouffer Corp. v. Health Valley Natural Foods, Inc., 1 U.S.P.Q. 2d 1900 (T.T.A.B. 1986) and EZ Loader Boat Trailers, Inc. v. Cox Trailers, Inc., 217 U.S.P.Q. 986 (Fed. Cir. 1983).

The differences in the marks are even more significant when considered along with the nature of and differences in the respective goods. Appellant's goods comprise a wireless networking system of products for sharing computer resources and access to the Internet and Intranet, whereas the registrant's goods are diagnostic software. These are different products used for different purposes. Thus, the two marks are not likely to confuse an educated buyer. The non-competitive nature of the products is also a relevant factor in determining likelihood of confusion between the marks. See Curtice-Burns, Inc. v. Northwest Sanitation Products, Inc., 530 F.2d 1396, 189 U.S.P.Q. 138 (C.C.P.A. 1976).

Simply because the marks at issue cover goods that can be broadly grouped as computer software and hardware does not support a finding of likelihood of confusion. Use in the same broad field is not sufficient to demonstrate that a genuine issue exists concerning likelihood of confusion, especially where computers are involved. The Board has long recognized that a finding of likelihood of confusion should not automatically follow in all cases where the goods or services in question involve computer software and/or hardware.

> As a result of the veritable explosion of technology in the computer field over the past several years and the almost limitless number of specialized products and specialized uses in this industry, we think that a per se rule relating to source confusion vis-a-vis computer hardware and software is simply too rigid and restrictive an approach and fails to consider the realities of the marketplace.

Information Resources, Inc., 6 U.S.P.Q. 2d at 1038 (quoting In re Quadram Corp., 228 U.S.P.Q. 863 (T.T.A.B. 1985)). See also Astra Pharmaceutical Products v. Beckman Instruments, 220 U.S.P.Q. 786 (1st Cir. 1983), where although the parties marketed and sold goods under the same ASTRA mark to hospitals, the court held that use in the same field is not sufficient to demonstrate that a genuine issue exists concerning likelihood of confusion. The hospital is composed of separate departments with diverse purchasing requirements, which, in effect constitute different markets for the parties' respective products.

Here, even if the respective products were purchased for use in connection with a single business, they would be purchased for different purposes and likely at different times by different individuals within the organization. The information technology field has become quite departmentalized for effective dealing with the broad range of problems from, e.g., those of the end-user of a laptop on the one hand, to the smooth operation of the network on the other hand. For example, the information technology department of a company may be split where some individuals are dedicated to support network software while others are dedicated to support hardware issues. Appellant's products are hardware for creating a wireless network, whereas registrant's products are diagnostic software.

Furthermore, in determining whether there is a likelihood of confusion, everything hinges on whether there is a probability that confusion will arise in the minds of an appreciable number of reasonably prudent buyers. Standard Brands, Inc. v. Smidler, 151 F.2d 34 (2d Cir. 1945). In Stouffer Corp. v. Health Valley Natural Foods, Inc., 1 U.S.P.Q. 2d at 1900, the Board explained that, even though competing goods may be sold in supermarkets, it did not believe that "purchasing decisions [were] apt to be made impulsively or carelessly, as would be the case of a child purchasing a candy or toy." A reasonably prudent purchaser is expected to exercise the degree of care and caution appropriate to the choice the purchaser faces in the market place. Volkswagen Aktiengesellschaft v. Church, 411 F.2d 350 (9th Cir. 1969). Thus, the reasonably prudent buyer is not indifferent, foolish or negligent.

Where the relevant buyer class is composed of purchasers making important buying decisions, it is reasonable to set a higher standard of care than exists for consumers making casual purchases. In other words, it is assumed that such buyers are less likely to be confused than the ordinary consumer and, while two marks might be sufficiently similar to confuse an impulse buyer, an attentive buyer or expert in the field may be more knowledgeable and careful and will not be confused. *3 J. McCarthy, McCarthy on Trademarks and Unfair Competition, Section 23:101.* See also Astra Pharmaceutical Products, 220 U.S.P.Q. 786, and Hewlett-Packard Co. v. Human Performance Measurement Inc., 23 U.S.P.Q. 2d 1390 (T.T.A.B. 1991). Even where the purchasers are the same, their sophistication is important and often dispositive because sophisticated consumers may be expected to exercise greater care. Electronic Design and Sales Inc. v. Electronic Data Systems Corp., 21 U.S.P.Q.2d 1388 (Fed. Cir. 1992).

