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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re A2D Technologies, Inc.

Serial No. 77806767

William P. Jensen of Crain, Caton & James, P.C. for A2D Technologies, Inc.

John S. Yard, Trademark Examining Attorney, Law Office 115 (John Lincoski, Managing Attorney).

Before Seeherman, Zervas and Shaw, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

A2D Technologies, Inc. has applied to register SMARTRASTER, in standard characters, as a trademark for "scientific research in the fields of oil and gas well log data; compiling data for research purposes in the fields of oil and gas well log data, geophysical exploration and well

logging; providing on-line well log data in the field of oil and gas well logging via a global computer network."¹ Applicant claimed, in its initial application papers, that its mark is registrable pursuant to the provisions of Section 2(f) of the Trademark Act. Applicant has also claimed ownership of a Supplemental Registration, No. 2327393, for SMARTRASTER for "computer readable storage media containing geological information relating to oil, gas, minerals and the environment."

The examining attorney issued a final refusal of registration pursuant to 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 the identified services, and that applicant has not demonstrated that its mark has acquired distinctiveness, and therefore is not registrable pursuant to Section 2(f).

Applicant has appealed this refusal.

Section 2(e)(1) prohibits the registration of a mark which, when used in connection with the identified services, is merely descriptive of them. Section 2(f)

¹ Application Serial No. 77806767, filed August 18, 2009, asserting first use and first use in commerce as early as November 23, 1995. The application originally included goods in Classes 9 and 16 as well; during the course of prosecution applicant amended its application to delete these goods, and also amended the identification of services in order to avoid the refusal under Section 2(e)(1).

provides that a mark that would otherwise be prohibited from registration by Section 2(e)(1) may be registered if it has become distinctive of the applicant's goods or services in commerce.²

As a preliminary matter, we note that in its brief applicant argued that its mark is not descriptive and "the Examining Attorney failed to meet his burden to establish descriptiveness," brief, p. 5. However, because applicant has sought registration under Section 2(f), and has not made this claim in the alternative, it has admitted that its mark is not inherently distinctive. In re Thomas Nelson Inc., 97 USPQ2d 1712, 1713 (TTAB 2011) (If an applicant initially seeks registration based on acquired distinctiveness or amends its application to seek registration based on acquired distinctiveness without expressly reserving its right to argue that its mark is inherently distinctive, [seeking] registration under Section 2(f) is an admission that the mark is not inherently distinctive). Accordingly, the question of

² Specifically, Section 2(f) provides, inter alia, that "Except as expressly excluded in subsections (a), (b), (c), (d), (e)(3), and (e)(5) of this section, nothing herein shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods in commerce." Section 3 of the Trademark Act provides that "Subject to the provisions relating to the registration of trademarks, so far as they are applicable, service marks shall be registrable, in the same manner and with the same effect as are trademarks..."

whether the mark is inherently distinctive is not before us, and it is applicant's burden to demonstrate that its mark has acquired distinctiveness, not the examining attorney's burden to show that the mark is merely descriptive.

Further, the greater the degree of descriptiveness, the greater the evidentiary burden on applicant to establish acquired distinctiveness. See *In re Bongrain International Corp.*, 894 F.2d 1316, 1317 n.4, 13 USPQ2d 1727, 1728 n.4 (Fed. Cir. 1990); *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988). Therefore, in order to assess the sufficiency of applicant's evidence of acquired distinctiveness, we must first consider the evidence of the descriptiveness of SMARTRASTER for the identified services.

