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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Hypres, Inc.

Serial No. 77455602

Steven M. Hoffberg, of Ostrolenk Faber LLP for Hypres, Inc.

Lief Martin, Trademark Examining Attorney, Law Office 112
(Angela Bishop Wilson, Managing Attorney).

Before Bucher, Zervas and Mermelstein, Administrative
Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Hypres, Inc. is the owner of an application¹ to
register on the Supplemental Register the term DIGITAL RF
(in standard character form) for the following
International Class 9 goods:

Aeronautical radio communication machines and
apparatus; Broadband radios; Devices for wireless
radio transmission; Marine radio communication
machines and apparatus; Microwave transmission
apparatus for delivering radio programs and

¹ Application Serial No. 77455602, reciting a bona fide intention to use the proposed mark in commerce. Applicant filed an amendment to allege use, claiming first use anywhere on March 20, 2001 and first use in commerce on December 15, 2004.

messages; Mobile radios; Electronic combiners for connecting antennas and receivers; Electronic transmitters and receivers for broadband wireless communications; Mobile data receivers; Radio transceivers; Transceivers; Wireless transceiver radio.

The examining attorney refused registration on the ground that the proposed mark is merely descriptive under Section 2(e)(1) of the Trademark Act, 15 U.S.C.

§1052(e)(1). After filing an amendment to allege use, applicant amended its application to seek registration on the Supplemental Register. The examining attorney then refused registration, under Section 23 of the Trademark Act, 15 U.S.C. §1091(c), on the ground that applicant's proposed mark is generic and thus incapable of registration on the Supplemental Register.² Both applicant and the examining attorney have filed briefs.

The examining attorney maintains that the proposed mark "designates a class of radio apparatus, and antennae therefore, for transmission of digital information via

² The examining attorney states that mere descriptiveness under Trademark Act Section 2(e)(1) is also an issue on appeal, and devotes approximately three pages of his brief to a discussion of this issue. Mere descriptiveness is not an issue in this appeal because applicant seeks registration of its proposed mark on the Supplemental Register, and applicant's amendment to seek registration on the Supplemental Register is a concession that the proposed mark is merely descriptive. *Plus Products v. Star-Kist Foods, Inc.*, 220 USPQ 541, 543 (TTAB 1983); *Evans Products Co. v. Boise Cascade Corp.*, 218 USPQ 160, 162 (TTAB 1983). In any event, applications for registration on the Supplemental

radio frequency" and is therefore generic. He relies on dictionary definitions of "digital," "RF" and "radio frequency" and the following evidence in his brief, which presumably is his best evidence:

A patent entitled "Digital RF transmitter system employing both digital precorrection and analog pre-correction." (U.S. Patent No. 6,600,516 (issued Jul. 29, 2003), September 24, 2010, Office action, pp. 22-27);

A patent entitled "Digital RF receiver and method of dynamically adjusting a multicluster memory buffer." (U.S. Patent No. 7,295,805 (issued Nov. 13, 2007), September 24, 2010, Office action, pp. 28-33);

A patent application entitled "Direct RF digital transceiver and method," stating that the invention relates to "RF transceivers, and more particularly to a digital RF transceiver that is able to obtain a digital representation of a received analog RF input signal and perform substantially all waveform processing of the received signal in the digital domain." (U.S. Patent Application No. 20090036160, accessed via www.freshpatents.com, September 24, 2010, Office action, pp. 42-44);

A patent for antenna systems for wireless communication devices, stating that certain embodiments of the antenna system as part of a wireless device such as a cellular telephone, smart phone or personal digital assistant include a digital radio frequency (RF) transceiver, which uses the antenna system to send and receive digital voice and/or data signals. (U.S. Patent No. 7,773,041 (issued Aug. 10, 2010), September 24, 2010, Office action, pp. 34-41, 37);

An article entitled "The Role of Time-Domain in the Digital RF World" stating that the article will explore basic measurement tasks "to establish the critical nature of time in digital RF"; and that "The digital RF revolution has introduced an unprecedented number of useful devices while lowering their cost and power consumption." (www.wirelessdesignasia.com, October 2, 2009, Office action, pp. 4-5);

Advertising material for a "'Lon Works®' transceiver for ... digital RF transmission." (www.reimesch.de, October 2, 2009, Office action, pp. 8-9);³

