

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

Mailed: July 15, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re TreeRadar, Inc.

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Serial No. 77579817

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James C. Wray, Esq. for TreeRadar, Inc.

Kristina Morris, Trademark Examining Attorney, Law Office 116  
(Michael W. Baird, Managing Attorney).

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Before Bucher, Holtzman and Cataldo, Administrative Trademark  
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

TreeRadar, Inc. (applicant) has filed an application to  
register the standard character mark TREERADAR on the Principal  
Register for goods and services ultimately identified as  
follows:<sup>1</sup>

Radar imaging systems for non-invasive assessment of  
tree and root health, comprised of radars, image  
processors, software, mobile mounts, carriages,  
printed instructions and carrying cases, all sold  
together as a unit, in Class 9; and

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<sup>1</sup> Serial No. 77579817 filed September 26, 2008 based on an allegation  
of first use and first use in commerce in May 2004.

Scientific and technological services, namely, measuring, imaging and analyzing internal and sub-surface wood structure, viability and decay and root masses, and quantitative analysis of tree health and structural integrity, in Class 42.

The trademark examining attorney initially refused registration under Section 2(e)(1) of the Trademark Act on the ground that applicant's mark is merely descriptive of its goods and services and, moreover, that applicant is barred by res judicata from relitigating this issue in view of a decision by the Board on its previous application (Serial No. 78714647). In response, applicant amended the application to seek registration under Section 2(f) of the Act, and subsequently submitted a declaration of over five-years substantially exclusive and continuous use of the mark in commerce. The examining attorney rejected the 2(f) evidence as insufficient and issued a new refusal under Section 2(e)(1) based on genericness.<sup>2</sup> Applicant argued in response that the mark is neither generic nor merely descriptive,<sup>3</sup> and further that res judicata does not apply because applicant is seeking registration under Section 2(f).

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<sup>2</sup> The examining attorney based the genericness refusal on Section 23 of the Act, but because applicant is seeking registration on the Principal Register and not the Supplemental Register, the appropriate basis for refusal remains Section 2(e)(1).

<sup>3</sup> Apart from the question of res judicata, we note that when applicant initially amended the application to seek registration under Section 2(f) it was not an alternative one and thus applicant effectively conceded that the mark is not inherently distinctive. See *Yamaha International Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988). It was not until after the examining attorney issued a final refusal that applicant argued against the

The refusals were ultimately made final, and applicant appealed. Applicant and the examining attorney have filed briefs.

We turn first to the refusal based on res judicata. A second suit is barred by res judicata if (1) there is identity of parties (or their privies); (2) there has been an earlier final judgment on the merits of a claim; and (3) the second claim is barred on the same set of transactional facts as the first. See *Sharp Kabushiki Kaisha v. ThinkSharp, Inc.*, 448 F.2d 1368, 79 USPQ2d 1376, 1378 (Fed. Cir. 2006; *Mayer/Berkshire Corp. v. Berkshire Fashions, Inc.*, 424 F.3d 1229, 76 USPQ2d 1310, 1312 (Fed. Cir. 2005).

The prior case (application Serial No. 78714647) involved the same applicant, the same term, TREERADAR, the same goods as those herein, and substantially the same services.<sup>4</sup> Applicant does not argue otherwise. In a final decision issued September 18, 2008, the Board affirmed the examining attorney's refusal to register the mark under Section 2(e)(1) of the Trademark Act on the ground that the mark is merely descriptive of applicant's

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descriptiveness refusal in the alternative. Nevertheless, because the examining attorney did not treat the matter as conceded, we will not do so here.

<sup>4</sup> The services in the prior application were identified as "scientific and technological services, namely, measuring, imaging and analyzing sub-surface tree viability and decay and internal structure of trees and root masses, and quantitative analysis of tree health and structural integrity." The present application, which substitutes "internal and sub-surface wood structure" for the wording "internal structure of trees," is broad enough to encompass the earlier services.

goods and services. Thus, the doctrine of res judicata applies and precludes relitigation of the issue of descriptiveness.

Accordingly, we turn to the question of whether the mark is generic and, if not, whether the evidence is sufficient to establish that the mark has acquired distinctiveness under Section 2(f).