The examining attorney has made of record dictionary definitions for "smart" and "raster" which read, in relevant part, as follows:

Smart: *Informal*. Equipped with, using, or containing electronic control devices, as computer systems, microprocessors, or missiles: a *smart phone*; a *smart copier*.³

Raster: pattern of horizontal scanning lines: the pattern of horizontal scanning lines made by an electron beam on the surface of a cathode-ray

³ <http://dictionary.infoplease.com>, using definition taken from Random House Unabridged Dictionary, © 1997.

tube that create the image on a television or computer screen.⁴

The examining attorney has also submitted evidence that the terms "smart raster" and "smart raster technology" are used in the field of geology and oil and gas exploration. This evidence shows that smart rasters are being used as a replacement for paper well logs:⁵

First proposed by Interpretive Imaging LLC, smart rasters are raster images of well logs enhanced with depth calibration information.
"Oil & Gas Journal," December 16, 1996

*

'Smart" raster logs can boost productivity of geologists (headline)

...

Today, four years after its introduction [in 1995], smart raster technology is coming of age. Large and small oil companies have enthusiastically embraced the software and

⁴ <http://encarta.msn.com>, using definition from Encarta World English Dictionary © 2009.

⁵ Some of the evidence submitted by the examining attorney use the terms "raster" or "smart raster" in connection with bar code scanners and other items/services that are either unrelated to the identified services or for which we cannot ascertain the goods or services. This includes the Google search summary results that the examining attorney included with his denial of applicant's request for reconsideration. See TBMP § 1208.03 and cases cited therein at Note 5 ("A search result summary from a search engine, such as Yahoo! or Google, which shows use of a phrase as key words by the search engine, is of limited probative value" because "there may be insufficient text to show the context within which a term is used"). We also have given no weight to the excerpts from the website <http://thestatueofliberationthroughchrist.org>. Although the webpages include what appears to be a relevant statement, "Smart raster well logs are used today in a wide variety of basins," there are so many apparently irrelevant and strange statements included in the webpages that it raises questions about what has been reported on the website.

converted tens of thousands of paper well logs into smart raster format. ...

In this article, E&P professionals from five companies give their views to help readers better understand the uses and benefits of smart raster technology.

...

Smart raster benefits [subtitle]

...

Relative to paper, smart raster software is faster. Relative to digital, raster well logs are more cost-effective.

"Raster is faster, and cheaper," says Wayne Gibson, a geologist with Cross Timbers Oil Co. in Fort Worth. "Rasterizing is a normal step toward digitizing these days. Then depth calibration turns a 'dumb' raster into a 'smart' raster. That allows you to do almost everything you can with a digital well log, but it costs a whole lot less.

...

"Whether you're interested in regional exploration or field characterization, smart raster technology is an inexpensive way to get your logs computerized,"...

...

Smart raster well logs are used today in a wide variety of basins, plays, and projects.

"Oil & Gas Journal," April 10, 2000

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Rasters Are Getting Smarter (headline)

...

Today, four years after its introduction, smart raster technology is coming of age, as large and small companies are embracing the software and converting tens of thousands of paper well logs into smart raster format.

"With 'smart' raster technology," says one geologist, "I correlated approximately 1,200 wells in two days. If I'd had to use hard-copy logs, this would have been impossible."

...

In 1995, things began to change. Denver-based start-up company interpretive imaging released

the industry's first "smart" raster well log technology, combining a whole new data format, along with log interpretation software.

...

Software developers such as GeoGraphix have recently added rasters to their existing array of digital formats. The latest smart raster software also can handle digital LAS logs as effectively as raster data.

Interpretive Imaging recently merged with A2D Technologies [applicant], providing oil companies with access to both smart raster and digital well log information.

The industry's raster data infrastructure is maturing. Smart raster technology is rapidly moving from the early adopters to the mainstream.

...

Smart raster well logs are used today in a wide variety of basins, plays and projects...

Explorer, June 2000, www.aapg.org

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'Smart' raster logs can boost productivity of geologists [title]

The Oil and Gas Journal, April 10, 2000
AccessMyLibrary, www.accessmylibrary.com

*

Ontario Oil, Gas & Salt Resources Library
Service/User Fees

...

Digital Products and Services

...

Geophysical Logs
\$15.00/smart raster (depth calibrated TIFF)
www.ogsrlibrary.com⁶

⁶ We recognize that this website is from a Canadian organization and not an organization from the United States. However, given the nature of the customers/users of applicant's services, we consider this material to have probative value. See TBMP § 1208.03 and cases cited therein at Note 4.

