

**THIS OPINION IS NOT A
PRECEDENT OF
THE T.T.A.B.**

Oral Hearing: July 15, 2008 Mailed: September 18, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re TreeRadar, Inc.

Serial No. 78714647

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

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

Before Hohein, Bucher and Cataldo,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

TreeRadar, Inc. has applied to register on the Principal Register the mark TREERADAR in standard characters for "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 International Class 9; and "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" in International Class 42.¹

The trademark examining attorney has refused registration under Section 2(e)(1) of the Trademark Act on the ground that applicant's mark is merely descriptive of a feature or quality of applicant's goods and services.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed main briefs and applicant filed a reply brief. In addition, applicant and the examining attorney presented arguments directed toward the issue on appeal in an oral hearing held on July 15, 2008.

Evidentiary Issues

Before turning to the substantive ground for refusal, we note that applicant has submitted four exhibits with its main brief. Exhibits 101, 102 and 104 consist of materials that previously were made of record by applicant and the examining attorney during prosecution of the involved application. As such, the materials comprising Exhibits

¹ Application Serial No. 78714647 was filed on September 16, 2005, based on applicant's assertion of August 2004 as the date of first use of the mark anywhere and in commerce on the goods and May 2004 as the date of first use of the mark anywhere and in commerce in connection with the services.

101, 102 and 104 are at best duplicative and cumulative of evidence timely made of record, and thus need not and should not be resubmitted. See *Life Zone, Inc. v. Middleman Group, Inc.*, ___USPQ2d___, (TTAB July 15, 2008).

Exhibit 103 consists of an October 10, 2007 declaration of applicant's president that was not previously made of record. Applicant argues that by submitting evidence with her denial of applicant's request for reconsideration, the examining attorney has introduced evidence "after Appeal" and that, as a result, "the Examining Attorney has opened the door to rebuttal evidence by Applicant and has waived any objection to its introduction" (reply brief, p. 1). Applicant's argument is unpersuasive. When a timely request for reconsideration of an appealed action is filed (with or without new evidence), the examining attorney may submit, with his or her response to the request, new evidence directed to the issue(s) for which reconsideration is sought. However, the applicant may not submit additional evidence in response to any evidence submitted by the examining attorney unless the examining attorney's action is a nonfinal action to which a response may be filed. Otherwise, if the applicant wishes to submit additional evidence, it must file a request for remand. See TBMP §1207.04 (2d ed. rev. 2004) and the

authorities cited therein. Inasmuch as the examining attorney's September 4, 2007 denial of applicant's request for reconsideration was not a non-final action, and applicant did not request remand of the instant case in order to submit additional evidence, the October 10, 2007 declaration submitted with applicant's appeal brief is untimely, and it has not been considered. See Trademark Rule 2.142(d) (the record in the application should be complete prior to the filing of an appeal). We note, however, that had we considered this exhibit in our determination of the issue on appeal, the result would be the same.

Issue on Appeal

As noted above, the issue on appeal in this case is whether applicant's mark, TREERADAR, merely describes a function, feature or characteristic of the goods and services recited in the involved application.²

² We note that with its June 7, 2007 response to the examining attorney's final Office action, applicant submitted the June 1, 2007 declaration of its president stating that the TREERADAR mark has been in use since September 8, 2004 on its goods and August 9, 2003 in connection with its services. We further note, however, that applicant has not requested an amendment to seek registration under Section 2(f) of the Trademark Act based upon a showing of acquired distinctiveness. Nor do we construe the June 1, 2007 declaration as constituting such a request. Accordingly, the issue of acquired distinctiveness is not before us.

Applicant contends that its proposed mark is suggestive and does not immediately describe its goods or services or a characteristic thereof. Applicant further argues that the examining attorney's evidence points to use of TREERADAR as applicant's mark rather than use of such designation as a merely descriptive term.

With its application, applicant submitted a label, reproduced below, as a specimen of use for the goods identified by the subject mark.



In addition, applicant submitted an advertising flier, reproduced below, as a specimen of use for the services identified by the subject mark.