The test for determining whether a mark is generic involves a two-step inquiry. First, what is the genus (category or class) of goods or services at issue? Second, is the term sought to be registered understood by the relevant public primarily to refer to that genus (category or class) of goods or services? See *In re Reed Elsevier Properties Inc.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007) (quoting *H. Marvin Ginn Corporation v. International Association of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986)).

The Office has the burden of proving the genericness of a term by "clear evidence" of the public's understanding thereof. *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987).

There is no dispute that the category or class of goods and services is the wording used in the application to identify the goods and services. See *Magic Wand, Inc. v. RDB, Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991) ("...a proper genericness inquiry focuses on the description of services [or

goods] set forth in the [application or] certificate of registration"). As set forth in the application, the category of goods comprises "radar imaging systems for non-invasive assessment of tree...health"; the category of services comprises "imaging...internal and sub-surface wood structure, viability and decay..."

The question, then, is whether TREERADAR is understood by the relevant public, in this case professional arborists and other tree care specialists, primarily to refer to the category of goods and/or services. See *Magic Wand*, 19 USPQ2d 1551; *Marvin Ginn*, 228 USPQ at 530.

Evidence of the relevant public's understanding of a term may be obtained from any competent source including consumer surveys, dictionary definitions, newspapers and other publications. See *Merrill Lynch*, 4 USPQ2d at 1143. See also *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) (online sources are probative of how a term would be perceived); *In re Reed Elsevier Properties Inc.*, 482 F.3d 1376, 82 USPQ2d 1378, 1381 (Fed. Cir. 2007) ("third-party websites are competent sources to show what the relevant public would understand a term to mean").

We note that TREERADAR is properly considered a compound word for purposes of the genericness analysis rather than a phrase, as the two terms appear without any space or separation

between them. See *In re American Fertility Society*, 188 F.3d 1341, 51 USPQ2d 1832, 1837 (Fed. Cir. 1999) regarding the genericness test set forth in *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110 (Fed. Cir. 1987) (finding SCREENWIPE generic for premoistened, antistatic cloth for cleaning computer and television screens).

Where a mark is a compound word (such as SCREENWIPE) the USPTO may satisfy its burden of proof with dictionary definitions or other evidentiary sources that each of the constituent words is generic, and "if the compound word would plainly have no different meaning from its constituent words, ... then the compound word too has been proved generic. No additional proof of the genericness of the compound word is required." *Id.* at 1836. See also *In re 1800Mattress.com IP LLC*, 586 F.3d 1359, 92 USPQ2d 1682, 1685 (Fed. Cir. 2009).

The examining attorney submitted dictionary definitions of the individual words "tree" and "radar," including the following:

TREE: Any perennial woody plant of considerable size (usually over twenty feet high) and growing with a single trunk.<sup>5</sup>

RADAR: A device or system consisting usually of a synchronized radio transmitter and receiver that emits radio waves and processes their reflections for display and is used especially for detecting and locating objects

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<sup>5</sup> *Webster's Revised Unabridged Dictionary* (1996, 1998).

(as aircraft) or surface features (as of a planet).<sup>6</sup>

The term RADAR is generic for applicant's goods and services. Applicant's goods are radar, and its "imaging" services are broad enough to include imaging using radar. Applicant's RADAR is used on a TREE. The term TREE names the focus or object of applicant's radar imaging system and services. As described in the identification of goods, applicant's radar is used to assess the health of trees. The services, described broadly as "imaging...internal and subsurface wood structure...for viability and decay," would include imaging of the internal and subsurface structure of a tree for viability and decay.<sup>7</sup>

The generic meaning of the individual terms "tree" and "radar" is confirmed by applicant's own use of the terms on its specimen label and the promotional information on its website, examples of which are reproduced below.

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<sup>6</sup> Merriam-webster.com.

<sup>7</sup> The radar detects, for example, hollows and cracks inside the trunk which indicate conditions of decay in the tree. See App's. Resp. dated June 15, 2010; exh. 117 (printout from applicant's website, treeradar.com). The definition of "radar" suggests that radar detects only "surface" objects. However, applicant's radar system uses technology that enables the detection of "subsurface" objects as well. As described on applicant's website, the technology is known as "ground penetrating radar (GPR)" which, according to the website, "is an established technology that is used worldwide to non-destructively investigate subsurface objects. Here, 'subsurface' means 'below the bark', i.e., inside the solid wood, or 'below the grade', i.e., root bed, for the trunk and subsurface scans, respectively."