The buyers of the goods in question are highly sophisticated individuals who are charged with finding solutions to specific technology needs. Such consumers know that hardware and software serves different purposes. Appellant's product is purchased for a particular purpose and much attention must be directed to the product specifications in determining the appropriateness of the product to meet the needs of the consumer. A purchase of this type would never result from a hasty decision made merely upon seeing a name. Rather, the decision to purchase Appellant's product is made by a discriminating purchaser, well informed in the area, only after careful consideration of the product. This same discrimination will also be exercised by the purchasers of registrant's goods, which are specialized products in their own rights. Where all parties involved exercise such care, the possibility of confusion is eliminated.

Furthermore, it has long been established that confusion is unlikely to occur when the goods or services in question represent a large investment by the purchaser either in terms of dollars or importance. See L.J. Mueller Furnace Co. v. United Conditioning Corp., 106

U.S.P.Q. 112 (C.C.P.A. 1955); Magnaflux Corp. v. Sonoflux Corp., 109 U.S.P.Q. 313 (C.C.P.A. 1956); Minnesota Mining and Manufacturing Co. v. Electronic Memories, Inc., 173 U.S.P.Q. 178 (C.C.P.A. 1972). Other things being equal, confusion is less likely where goods and services are expensive and are purchased after careful consideration than where they are purchased casually. In order to set up a wireless network using Appellant's products it would cost $2500, at minimum. This minimum cost only accounts for one computer being wireless. To add more computers to the wireless network would increase the costs. For a mid- to large-sized company, the costs of setting up a wireless network using Appellant's products could very well cost over $100,000. Thus it can be seen that Appellant's products are a substantial investment of capital and, accordingly, this would most likely be researched before purchase.

Additionally, Appellant notes that its products may only be purchased through limited authorized distributors and value-added resellers. Appellant's products are not sold over the counter at retail outlets. Therefore, this is not the type of case where two low-priced products used for the same or similar purpose are sold side-by-side and purchased with a minimum of care. It is quite the opposite - the products are different and serve different purposes, are expensive and sold through different trade channels and the potential purchasers are sophisticated.

In light of the above, Appellant respectfully submits that differences in the marks and goods, the purpose of the goods and the sophistication of the prospective buyers make confusion between the HARMONY and HARMONI marks unlikely.

V. CONCLUSION

It is respectfully submitted that the record supports Appellant's position that its mark is not confusingly similar to the registered mark for HARMONI. It is further submitted that the

Examining Attorney's refusal of registration should be reversed and the application approved for publication of the mark.

Respectfully submitted,
Proxim, Inc.

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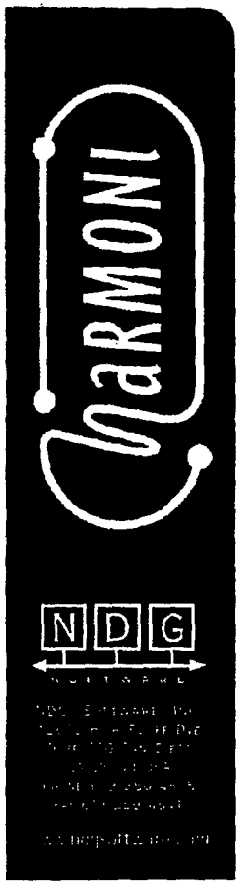
EXHIBIT A

The *face* of the Network.



HaRMONi is the world's first fully programmable, secure RMON-II agent. This latest technology from NDG Software, world leaders in network monitoring and management tools, is a dramatic improvement on existing software agents. It is set to revolutionize the world of remote monitoring.

Hierarchial

HaRMONi is the first RMON-II agent of its kind to feature complete programmability and PKI security.

The agent provides all the functionality of standard RMON-II agents with the addition of an open-standard programmable MIB and a *virtual machine*. This dramatically expands the capabilities of standard RMON-II network management, resulting in reduced overhead, distributed intelligence and an increased level of fault tolerance.

Autonomous

Specifically, the mechanism that allows HaRMONi to run general-purpose programs either manually via an NMS, or automatically via the RMON alarm group, will continue to run even after a fault occurs in the system. By running general-purpose programs from RMON, it is possible to calculate and store value-added data in local MIBs for retrieval at a later date.

The first agent to allow enterprise management to be incorporated into the existing network management framework, HaRMONi also serves as a desktop-based RMON-II agent. It may be programmed to perform *both* enterprise and network tasks. This allows existing NMS solutions to conduct enterprise management, using existing open systems standards such as SNMP, RMON and TCP/IP, as well as standard programming languages like Perl, JAVA and TCL/TK.

Remote Monitoring

HaRMONi's programmability allows the network manager to construct a customized application within the RMON framework. This is done by writing programs in an interpreted language that can be stored and distributed like any other piece of RMON data, effectively removing the restrictions of current network management systems where the functionality and structure of network management information are traditionally hard-wired.