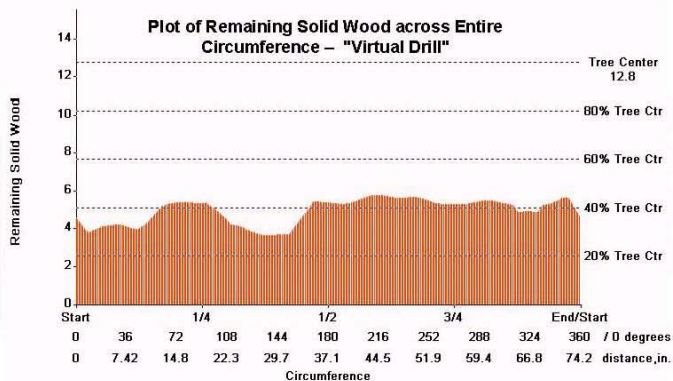
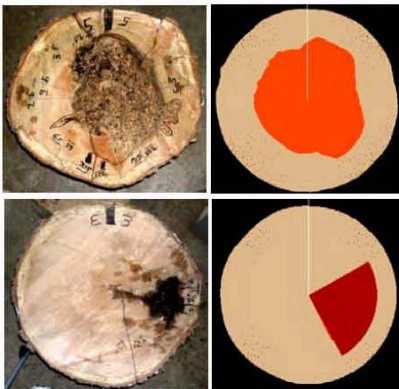
512 Ashford Road
Silver Spring MD 20910
301.589.2265
301.587.3228 (fax)
info@TreeRadar.com
www.TreeRadar.com

TRU™ (Tree Radar Unit) Non-Invasive Inspection of Trunks and Roots

Trunk Inspection – "Virtual Drill"



- Rapid, Non-Invasive Inspection
- Multi-Elevation Scans – Four to Six Elevations Scanned
- Minimal Setup & Scan Times – Entire Multi-Elevation Trunk Scanned in 20 minutes
- Image of Predicted Internal Cross-Sectional View for each Elevation Scanned
- Plot of Remaining Solid Wood across Entire Circumference – "Virtual Drill"
- Detect Hollows and "Punky" Wood
- High-Elevation Scanning – via Bucket Truck or Climber
- Sector Scans – for Trunks or Limbs with Accessibility Problems
- Professional Analysis Report



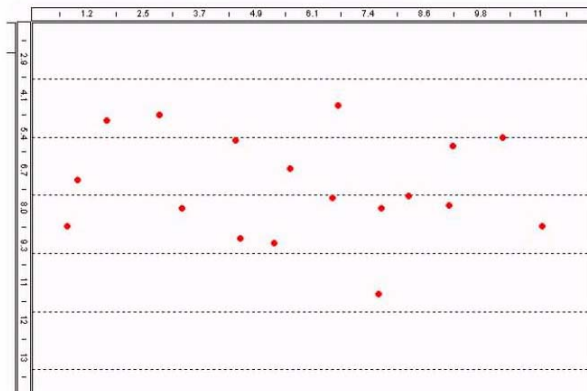
TRU™ (Tree Radar Unit)

Non-Invasive Inspection of Trunks and Roots

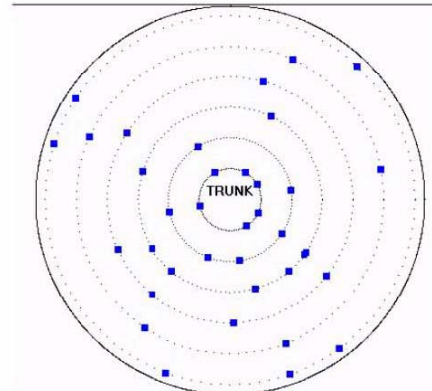
Root Inspection – "Virtual Excavator"



- **Rapid, Non-Invasive Inspection of Subsurface Structural Roots**
- **Depth Penetration down to 1 Meter**
- **Minimal Setup & Scan Times – Typically 30 to 60 minutes for a Multi-Line Scan**
- **Scan either in Straight Lines Parallel to Tree or in Concentric Circular Lines around Tree**
- **Detection of Structural Roots as small as 0.5-inch (1.3-cm)**
- **Subsurface 2D image of Root Location and Depth for each Line Scanned – "Virtual Excavator"**
- **Top-Down 3D Image of Root Layout and Density**
- **Detect and Image Roots under Covered Soil such as Asphalt and Concrete**
- **Professional Analysis Report**



Virtual Trench - 2D Planar Depth Image of Root Location (top scale, ft) and Depth (left scale, in) for One Scan Line



3D Top-Down Image of Root Layout and Density

Applicant further relies upon the above-referenced June 6, 2007 declaration of its president, and additional advertisements taken from its Internet website (www.TreeRadar.com).