**TREE RADAR**  
Radar Imaging for NON-INVASIVE Assessment of Tree and Root Health

TreeRadar™ is a major step in the application of arboricultural mitigating procedures to prolong the life of trees.

### TreeRadar - MRI for Trees

... a major step in the application of arboricultural mitigating procedures to prolong the life of trees.

Much like an MRI solves a critical medical need for very high-resolution, non-invasive imaging of the body, the Tree Radar Unit (TRU™) radar imaging system creates the same type of high-resolution, non-invasive image of the internal structure of a tree and its root mass. This image fills a critical gap in the quantitative analysis of tree health and structural integrity.

TreeRadar has developed the patented TRU system for tree diagnosis that represents a novel application of ground penetrating radar (GPR) technology. GPR is an established technology that is used worldwide to non-destructively investigate subsurface objects.

Here, "subsurface" means "below the bark", i.e., inside the solid wood, or "below the grade", i.e., root bed, for the trunk and subsurface scans, respectively.

### Serious Consequences Result from Undetected Tree Decay

Decay entering the tree trunk from the ground (or sometimes advancing down from above) creates an air pocket in the removed wood space. The air pocket can be either a total hollow, or a very early stage of decay where the wood consistency has changed but no visible hollow has yet appeared. The TRU system is sensitive to, and can detect, both conditions, including difficult-to-detect early stage decay. TRU can also detect internal cracks and cracks that have progressed to the outer surface, but are not yet visible.



Most trees fall over because of compromised roots. The TRU system can non-invasively inspect soils - either covered or

Damage from trunk decay.

- TRU System & Software
- Trunk Inspections
- Root Inspections
- FAQ's
- Training & Workshops
- Inspection Services
- Work in Progress
- Case Studies
- Press & Publicity
- Pricing
- Arborists Links
- About Us
- Contact Us
- Home

The TRU™ System

These materials state, for example, that applicant provides "Radar Imaging For...Assessment of Tree...Health"; that

applicant's "radar imaging system creates...[an] image of the internal structure of a tree..."; and that applicant's "TRU [Tree Radar Unit]...can detect...early stage decay." Applicant's own use of the individual words in a generic manner is strong evidence that the combined term is generic. See, e.g., *Gould Paper Corp.*, 5 USPQ2d at 1112 ("[applicant's] own submissions provided the most damaging evidence that [the word SCREENWIPE is generic]."); *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978) ("Evidence of the context in which a mark is used...in advertising material...is probative of the reaction of prospective purchasers to the mark"); *In re Educational Communications, Inc.*, 231 USPQ 787, 790 (TTAB 1986) ("applicant's own highly descriptive usages of the components of its asserted mark...is strong evidence of its generic nature").

Under the analysis in *Gould*, where the term SCREENWIPE was held generic for cloth for cleaning computer and television screens, the term TREERADAR is generic for radar imaging goods and services used to assess the health of trees. Based on the dictionary definitions and applicant's own labeling and promotional materials, the individual words "tree" and "radar" are generic, and the relevant public would not understand TREERADAR to have any meaning apart from the meaning of the individual terms combined. TREERADAR "immediately and

unequivocally describes the purpose, function and nature of the goods" and services. Gould Paper Corp., 5 USPQ2d at 1112.

The record also includes evidence showing use of the combined term "tree radar" by others in a generic manner to refer to the same type of goods and services provided by applicant. This evidence consists of excerpts of articles from the LexisNexis database (supplemented by applicant's submission of the full text of the articles) and printouts from third-party websites. Pertinent portions of these materials are reproduced below (emphasis added):

HEADLINE: Downtown tree on chopping block  
BODY: ... **Tree radar tests**, performed in 2003 and 2006, showed irreparable damage, said Ray Weaver, a spokesman for the city. The non-invasive tests shoots electromagnetic waves into the trunk and produces a cross-sectional image of the tree, showing the amounts of hard and soft wood present, he said.  
*The Capital* (Annapolis, MD) (August 17, 2006)