A term is merely descriptive if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered to be merely descriptive; rather, it is sufficient that the term describes one significant attribute, function or property of the goods or services. In re H.U.D.D.L.E., 216 USPQ 358 (TTAB 1982); In re MBAssociates, 180 USPQ 338 (TTAB 1973). Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with the goods or services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use; that a term may have other meanings in different contexts is not controlling. In re Bright-Crest, Ltd., 204 USPQ 591, 593 (TTAB 1979).

The evidence submitted by the examining attorney shows that "smart raster" is the term used for the display of "calibrated" or enhanced well log data or well log images,

or the technology to produce such images. Further, deleting the space between "smart" and "raster" to make the compound term SMARTRASTER does not change the commercial impression of the term; consumers will understand SMARTRASTER to be the equivalent of "smart raster." In fact, as displayed in applicant's specimen and other literature, with "smart" shown in lower case and "raster" in upper case, the composition of the mark as consisting of the two words is emphasized. Thus, applicant's mark is highly descriptive of its services, as it immediately tells consumers that a major characteristic of the imaging of the data in its service of "compiling data for research purposes in the fields of oil and gas well log data, geophysical exploration and well logging" and its services of "providing on-line well log data in the field of oil and gas well logging via a global computer network" uses smart raster technology. That is, the mark describes the fact that applicant's SMARTRASTER services add more information and functionality to conventional well log raster images. See *In re Cryomedical Sciences Inc.*, 32 USPQ2d 1377, 1378 (TTAB 1994), in which the Board recognized, more than 15 years ago, that "[t]he 'computer' meaning of the term 'smart,' as is the case with many 'computer' words, is making its way into the general language." The fact that

applicant has chosen to omit the specific words "smart" and "raster" from its identification of services does not avoid the fact that "smart rasters" are an integral element of its services.

Because SMARTRASTER is highly descriptive of applicant's services, applicant has a concomitantly heavy burden to show that the term has acquired distinctiveness as applicant's trademark. To show that its mark has acquired distinctiveness, applicant stated, in its initial application papers, that "the mark has become distinctive of the goods/services through the applicant's substantially exclusive and continuous use in commerce for at least the five years immediately before the date of this statement," i.e., for the five years prior to August 18, 2009. Applicant has also asserted that use of its mark commenced in November 1995. In addition, in its request for reconsideration, applicant stated that it has attached "statistics and soft copies of information regarding SMARTRASTER." We examine this evidence in turn.

Applicant states that Exhibit A contains "several marketing flyers." There is no information as to the number of these flyers that were distributed to potential customers, or how they were distributed.

Applicant states that "the spreadsheet attached as Exhibit B lists the web pages that contain Applicant's SMARTRASTER mark, the number of visitor by period to those websites, and the two press releases that contained Applicant's SMARTRASTER mark." Request for reconsideration. What applicant has submitted are two pieces of paper which list the urls of three different websites, and under each url the number of "pageviews" by month, showing pageviews for the year from February through November 2010 for two of the websites, and pageviews from December 2008 through November 2010 for a third website. Pages from the websites themselves were not submitted, so we cannot determine whether or how SMARTRASTER may have appeared on the webpages that were viewed in order to ascertain whether viewers actually saw the mark, or if they did, what impact it might have had. Moreover, we consider the number of pageviews to be rather limited. For one website, the views were in single digits, except for 13 views in December 2008 and no views in June 2009, so that for the entire period December 2008 through November 2010, there were a total of 103 pageviews. The other websites received more views—in the general range of 500-600 per month for one, and in the range of 1000-1200 for another. However, there is no information as to whether each

pageview represents a different individual accessing the page, such that there were thousands of individuals who were exposed to applicant's mark, or whether the number of pageviews represents many of the same individuals accessing the websites at different times, such that the number of viewers was quite limited. In light of the services, which involve data compilation and providing data which could be updated on a regular basis, it is certainly possible that the same persons regularly view the webpages.