The examining attorney maintains that the mark merely describes a feature or quality of the goods and services. In support of the refusal, the examining attorney has made of record dictionary definitions of "tree" and "radar." According to these definitions, "tree" may be defined as "a perennial woody plant having a main trunk and usually a distinct crown"³ and "radar" may be defined as "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 (as aircraft) or surface features (as of a planet)."⁴ The examining attorney has further made of record articles and advertisements retrieved from Internet webpages. Excerpts from these webpages follow (emphasis added):

Tree Radar

Tree roots can cause a variety of problems and there are a number of reasons why you might want to find out where tree roots are. Previously, without labour intensive investigations, it has

³ *American Heritage Dictionary of the English Language*, 4th ed. Houghton Mifflin Company, 2000.

⁴ *Merriam-Webster OnLine*, www.m-w.com.

been difficult to determine where tree roots are. More recently air lances or spades have been developed that can expose roots. However use of the air spade necessitates disturbance and is only practicable when there is access to the soil around the tree. In hard landscapes, **tree radar** will provide information cost effectively and quickly.

(www.treeradar.co.uk)⁵

Correspondent, Julie Carey, reported during WRC 4's December 2nd 4pm news broadcast on the Barnaby Woods tree task force, use of **tree radar** and changes in the city's procedure for tree removal. The operation of the **tree radar** was shown, and was described as a tool to be used when the conclusion, arising from the visual inspection was a "close call."

*The city is using the **tree radar** unit first on Barnaby Street, where outraged residents won a reprieve for most of the old oaks that define the neighborhood.*

(www.barnabywoods.org)

Tree Radar

Pogo Technicians use tools much like an MRI, which solves a critical medical need with a very high-resolution, non-invasive imaging of the body. The **Tree 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

⁵ Foreign publications may be considered in determining how a term can be perceived in the United States. See *In re Remacle*, 66 USPQ2d 1222, 1224 n.5 (TTAB 2002). More recently, the Federal Circuit has explained that "[i]nformation originating on foreign websites or in foreign news publications that are accessible to the United States public may be relevant to discern United States consumer impression of a proposed mark." *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1835 (Fed. Cir. 2007). Thus, we have considered this article in our determination herein.

structural integrity. This instrument will scan the trunk, the limbs, as well as the roots of a tree.

Trunk Scan:

Typically arborists drill into trees to assess the condition of trunks and by doing this they are potentially spreading existing decay or introducing new decay organisms into the tree. Equipped with radar, Pogo Tree experts can harmlessly obtain multiple high resolution trunk scans which identify and characterize structural defects including decay and cracks.

Limb Scan:

Pogo's radar system can also detect internal cracks and cracks that have progressed to the outer surface, but are not yet visible.

Root Scan:

Most trees fall over because of compromised roots. The Pogo radar system can non-invasively inspect soils either covered or uncovered to provide images of the layout and density of subsurface structural roots.

(www.pogoorganics.com)

So, how thick is the healthy wood in a trunk or branch? Researchers are working to address this big question. At the present time, arborists are limited in their ability to measure and evaluate the internal structure of a trunk or limb. The following are procedures with limited potential to evaluate the internal structure of trees.

Coring devices:

Increment Borer...

Drill with small drill bit...

Resistograph...

Digital Microprobe...

Listening and radar devices:

Rubber mallet...

PiCUS Sonic Tomography...

Tree Radar - A hand held radar device is run around the trunk/branch. The computer database is sent to the company for evaluation.

(www.cmg.colostate.edu/gardennotes)

It is well settled that a term is considered to be merely descriptive of goods and/or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it immediately describes an ingredient, quality, feature or characteristic thereof or if it directly conveys information regarding the nature, function, purpose or use of the goods and/or services. See Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052. See also *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods and/or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or feature about them. Moreover, whether a term is merely descriptive is determined not in the abstract, but in relation to the goods and/or services for which registration is sought. See *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). Thus, "[w]hether consumers could guess what the product is from consideration of the mark alone is not the test." *In re American Greetings Corp.*, 226 USPQ 365 (TTAB 1985).