HEADLINE: Device helps show whether trees are dangerous  
BODY: .... Today, new technology would allow arborists to see inside such a tree to precisely gauge the extent of the damage. ... "It's basically a virtual drill," Tony Mucciardi of **TreeRadar Inc.** told local arborists Tuesday during a visit to Rochester. ... At \$17,500, **tree radar** isn't something to rush out and buy at the local hardware store. ... Within a few years, the company expects that arborists across the country will be offering **tree radar analysis** to homeowners for a few hundred dollars. ... Rochester won't likely make the investment in **tree radar** any time soon but Nolan can see its benefit.  
*Rochester Democrat and Chronicle* (New York) (October 27, 2005)

AUSTIN NEWS - KXAN.COM

[Heading] City: 30 high-risk Zilker trees must go:  
... "Compared to some of the trees in the pool area,  
that's one of the better ones," said Passmore. "That  
tree in particular was one that rated 100 percent  
sound wood at every **tree radar point** that we took."  
... The analysis included ... using radar imaging to  
determine the internal wood structure.  
kxan.com

AUSTIN CITY COUNCIL - AGENDA

Subject: ...tree assessment services for the Barton  
Springs Pool area in an amount not to exceed \$56,456.  
... [T]rees were identified as needing additional  
assessment to better determine their health,  
including the use of advanced techniques, such as  
**tree radar**. ... The Consultant will...investigate  
the structural integrity of the lower and upper trunk  
sections and branches using non-invasive technology  
such as **a tree radar**....  
ci.austin.tx.us

PEOA Forum at Nillumbik 06 September 2007 Newsletter:  
Vegetation enforcement and tree identification:  
Arborist Nick Archer

Nick Archer, an arborist that has worked with  
Nillumbik Shire gave an excellent presentation on  
tree poisoning, tree protection fences, reducing  
construction impacts and hazardous trees. However he  
ran out of time and has not covered **tree radar** or DNA  
testing of trees.

[http://planning-enforcement.com/doc/PEOA\\_Newsletter\\_No\\_1.doc](http://planning-enforcement.com/doc/PEOA_Newsletter_No_1.doc)

Tree Checks, Tree Management Systems - Professional  
Arboricultural Consultants

We provide: ... Root tracking and mapping services  
(**tree radar**); Internal trunk cavity detection (**tree  
radar**)....

[homeimprovementpages.com.au](http://homeimprovementpages.com.au)

Tree Micro-Ecology: Perceptions of Disease & Decay  
in Trees

TEP'S TREE MICRO-ECOLOGY SEMINAR - HIGHLIGHTS

TEP had put together a very compact, in-depth  
programme covering the micro-ecology of the living  
soil, use of innovative devices for tree decay

detection (thermal imaging and **tree radar**), and tree condition surveys in the UK and USA.  
treeworks.co.uk

Contrary to applicant's contention, the fact that some of the websites are from foreign sources does not detract from their probative value. These websites are readily accessible and available to arborists in the United States, and the information about new technology in their field would likely be of interest to them, regardless of the country of origin. See *In re Remacle*, 66 USPQ2d 1222, 1224 n.5 (TTAB 2002) ("[I]t is reasonable to assume that professionals in medicine, engineering, computers, telecommunications and many other fields are likely to utilize all available resources, regardless of country of origin or medium."). See also *In re Bayer Aktiengesellschaft*, 82 USPQ2d at 1835. Furthermore, applicant itself has relied on foreign websites to support its contention that TREERADAR is recognized as a mark.

Applicant argues that these materials "mistakenly" refer to applicant's mark without capitalization and that the "incorrect" spellings and usage of applicant's mark are reporter's errors "which have been corrected." Br., p. 5. There is no evidence that the asserted errors have been corrected, and in any event, these materials still provide evidence of the context of use, the exposure of the term in a generic manner to the relevant public,

and the meaning the public is likely to associate with the term as a result of such use.

