

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Border Media Partners, L.L.C.

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Serial No. 78491274

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Cline H. White of Tuggey Rosenthal Pauerstein Sandoloski  
Agather LLP for Border Media Partners, L.L.C.

Dominick J. Salemi, Trademark Examining Attorney, Law  
Office 106 (Mary Sparrow, Managing Attorney).

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Before Seeherman, Hairston and Taylor, Administrative  
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Border Media Partners, L.L.C. filed an application to  
register on the Principal Register the mark DIGITAL for  
"radio broadcasting services" in International Class 38."<sup>1</sup>

The examining attorney finally refused registration on  
the ground that the mark is merely descriptive under

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<sup>1</sup> Application Serial No. 78491274, filed September 29, 2004,  
alleging first use anywhere and first use in commerce on November  
30, 2002.

Section 2(e)(1) of the Trademark Act, 15 U.S.C.

§1052(e)(1). Concurrent with a notice of appeal, applicant filed a request for reconsideration. The Board instituted the appeal, but suspended action on it and remanded the application to the examining attorney for consideration of applicant's request for reconsideration. The examining attorney denied applicant's request for reconsideration, and the Board resumed proceedings in the appeal.

Thereafter, applicant filed an amendment to the Supplemental Register. The Board again suspended proceedings in the appeal, and remanded the application to the examining attorney for consideration of the amendment to the Supplemental Register. The examining attorney finally refused registration of applicant's mark under Section 23 of the Trademark Act, 15 U.S.C. §1091, on the ground that applicant's mark is generic and, therefore, incapable of identifying applicant's services and distinguishing them from those of others.

Applicant and the examining attorney filed briefs; applicant filed a reply brief.

Before addressing the merits of the substantive refusal, we discuss a procedural issue. In the "Issues" section of its brief, applicant states:

Applicant appeals the Examiner's ruling and seeks a determination that the Mark is not merely descriptive of the described services, and registration of the Mark on the principle [sic] register be allowed. Alternatively, if the TTAB determines the Mark is merely descriptive, Applicant seeks a determination that the Mark is not generic for the described services, and registration of applicant's Mark on the supplemental register be allowed.

(Brief, p. 2)

Applicant's amendment to the Supplemental Register, however, does not state that it was made "in the alternative," that is, that the amendment is conditional on the Board first finding that the mark is not registrable on the Principal Register because it is merely descriptive. We find, therefore, that applicant has, by its amendment, conceded that the mark is merely descriptive, and that the issue of registrability on the Principal Register is not before us in this appeal. In view thereof, we have given no consideration to applicant's arguments in its brief and reply brief concerning mere descriptiveness.

The sole issue before us in this appeal is whether the mark is generic in connection with the identified services.

The examining attorney argues:

The term DIGITAL is the common name for an important feature of applicant's radio broadcasting services. A term that serves as the common descriptor of a key ingredient, characteristic or feature of the [services] is also generic and thus incapable of distinguishing source. (citations omitted)

(Final refusal, unnumbered page 2).

The evidence submitted by the examining attorney includes the following "Wikipedia" entry:

A digital system is one that uses discrete values rather than a continuous spectrum of values: compare analog. The word comes from the same source as the word digit: the Latin word for finger (counting on the fingers) as these are used for discrete counting. The distinction digital versus analog can refer to data storage and transfer, the internal workings of an instrument and the kind of display.

The examining attorney also submitted a definition from Merriam-Webster's Dictionary of "**digital**" as "relating to an audio recording method in which sound waves are represented digitally (as on magnetic tape) so that in the recording wow and flutter are eliminated and background noise is reduced."