As for the press releases that applicant has referenced in the request for reconsideration, Exhibit B lists only the title and date of the press releases. Applicant has not submitted the press releases themselves, so that we can ascertain the impact that its use of SMARTRASTER may have had on readers. And, more importantly, we have no information as to whether these press releases were published in any journals or otherwise viewed by customers.

Applicant states that Exhibit C is a March 2003 marketing email that was sent to 3,712 people. It appears to be an attachment to an email since it is in the nature of a single page flyer. The most prominent text is the words "TAKE ADVANTAGE of BASIN WIDE DATA," which appears at the top of the page near a map of the United States, and

the logo A2D appears separately, in large form, at the bottom of the page. The term "smarTRASTER" appears in two places within the paragraphs of text, i.e., "A2D's smarTRASTER Advantage Program provides instant, basin-wide access to the largest online collection of depth calibrated and intelligent raster logs in your area of interest"; and "A smarTRASTER Advantage commitment through A2D's leading LOG-LINE PLUS! data center meets the needs of both large and small exploration programs." Certainly applicant has not used a "look for" format that would indicate that the mark will stand out to consumers. At best, the depiction of the two words in the combination of lower case and upper case as smarTRASTER may indicate to consumers that the term is not merely the generic name for the images, but is meant to be a trademark.

Applicant also states that a further email "marketing Applicant's SMARTRASTER mark, was sent to 3,863 people." Request for reconsideration, December 27, 2010. However, applicant has not provided this email, or the date it was distributed, nor do we know the manner in which the mark was shown in it.

As we have previously stated, it is applicant's burden to demonstrate that its mark has acquired distinctiveness. First, we must comment on the examining attorney's point

that applicant did not submit a declaration supporting its claims of acquired distinctiveness, with the exception of the statement of five years and continuous and exclusive use that was part of its initial application. The other statements about its use, and the characterization of the exhibits were made by applicant's attorney as part of the request for reconsideration, and the exhibits were not supported by a declaration. Although in many situations it is preferable for an applicant to submit evidence of acquired distinctiveness by a declaration, in this case there is no reason to doubt that the exhibits are genuine or that the statements made by applicant's attorney regarding the exhibits are inconsistent or not credible. Therefore, we have given the exhibits and the accompanying statements full probative value.

However, given the highly descriptive nature of SMARTRASTER for the identified services, the evidence submitted by applicant falls far short of establishing that SMARTRASTER is perceived as applicant's trademark, rather than as the term used for the data that it compiles and provides, i.e., the data that is the subject matter of its services. In addition to the gaps about the information about the pageviews, distribution of flyers, etc., as discussed above, we also note that applicant has not

provided any evidence about its advertising expenditures or number of consumers.

We acknowledge that the manner in which applicant has used SMARTRASTER in its flyer and email, i.e., with "smart" in lower case and "RASTER" in upper case, is somewhat unusual and, because of this depiction, consumers could understand that applicant is using the term as a trademark. To be clear, the evidence submitted by applicant is not sufficient to show that even in this form the mark has acquired distinctiveness. But in any event, applicant is not seeking to register "smarTRASTER" in the way it is depicted in its materials. Rather, it has applied for the mark as SMARTRASTER, in standard character format. While USPTO policy, in general, allows the registration of a term that is used in a combination of upper and lower case letters to be registered in standard character format, in this particular case, a registration issuing to applicant in such format would allow applicant to use the mark as SMARTRASTER, and certainly applicant has not demonstrated that SMARTRASTER has acquired distinctiveness as a mark identifying the source of applicant's services.

Accordingly, because SMARTRASTER is merely descriptive of applicant's identified services, and because applicant has not demonstrated that it has acquired

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distinctiveness as a mark and that it is entitled to registration under Section 2(f) of the Trademark Act, SMARTRASTER is prohibited from registration by Section 2(e)(1) of the Act.

Decision: The refusal of registration is affirmed.