Applicant also argues that every mention of the term in these materials refers to applicant and its product.<sup>8</sup> This is not surprising considering that applicant apparently holds a patent for its particular use of GPR technology (i.e., to detect internal decay in a tree),<sup>9</sup> and appears to be one of the only producers of this type of radar device. Further, to the extent that some of these third parties may be customers of applicant, as applicant claims, we view this as evidence that even applicant's own customers do not recognize "tree radar" as a mark. They may recognize applicant as a producer of a "tree radar" device but the term "tree radar" is used by these third parties in a generic manner to denote a particular type of device

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<sup>8</sup> Applicant has resubmitted a declaration by its president, Anthony N. Mucciardi, that was originally submitted in the prior application but rejected by the Board in that case as untimely. The declaration attests to applicant's business relationships with entities identified in certain evidence made of record by the examining attorney in that case. Mr. Mucciardi ultimately states in the declaration that "There is no attachment in the examining attorney's Attachments 1-32 which...does not refer to Applicant's TreeRadar." Inasmuch as none of the referenced attachments was made of record in the present case, the declaration is of little probative value. Nevertheless, we will assume for purposes of considering applicant's argument that Mr. Mucciardi's statement applies to the examining attorney's evidence in the present case.

<sup>9</sup> Mr. Mucciardi, states: "TreeRadar is a novel application - novel enough that we got a patent - of that technology [GPR] to provide a noninvasive way of looking into the tree trunk for internal decay and below ground for mapping of roots." App's. Resp., June 15, 2010, exh. 104 (*Tree Services* magazine, April 2007; article entitled "Radar Vision - New technology offers arborists a noninvasive look").

used for assessing tree health, not to indicate the source of such goods.

Even if the record reflected no use of this term by others, it would not be dispositive where, as here, the term clearly would be understood as having a generic meaning. See *In re Active Ankle Systems Inc.*, 83 USPQ2d 1532, 1538 (TTAB 2007) ("Even if applicant was the first and/or sole user of a generic term or phrase, ...that does not entitle applicant to register such a term or phrase as a mark."); *In re National Shooting Sports Foundation*, 219 USPQ 1018, 1020 (TTAB 1983). As we noted earlier, the relevant inquiry is whether the relevant public would *understand* the term to have generic significance. It is not necessary to show that the relevant public actually uses the term generically. See *In re 1800Mattress.com IP LLC*, 586 F.3d 1359, 92 USPQ2d 1682, 1685 (Fed. Cir. 2009).

The examining attorney has established *prima facie* that the relevant public would understand TREERADAR to identify a type of radar imaging system and service. Applicant's arguments and evidence fail to rebut this showing.<sup>10</sup>

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<sup>10</sup> Contrary to applicant's contention, the examining attorney's suggestion in the previous application that applicant amend its application to the Supplemental Register is not evidence in the present case that the mark is not generic. Suffice it to say that the issue in that case was descriptiveness, not genericness, and an amendment to the Supplemental Register was neither proffered by applicant nor accepted by the examining attorney.

Applicant has submitted evidence from various news sources and other publications, as well as third-party websites which, according to applicant, demonstrates that these words have been used by applicant's customers and others as a trademark to indicate source or origin in applicant for its radar imaging goods and services. Representative examples of applicant's evidence are excerpted below (emphasis added).

Tree Services: For Tree Care/Landscape Contractors & Arborists:

[article entitled] Radar Vision - New technology offers arborists a noninvasive look:

Why, then, would a tree care professional pull out a drill or boring device to check on the health status of a prized tree? Tony Mucciardi wondered the same thing, and from his questioning, **TreeRadar** ([www.treeradar.com](http://www.treeradar.com)) was born. ... "**TreeRadar** is a novel application...of [GPR] technology to provide a noninvasive way of looking into the tree trunk for internal decay...."

*Tree Services* [magazine] (April 2007)

DNR Forest Service to Test Health of Trees at Government State House Using Special MRI-LIKE Equipment:

Three linden trees and two magnolia trees will be evaluated for possible decay using a **Tree Radar unit**, the most advanced technology available for the management of historic trees in our state's capital. [dnr.state.md.us](http://dnr.state.md.us) (July 13, 2005)

The Washington Post

Scar-Free Diagnoses For Trees in Trouble  
Radar Device Allows Gentler Exams

The tree-exam invention, called a **Tree Radar Unit**, looks like a small shoebox and is built around the principles of ground-penetrating radar, which is used, among other functions, to scan for underground utility pipes.