The evidence submitted by the examining attorney also includes the following excerpted articles from the Nexis database with references to "*digital radio broadcasting/broadcast*":<sup>2</sup>

HD radio is a new form of *digital radio broadcasting* that allows radio stations to deliver extra music content on up to four side channels

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<sup>2</sup> One of the Nexis excerpts is from a newswire. Newswire stories do not have the same probative value as stories appearing in newspapers and magazines. In re Cell Therapeutics Inc., 67 USPQ2d 1795 (TTAB 2003). In this case, we find the newswire story to be cumulative. Also, several of the Nexis excerpts are from foreign publications. We have not given any weight to these excerpts since we cannot determine what extent consumers in the United States have been exposed to them.

that piggyback the frequency it already uses.  
Wisconsin State Journal, June 4, 2007;

Sony Corp. says it will introduce its first HD radio products in July, joining the growing group of companies seeking to make the next-generation digital radio technology a standard feature in audio products over the next several years. HD radio is a new form of *digital radio broadcasting* that allows radio stations to deliver extra music content on up to four side channels that piggyback on the frequency it already uses.  
Tribune-Review (Greensburg, PA), May 30, 2007;

HD *digital radio broadcasts* will air on 95% of Clear Channel Radio stations in the top 100 markets by the end of 2007 underlining the company's commitment to the aggressive roll out of HD digital radio.  
Business Wire, August 17, 2006;

And because NIPR is the pioneer in *digital-radio broadcasting* in this corner of the state, those pioneer listeners who spring serious bucks for digital radios will have only three ...  
Fort Wayne News Sentinel, October 14, 2005; and

... iBiquity expects that up to 300 stations coast to coast will be offering its services by the end of the year - the New York market included. One reason: Investment for *digital radio broadcasting* equipment is a relative bargain at about \$80,000.  
The Augusta Chronicle, January 23, 2003.

Finally, the examining attorney points to the manner in which DIGITAL appears on applicant's specimen as evidence that the term "digital" is generic in connection with the services.

Applicant argues that the examining attorney has not established by clear evidence that DIGITAL is generic in connection with applicant's services because neither the

"Wikipedia" entry nor the dictionary definition relied on by the examining attorney makes mention of "radio broadcasting services." With respect to the dictionary definition, in particular, applicant argues that it does not support a finding of genericness with respect to applicant's radio broadcasting services because the definition relates to an audio recording method. Further, applicant maintains that a search of the online version of The American Heritage Dictionary for the term "digital" revealed thirty-eight entries, none of which refers to "digital broadcasting services;" and that a "Google" search for "digital" revealed that among the first 100 "hits" there is no mention of "radio broadcasting services."<sup>3</sup> With respect to the Nexis excerpts submitted by the examining attorney, applicant maintains that such excerpts are not probative because they do not show use of the term "digital" in connection with "what consumers hear disc jockeys say on the radio." (Reply brief, p. 3). In view of the foregoing, it is applicant's position that DIGITAL is not generic in connection with radio broadcasting services.

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<sup>3</sup> We note that applicant submitted the dictionary entries, but did not submit the "Google" search results.

The critical issue in determining genericness is whether members of the relevant public primarily use or understand the designation sought to be registered as a reference to the genus or category of services in question. *H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986). In making our determination, we follow the two-step inquiry set forth in *Marvin Ginn*:

- (1) What is the genus or category of services at issue?, and
- (2) Is the designation sought to be registered understood by the relevant public primarily to refer to that genus or category of services?

Evidence of the public's understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers and any other publications. See *In re Merrill Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987), and *In re Northland Aluminum Products, Inc.*, 777 F.2d 1556, 227 USPQ 961 (Fed. Cir. 1985).

In this case, the genus or category of services involved here is commensurate with the identification of services, namely, "radio broadcasting services."