In the instant case, the evidence made of record by the examining attorney and applicant supports a finding that, as applied to applicant's goods and services, the

term TREERADAR would immediately describe, without conjecture or speculation, a significant characteristic or feature of such goods and services, namely, that they utilize radar imaging to measure and assess the internal and sub-surface health of trees. The above-referenced dictionary definitions establish that TREERADAR merely describes an imaging system consisting in part of a synchronized radio transmitter and receiver - RADAR - that uses radio waves to locate and analyze the roots, trunk and crown of a perennial woody plant - a TREE. Applicant's goods are radar imaging systems used to assess tree and root health. Applicant's services involve using radar for measuring, imaging and analyzing tree and root health, viability, decay and structural integrity. Thus, as defined, TREERADAR merely describes a central function, feature or characteristic of the recited goods and services.

Further, applicant's specimens, submitted with the involved application and reproduced above, indicate that TREERADAR is used in connection with goods and services that provide "radar imaging for non-invasive assessment of tree and root health." The specimens further indicate that applicant's goods and services provide scans producing both two dimensional and three dimensional images that allow

"rapid, non-invasive inspection" of tree trunks and roots. As such, applicant's own specimens support a finding that TREERADAR merely describes a function or feature of the recited goods and services.

In addition, the Internet articles and advertisements submitted by the examining attorney establish that the goods and services identified by applicant's TREERADAR mark are useful, *inter alia*, to arborists seeking a non-invasive method of assessing the health of trees and their roots. Certain of the Internet materials made of record by the examining attorney further establish that "tree radar" is used not as a trademark, but as a merely descriptive term as applied to such goods and services. Material obtained from the Internet is acceptable in ex parte proceedings as evidence of potential public exposure to a term. *See In re Fitch IBCA, Inc.*, 64 USPQ2d 1058 (TTAB 2002).

We note applicant's argument that the Internet material submitted by the examining attorney refers to its own goods and services. However, the Internet articles and advertisements of record do not display TREERADAR as applied for in the involved application. Rather, the Internet evidence either displays "tree radar" as a descriptive term or displays "Tree Radar" in a manner that is not clearly trademark usage. Thus, even if applicant

was the first and/or at one time the only user of the term TREERADAR in connection with its goods and services, it is well settled that such does not entitle applicant to the registration thereof where, as here, the term has been shown to immediately convey only a merely descriptive significance in the context of applicant's goods and services. See, e.g., *In re National Shooting Sports Foundation, Inc.*, 219 USPQ 1018, 1020 (TTAB 1983); and *In re Mark A. Gould, M.D.*, 173 USPQ 243, 245 (TTAB 1972).

Finally, we are not persuaded that the telescoping of the terms "tree radar" into TREERADAR imbues such a merely descriptive term with distinctiveness as a trademark. Numerous cases have held that telescoping two words which as a whole are merely descriptive of the goods or services into a single term does not avoid a finding of mere descriptiveness for the combined term. See, for example, *In re Omaha National Corporation*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987) (FIRSTIER, the equivalent of "first tier," is merely descriptive of banking services); *In re A La Vieille Russie Inc.*, 60 USPQ2d 1895, 1897, n. 2 (TTAB 2001) ("the compound term RUSSIANART is as merely descriptive as its constituent words, 'Russian art.'"); *In re U.S. Steel Corp.*, 225 USPQ 750 (TTAB 1985) (SUPEROPE merely descriptive of wire rope); *In re Gagliardi Bros.*,

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Ind., 218 USPQ 181 (TTAB 1983) (BEEFLAKES is merely descriptive of thinly sliced beef); and *In re Orleans Wines, Ltd.*, 196 USPQ 516 (TTAB 1977) (BREADSPRED is merely descriptive of jellies and jams).

Accordingly, we find that applicant's mark is merely descriptive as contemplated by Section 2(e)(1) of the Act.

Decision: The refusal to register is affirmed.