[washingtonpost.com](http://washingtonpost.com) (November 10, 2005)

DTS Dynamic Tree Systems

**Tree Radar Evaluations**

Scanning A Tree

Scanning a tree is a straightforward process at the site. For trunk scans, several elevations designated for measurement are marked on the tree. The handheld transceiver of the TRU is moved around the tree at these markers as the equipment sends pulses into the trunk and records all signals reflected from the interior.

dynamictreesystems.com

FRONTIER TREE SERVICES - "We'll go out on a limb for you!"

**Tree Radar Unit** (TRU) and ground penetrating radar (GPR)

**TreeRadar** also scans below ground to examine the number, location, length and density of tree roots.... Use of GPR instrumentation for internal trunk decay detection and subsurface structural root mapping is now being used in the arboricultural field via a **patented Tree Radar Unit**.  
frontiertreeservices.com

TREERADARAUSTRALIA

The only non-invasive method of decay detection in a tree:

[the web page lists "**Tree Radar Services**" along with categories such as "Home" "Reports and Surveys" "FAQ" and "Enquiries"]

**Tree Radar Australia** also uses Tree Radar Unit™ (TRU™) to provide the only, completely non-invasive method of tree decay detection and tree root detection available in Australia.

treeradaraustralia.com.au

pba solutions

Ground Penetrating Radar (GPR) - **TreeRadar** for tree decay and locating tree roots:

Using the latest radar technology we can under take [sic] non-invasive tree decay assessments. ...

Other services for GPR - **TreeRadar**:

**Our TreeRadar software** has been specifically designed to locate tree roots and assess tree decay.

pba-solutions.com

Matthew's Tree Service & Landscaping  
[lists "**Tree Radar Evaluations**" and "**Noninvasive Tree Radar**" along with other categories of services, e.g., "Construction," "Habitat," and "Crane Removal"]  
Noninvasive Evaluation Using **Tree Radar**<sup>™</sup>  
Overcoming disadvantages of past techniques:  
Matthew's Tree Service Inc. now provides an innovative and noninvasive means for tree evaluation using **Tree Radar**<sup>™</sup>.  
matthewstreeservice.com

SORBUS INTERNATIONAL LIMITED  
**TreeRadar** Root Survey System:  
Ground penetrating radar system for the detection and mapping of tree roots and other underground targets.  
sorbus-intl.co.uk

Tree Associates Services  
[The navigation pane of the website lists "**Tree Radar Service**" along with other service categories, e.g., "Evaluation of Tree Health," "Tree Preservation Programs" and "Tree and Plant Appraisal"]  
**Tree Radar Unit** (TRU) Services:  
Tree Associates is one of the few companies that own a **Tree Radar Unit** (TRU) which utilizes ground penetrating radar to map decay and locate tree roots in a non-invasive manner. Being one of the first users of and conducting grant-funded research with this cutting-edge technology has given Tree Associates an intimate knowledge of this tool's capabilities.  
treeassociates.net

Arborist OnSite, Inc.  
**Tree Radar** is a non-invasive imaging system that will show you the internal structure of a tree....  
arboristonsite.com

While the evidence submitted by the examining attorney clearly shows use of TREERADAR in a generic manner, most of applicant's evidence of claimed trademark use and recognition is ambiguous, at best. The evidence states, for example, that "Tree

Radar is a non-invasive imaging system that will show you the internal structure of a tree"; that the "Tree Radar Unit" provides "a method of decay detection." The evidence refers to "a patented Tree Radar Unit"; and the "cutting edge technology" of "a Tree Radar Unit"; and lists "Tree Radar" as a type of service, e.g., "Tree Radar Service"; "Tree Radar Evaluation," along with other generic categories of services. In one instance the term is used in the manner of a verb ("TreeRadar for tree decay") which indicates generic use rather than trademark use. Mr. Mucciardi himself states, in his interview with *Tree Services* magazine, that "TreeRadar...provide[s] a noninvasive way of looking into the tree trunk for internal decay...."