A press release stating that "IntelRa, headquartered in Seoul, Korea, provides worldwide market leading digital modules and digital RF systems for existing and next generation wired/wireless infrastructure networks for highly optimized, energy-effective and cost competitive systems." (PR Newswire Association, accessed via Lexis-Nexis, October 2, 2009, Office action, pp. 10-11);

An article discussing a "superconductor digital-RF transmitter." (Journal of Technology & Science, accessed via Lexis-Nexis, October 2, 2009, Office action, pp. 14-15);

An article discussing an encrypted digital wireless system, referring to a digital wireless dual-channel receiver featuring, inter alia, "digital RF transmission" of audio signals. (AV

³ This web page is from a foreign source. The Board has held that it "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. Further, the Internet is a resource that is widely available to these same professionals and to the general public in the United States." *In re Remacle*, 66 USPQ2d 1222, 1224 n.5 (TTAB 2002). In this case involving radio technology specifically directed to scientists and engineers (see *infra*), it is reasonable to consider a relevant article regarding radio technology from an Internet website, in English, from another country.

Magazine, accessed via Lexis-Nexis, October 2, 2009, Office action, pp. 16-17);

Web page from MIPRO featuring encrypted receivers having an "encryption key for maximum security against unauthorized listening, 24-bit audio quality, true digital RF transmission," for receiving signals from wireless microphones. (www.mipro.com, October 2, 2009, Office action, pp. 18-19);

Summary of an educational course entitled "Digital RF Communication Systems." (www.besserassociates.com, October 2, 2009, Office action, pp. 69-71); and

Technical literature describing "Digital RF Communication Receiver[s]" in general, and various aspects of "Digital RF" communication systems. (http://cp.literature.agilent.com/litweb/pdf/5968-3579E.pdf, March 3, 2009, Office action, pp. 14 - 46.).

Additionally, we note the article in the record entitled "Digital RF techniques ease chip integration challenges" taken from <http://www.eetimes.com/>, reprinted at www.design-reuse.com. (October 2, 2009, Office action, p. 48.) The article states, "Instead of having to struggle to design and implement analog components, chip designers can employ digital RF techniques to process RF signals using familiar and proven tools and processes." Under the heading "Digital RF Integration," the article states "Digital RF processing has been taking place in stages over the last decade." Additionally, it states, "With digital RF it becomes possible to fully analyze baseband signal

characteristics ..., and a handful of external analog components enable loop-back tests to reliably assess signal quality"; and "With each process node shrink and increase of transistor speed, digital RF processing can accommodate more and more of the communications spectrum ..."

Further, the webpage at www.electronicproducts.com entitled "ASGs satisfy digital RF needs" (March 3, 2009, Office action, p. 9) states,

Suited for testing software defined radio, radar, WiMAX, WiFi, MIMO, and UWB, AWG5000 series arbitrary waveform generators (AWGs) let users generate high-res signals for testing both analog and digital baseband and IF circuits in mixed-signal digital RF devices.

Applicant maintains that DIGITAL RF is not generic and explains that "radio frequency" pertains to signals that are analog in nature and propagate as electromagnetic waves; and that "digital" would be perceived by purchasers as referring to a discrete value. Applicant concludes:

There is thus a significant incongruity between "digital", signifying something that can be expressed discretely in amplitude and time and can be processed and abstracted according to established rules (programs), on one hand, and "RF", implying something clearly not discrete or independent on its environment, often defying attempts to mask its complexity.

Because of this incongruity, the composite mark cannot be "the common or class name for the goods and/or services."

Brief at unnumbered p. 3. Applicant also challenges the relevance of some, but not all,⁴ of the examining attorney's evidence on various grounds, mostly on the basis that the evidence does not specify a particular product, is for test equipment, is for a signal generator or is not for radio equipment. We view this evidence, which does not specifically state that it involves radio equipment, relevant to the extent that it discusses digital RF as an area of technology. This material at a minimum suggests that an area of technology exists having wide application, including in connection with applicant's goods. Also, applicant states that reliance on material regarding applicant's own products "is not evidence against applicant." Brief at unnumbered p. 4. To the contrary, such use by applicant is highly relevant evidence that applicant itself uses the term in a generic manner and that applicant's potential purchasers would likewise consider the term to be generic.