We next must determine whether the purchasing public understands DIGITAL to refer to the genus of services at issue. In making this determination, we note that the

Board has held that adjectives, not just nouns, can be deemed to be generic. Adjectives are generic if they name a key characteristic or feature of the goods or services. In re Central Sprinkler Co., 49 USPQ2d 1194, 1199 (TTAB 1998) [Applicant's mark ATTIC did not fall within the classic case of a generic noun, but rather was a generic adjective; nonetheless the Board held that because the term "attic" "directly names the most important or central aspect or purpose of applicant's goods, that the sprinklers are used in attics, this term is generic and should be freely available for use by competitors"]. See also In re Northland Aluminum Products, Inc., supra [BUNDT for coffee cake held generic]; In re Sun Oil Co., 426 F.2d 401, 165 USPQ 718 (CCPA 1970) [CUSTOMBLENDED for gasoline held generic]; In re Helena Rubenstein, Inc., 410 F.2d 438, 161 USPQ 606 (CCPA 1969) [PASTUERIZED for face cream held generic]; In re Pennzoil Products Co., 20 USPQ2d 1753 (TTAB 1991) [MULTI-VIS for multiple viscosity motor oil held generic]; In re Reckitt & Coleman, North America Inc., 18 USPQ2d 1389 (TTAB 1991) [PERMA PRESS for soil and stain remover held generic]. Thus, if the evidence is clear that "digital" names a key characteristic or feature of radio broadcasting services, applicant's mark DIGITAL would be generic for such services.

The Nexis evidence presented by the examining attorney clearly shows that some radio stations in the United States are now broadcasting in a digital format and that there would be public awareness of the applicability of the term "digital" to radio broadcasting services of this type.

We acknowledge that the definition of the term "digital" relied on by the examining attorney relates to an audio recording method and, therefore, is of limited probative value. However, we judicially notice the following definitions<sup>4</sup> of "digital" and "digital radio":

**digital:** 1. Representing information by means of a set of discrete values, usually the digits 1 and 0. Digital technology is distinguished from analog technology, which represents data using continuously varying quantities.  
High Definition An A to Z Guide to Personal Technology (2006).

**digital radio:** Radio content that is encoded in a digital format. Within the United States, digital radio is broadcast by satellite radio providers using proprietary standards and by traditional radio stations using HD Radio or Digital Radio Mondiale (DRM), a worldwide standard. In other parts of the world, the dominant standard is DAB. Satellite Radio, HD Radio, DRM and DAB all require special receivers. Radio programming is also available in standard digital audio formats over the Internet.  
High Definition An A to Z Guide to Personal Technology (2006).

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<sup>4</sup> The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

**digital radio:** Transmitting audio programs (music, news, sports, etc.) in digital format.  
Computer Desktop Encyclopedia (Ninth Edition 2001).

In the present case, applicant does not dispute that its radio broadcasts are aired in a digital format. Upon encountering the term DIGITAL for radio broadcasting services, the relevant public certainly will understand the term to primarily refer to radio broadcasts that are aired in a digital format, that is, digital radio broadcasting.

We must also consider how the relevant public will encounter the matter sought to be registered. Applicant's specimen, which is a billboard advertisement, identifies applicant's services as "Digital 107.3 FM Internacional." Such use of DIGITAL, in our view, is more in the nature of a type of radio broadcast than a source identifier. In this case, because DIGITAL describes the most important or central aspect of applicant's radio broadcasting services, that is, that they are aired in a digital format, it is a generic adjective for such services. This term should not be subject to exclusive appropriation, but rather should remain free for others in the industry to use in connection with their similar services. In re Boston Beer Co. L.P., 198 F.3d 1370, 53 USQ2d 1056 (Fed. Cir. 1999).

Applicant's argument that DIGITAL is not generic because the specific phrase "radio broadcasting services" does not appear in the "Wikipedia" entry and dictionary definition submitted by the examining attorney nor in the dictionary definition and "Google" hits relied on by applicant is simply not persuasive of a different result herein. Similarly, applicant's contention that the Nexis excerpts are not probative because they do not show use of the term "digital" by radio disc jockeys when on the air is without merit.

In sum, we find that the evidence of record clearly establishes that "digital" is a term used to refer to a type of radio broadcast. Based on this evidence, we conclude that DIGITAL is generic in connection with applicant's radio broadcasting services. As such, it is incapable of distinguishing applicant's services, and therefore is unregistrable on the Supplemental Register.

**Decision:** The refusal to register is affirmed.