We note applicant's claim that Tree Radar Australia may be a customer of applicant. However, that entity is using "Tree Radar" not as identifying a product or service from applicant but as part of its own company name. Another entity ("pba solutions") appears to be using TreeRadar to refer to its own product ("Our TreeRadar software has been specifically designed to...assess tree decay"). This evidence suggests that the term may not be viewed as identifying any one source, or source in applicant alone.

Furthermore, the mere fact that the term is depicted with initial capital letters in these materials, while perhaps serving to highlight this new product and technology (e.g., "tree-exam

invention called a Tree Radar Unit"; "a Tree Radar unit, the most advanced technology available"), does not change it into a registrable term. See *In re Noon Hour Food Products Inc.*, 88 USPQ2d 1172, 1173 n.2 (TTAB 2008) ("[M]inor variations in the display of a generic term...typically are legally insignificant."); *In re Hannifin Corporation*, 122 USPQ 298 (TTAB 1959) ("An apt descriptive name of a product remains an apt descriptive name irrespective of how it is spelled or displayed").

We find that the clear and unambiguous meaning of the components comprising the term "TREERADAR" as well as the generic manner of use of the term by others is far more convincing evidence of public perception of the term than applicant's evidence which at most shows that a handful of customers view TREERADAR as a mark.

Although we have determined that TREERADAR is generic, in the interest of completeness, we will address the question of whether, assuming the mark is not generic, the evidence of acquired distinctiveness is sufficient to support registration under Section 2(f).

The burden is on applicant to show acquired distinctiveness, and the more descriptive the term, the heavier that burden. *Yamaha International Corp.*, 6 USPQ2d at 1008. It is clear based on the foregoing evidence that the term TREERADAR, if we had not

found it to be generic, is certainly highly descriptive of applicant's goods and services. Thus, strong proof of acquired distinctiveness is required, and applicant has not provided it.

To establish acquired distinctiveness, "an applicant must show that 'in the minds of the public, the primary significance of a...term is to identify the source of the product [or service] rather than the product [or service] itself.'" In re Dial-A-Mattress Operating Corp., 240 F.3d 1341, 57 USPQ2d 1807, 1812 (Fed. Cir. 2001), quoting Inwood Labs., Inc. v. Ives Labs., 456 U.S. 844, 851 n.11, 214 USPQ 1, 4 n.11 (1982).

Applicant has submitted, in addition to the examples of purported trademark usage noted above, the declaration of Mr. Mucciardi attesting to substantially exclusive and continuous use of the mark since 2004 on the goods and since 2003 in connection with the services.

It has been consistently held that a claim of continuous and substantially exclusive use as a mark for a number of years, without specific evidence of the extent of use and exposure of the mark to the relevant public, is insufficient in and of itself to support registration under Section 2(f) where the term sought to be registered is highly descriptive in nature. See Noon Hour Food Products, Inc., 88 USPQ2d at 1181 (evidence of nearly a hundred years of use in commerce insufficient to establish acquired distinctiveness in light of the highly descriptive

nature of BOND-OST for cheese); In re Synergistics Research Corporation, 218 USPQ 165, 167 (TTAB 1983) and cases cited therein. See also In re Kalmbach Publishing Co., 14 USPQ2d 1490, 1492 (TTAB 1989) (claim of 12-years' use insufficient); In re Gray Inc., 3 USPQ2d 1558, 1559 (TTAB 1987) (PROTECTIVE EQUIPMENT highly descriptive of burglar and fire alarms; "a showing considerably stronger than a prima facie statement of five years' substantially exclusive use is required.").

Applicant did not attempt to show that its mark has been the subject of substantial sales or advertising, or to provide any other evidence which would help determine the actual extent of purchaser exposure to and/or recognition of the mark.

Considering the highly descriptive nature of TREERADAR, applicant's minimal evidence of use and recognition of the mark is far from sufficient to demonstrate that the primary significance of TREERADAR "in the minds of the public" is to identify the source of applicant's goods and services. Therefore, we find that applicant has not shown that its mark has acquired distinctiveness.

**Decision:** The refusals under Section 2(e)(1) of the Act on the grounds that the mark is generic, that based on res judicata the mark is merely descriptive, and that the evidence is insufficient to establish acquired distinctiveness are affirmed.