The Court of Appeals for the Federal Circuit, our primary reviewing court, has held that "[t]he critical

⁴ The evidence that applicant challenges was submitted by the examining attorney in connection with the descriptiveness refusal; applicant is silent with respect to the evidence submitted with the final Office action on the genericness refusal. As noted below, we rely on all of the evidence in the record.

issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question." *H. Marvin Ginn Corp. v. Int'l Association of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986). *Ginn* explains that:

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 or retained on the register understood by the relevant public primarily to refer to that genus of goods or services?

Id. The Office bears the burden of establishing genericness based on clear evidence of generic use. *In re American Fertility Society*, 188 F.3d 1341, 51 USPQ2d 1832, 1835 (Fed. Cir. 1999).

Turning to the first step of the *Ginn* test, i.e., the genus of goods, the examining attorney states that "the mark designates a class of radio apparatus, and antennae therefore, for transmission of digital information via radio frequency." Brief at unnumbered p. 7. He also states that the proposed mark is "a generic designator for applicant's class of goods, namely, digital RF communication apparatus." Brief at unnumbered pp. 6 and 8, respectively. Applicant has not stated in its brief what it regards the genus of the goods. The identification of

goods includes a variety of goods, extending from broadband radios⁵ to transceivers⁶ to electronic combiners. We therefore find that the genus of goods at issue in this case is defined as "communications equipment for sending and/or receiving radio frequencies and converting them to digital form."

Next, we must determine whether the designation DIGITAL RF is understood by the relevant purchasing public primarily to refer to that genus of goods. *Ginn*, 228 USPQ at 530. "Evidence of the public's understanding of the term may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers, and other publications." *In re Merrill Lynch, Pierce, Fenner and*

⁵ Merriam-webster.com defines "broadband" as

1: operating at, responsive to, or comprising a wide band of frequencies <a *broadband* radio antenna>

2: of, relating to, or being a high-speed communications network and especially one in which a frequency range is divided into multiple independent channels for simultaneous transmission of signals (as voice, data, or video).

We take judicial notice of this definition. 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, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

⁶ Merriam-webster.com defines "transceiver" as "a radio transmitter-receiver that uses many of the same components for both transmission and reception." We take judicial notice of this definition of "transceiver."

Smith Inc., 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987). We have considered all of the evidence in the application, including the evidence submitted in connection with the mere descriptiveness refusal of the proposed mark.

"The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question." *Ginn*, 228 USPQ at 530. In this case, the relevant public consists of those involved in the design, operation and purchase of radio apparatus. Specifically, members of the relevant public include engineers and scientists in the government and in commercial wireless communication markets such as satellite and tactical communications, signals intelligence, electronic warfare and software defined radio. See applicant's brochure and article entitled "Hypres Delivers Two Digital-RF Receiver Systems to U.S Office of Naval Research ..." at www.reuters.com, submitted with the Amendment to Allege Use. See also response dated September 1, 2009, stating, "... an ordinary purchaser of these goods, which is typically an engineer or technician ..."

The evidence of record establishes that "digital RF" is an abbreviation for "digital radio frequency," and that certain radio apparatus have as a feature the ability to

convert radio waves into digital signals. Digital RF apparatus can convert digital signals to analog (and vice versa) for transmission over radio frequencies. Additionally, the evidence reveals references to "digital RF transmitters," "digital RF transceivers" and "digital RF receivers." There are also references to the "digital RF revolution," "digital RF transmission," "digital RF techniques," "digital RF processing," "digital RF devices" and "digital RF communication systems." These references reflect that "digital RF" is broadly used to identify radio transmitting and receiving equipment which can convert digital signals to analog and vice versa. The examining attorney therefore has established prima facie that the relevant public would understand that the designation refers to the genus of goods, namely, communications equipment which uses digital RF.

Applicant has offered no evidence in response to the examining attorney's position that the designation is generic. As noted, applicant's arguments dispute only the relevance and probity of the examining attorney's evidence. We are not persuaded by these arguments, and in any event, we would come to the same conclusion based on the evidence which applicant does not dispute. We therefore find that the examining attorney has established prima facie by clear

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evidence that the designation "DIGITAL RF" is generic for applicant's goods.

DECISION: The refusal to register is affirmed and registration of applicant's proposed mark is refused.