A powerful and flexible agent, HaRMONi provides a cost effective solution for corporations who need to monitor and manage many desktops. It reduces network traffic bottlenecks by removing the necessity to transfer raw data to the NMS because HaRMONi stores this data. It also allows for offline operation as it requires no intervention from the NMS to activate a program.

Instrument

HaRMONi *installs on any Windows PC or Server and provides full RMON-II network monitoring for both Ethernet and Token Ring networks.* HaRMONi *does not require a dedicated PC or dedicated network interface card.*

EXHIBIT B

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Remote Monitoring (RMON)

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Remote Monitoring (RMON)

Background

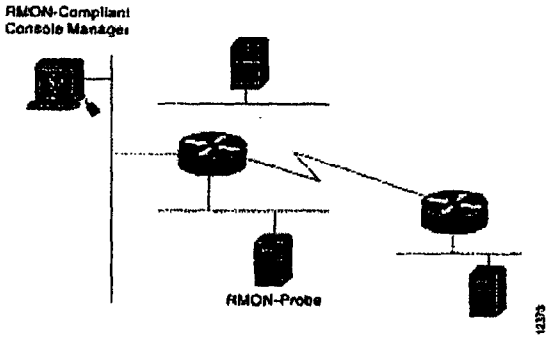
Remote Monitoring *(RMON)* is a standard monitoring specification that enables various network monitors and console systems to exchange network-monitoring data. RMON provides network administrators with more freedom in selecting network-monitoring probes and consoles with features that meet their particular networking needs. This chapter provides a brief overview of the RMON specification, focusing on RMON groups.

The RMON specification defines a set of statistics and functions that can be exchanged between RMON-compliant console managers and network probes. As such, RMON provides network administrators with comprehensive network-fault diagnosis, planning, and performance-tuning information.

RMON was defined by the user community with the help of the Internet Engineering Task Force (IETF). It became a proposed standard in 1992 as RFC 1271 (for Ethernet). RMON then became a draft standard in 1995 as RFC 1757, effectively obsoleting RFC 1271.

Figure 51-1 illustrates an RMON probe capable of monitoring an Ethernet segment and transmitting statistical information back to an RMON-compliant console.

Figure 51-1: An RMON probe can send statistical information to an RMON console.



RMON Groups

RMON delivers information in nine *RMON groups* of monitoring elements, each providing specific sets of data to meet common network-monitoring requirements. Each group is optional so that vendors do not need to support all the groups within the Management Information Base (MIB). Some RMON groups require support of other RMON groups to function properly. Table 51-1 summarizes the nine monitoring groups specified in the RFC 1757 Ethernet RMON MIB.

Table 51-1: RMON Monitoring Groups

RMON Group	Function	Elements
Statistics	Contains statistics measured by the probe for each monitored interface on this device.	Packets dropped, packets sent, bytes sent (octets), broadcast packets, multicast packets, CRC errors, runts, giants, fragments, jabbers, collisions, and counters for packets ranging from 64-128, 128-256, 256-512, 512-1024, and 1024-1518 bytes.
History	Records periodic statistical samples from a network and stores them for later retrieval.	Sample period, number of samples, item(s) sampled.
Alarm	Periodically takes statistical samples from variables in the probe and compares them with previously configured thresholds. If the monitored variable crosses a threshold, an event is generated.	Includes the alarm table and requires the implementation of the event group. Alarm type, interval, starting threshold, stop threshold.
Host	Contains statistics associated with each host discovered on the network.	Host address, packets, and bytes received and transmitted, as well as broadcast, multicast, and error packets.
HostTopN	Prepares tables that describe the hosts that top a list ordered by one of their statistics. The available statistics are samples of one of their base statistics over an interval specified by the management station. Thus, these statistics are rate-based.	Statistics, host(s), sample start and stop periods, rate base, duration.
Matrix	Stores statistics for conversations between sets of two addresses. As the device detects a new conversation, it creates a new entry in its table.	Source and destination address pairs and packets, bytes, and errors for each pair.
Filters	Enables packets to be matched by a filter equation. These matched packets form a data stream that might be captured or might generate events.	Bit-filter type (mask or not mask), filter expression (bit level), conditional expression (and, or, not) to other filters.
Packet Capture	Enables packets to be captured after they flow through a channel.	Size of buffer for captured packets, full status (alarm), number of captured packets.
Events	Controls the generation and notification of events from this device.	Event type, description, last time event sent.

Posted: Thu Jun 17 16:30:50 PDT 1999