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Paper No. 9
Bottorff

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Digital Lightwave, Inc.**

Serial No. 76/285,088

Stefan V. Stein of **Holland & Knight LLP** for **Digital Lightwave, Inc.**

Russ Herman, Trademark Examining Attorney, Law Office 108
(**David Shallant**, Managing Attorney).

Before **Seeherman, Hairston and Bottorff**, Administrative Trademark Judges.

Opinion by **Bottorff**, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register of the mark PROGRAMMABLE PROTOCOL PROCESSOR, in typed form,

for "electronic testing equipment, namely, telecommunication line integrity testing apparatus."¹

The Trademark Examining Attorney has refused registration on the ground that the mark is merely descriptive of the identified goods. Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1). When the refusal was made final, applicant filed this appeal. Applicant and the Trademark Examining Attorney filed appeal briefs, but applicant did not file a reply brief, nor did applicant request an oral hearing.

In support of his refusal, the Trademark Examining Attorney has submitted and relied on the following definitions from The American Heritage Dictionary of the English Language (3rd ed. 1992):

program - "*verb, transitive ... 4. Computer Science.* To provide (a computer) with a set of instructions for solving a problem or processing data." We note that the dictionary excerpt also defines "program" as a verb meaning "to provide (a machine) with a set of coded working instructions," and as a noun meaning "a set of coded instructions for insertion into a machine, in accordance

¹ Serial No. 76/285,088, filed July 13, 2001. The application is based on applicant's asserted bona fide intention to use the mark in commerce. Trademark Act Section 1(b), 15 U.S.C. §1051(b).

with which the machine performs a desired sequence of operations." The excerpt also shows that "programmable" is the adjectival form of the word "program."

protocol - "noun ... 5. *Computer Science*. A standard procedure for regulating data transmission between computers."

processor - "noun ... 2. *Computer Science*. **a.** A computer. **b.** A central processing unit. **c.** A program that translates another program into a form acceptable by the computer being used."

The Trademark Examining Attorney also has submitted the following evidence obtained from the NEXIS database:

From Electronic Design (July 10, 2000):

HEADLINE: Network Processors Take the High Road... And the Low Road: Technology Information
BODY: Under the watchful eye of an on-chip Power PC core, IBM Microelectronics packs 16 programmable protocol processors into its network processor. A PCI control-bus interface provides access to an external control processor. The protocol processors are ...;

From Business Wire (October 9, 2001):

HEADLINE: UTStarcom Selects Virata's Helium 210-80 for its AN-2000-IB IP-based DSLAM Product Being Deployed by Yahoo! BB in Japan
BODY: ...single-chip communications processor, performing ATM switching and Layer 2/3 processing. A general-purpose RISC protocol processor runs higher layer protocols, while a higher-performance micro-coded RISC network processor is used for ...

From TELECOMWORLDWIRE (September 26, 2001):

HEADLINE: Virata introduces communications processor family

BODY: ... processor to control and manage the direct connections to Ethernet and USB and to handle Ethernet bridge filtering and advanced DMA functions. A protocol processor, meanwhile, runs Virata's bridging and routing software as well as management and control functions such as embedded web management and universal plug and ...;

From Business Wire (September 25, 2001):

HEADLINE: Virata Targets the Switch/Router Market With New Nitrogen Processor Family

BODY: ... manages the direct connections to Ethernet and USB, and handles Ethernet bridge filtering and advanced DMA functions. The chip also includes a protocol processor that runs Virata's high-level bridging and routing software as well as management and control functions such as embedded web management and UPnP ...;

From Business Wire (September 25, 2001):

HEADLINE: Virata Delivers complete "Home Router Kit" With New Processor, Reference Designs, and Software Suite

BODY: ... manages the direct connections to Ethernet and USB, and handles Ethernet bridge filtering and advanced DMA functions. The chip also includes a protocol processor that runs Virata's high-level bridging and routing software as well as management and control functions such as embedded web management and UPnP ...;

From PR Newswire (September 13, 2001):

HEADLINE: KC Technology's MicroPAX™ Bluetooth™ controller Gets BQB Qualification; MicroPAX Proved Its Functionality Going Through an

Official Qualification Process Compliant with
Bluetooth Spec v1.1

BODY: ... much sought MicroPAX Bluetooth
controller KC2680. The MicroPAX KC2680 is a
highly integrated low cost, low power protocol
processor for hosted Bluetooth applications.
Powered only by an 8-bit CPU running at 8 MHz ...

From Transmission and Distribution World (September 2001):

HEADLINE: Atlanta IEEE/PES T&D Expo 2001 Show
Guide; Developing Perspectives

BODY: ... substation communication, Schweitzer
Engineering Laboratories (SEL), announces its
SEL-2701 Ethernet Processor, an Ethernet
physical interface and protocol processor
specifically designed for the demands of the
electrical industry. Installed into host
devices like the SEL-2030 Communications
Processor and protection and ...

A term is deemed to be merely descriptive of goods or
services, within the meaning of Trademark Act Section
2(e)(1), if it forthwith conveys an immediate idea of an
ingredient, quality, characteristic, feature, function,
purpose or use of the goods or services. See, e.g., *In re*
Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987), and
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 merely
descriptive; it is enough that the term describes one
significant attribute, function or property of the goods or

services. See *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 those 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).

Finally, "[w]hether consumers could guess what the product [or service] is from consideration of the mark alone is not the test." *In re American Greetings Corporation*, 226 USPQ 365, 366 (TTAB 1985).

Applying these principles in the present case, we find that the mark applicant seeks to register, PROGRAMMABLE PROTOCOL PROCESSER, is merely descriptive of the goods identified in the application, "electronic testing equipment, namely, telecommunication line integrity testing apparatus." Applicant's goods, as identified, may be used to test the integrity of a telecommunications line to determine whether it adheres to a particular telecommunications protocol, e.g., data transmission rate

in terms of low speed or high speed. Viewed in connection with applicant's goods, the mark immediately informs purchasers of a significant feature or characteristic of the goods, i.e., that applicant's testing apparatus incorporates or employs a processor which can be programmed or reprogrammed to accommodate different such telecommunications protocols.

We are not persuaded by applicant's arguments in opposition to the mere descriptiveness refusal. Contrary to applicant's contention, it is not dispositive that there may be no dictionary entry for the entire phrase "programmable protocol processor." See, e.g., *In re Venture Lending Associates*, 226 USPQ 285 (TTAB 1985). Each of the words in the mark has a readily-understood merely descriptive meaning as applied to the goods, and they are as merely descriptive when considered in the composite as they are when considered separately. Applicant certainly has not identified any new, inventive or otherwise distinctive commercial impression which results from the combining of the three words. Likewise, applicant misstates the test for mere descriptiveness by contending that purchasers would not be able to guess, simply by viewing the mark, what the goods are or what they do. *In re American Greetings Corporation, supra*, 226 USPQ at 366.

Applicant also contends that its competitors "may, and do, use a wealth of other words in any number of combinations, to describe their competing goods." Even if that is so (and applicant has not given any examples of such alternatives), it would not negate the mere descriptiveness of applicant's mark, nor would it justify registration of that mark. See, e.g., *In re The Officers' Organization For Economic Benefits, Limited*, 221 USPQ 184 (TTAB 1984). Finally, it is not dispositive that none of applicant's competitors currently uses the term to describe their goods, or that applicant may be the first or only user of the term in connection with such goods. See, e.g., *In re National Shooting Sports Foundation, Inc.*, 219 USPQ 1018 (TTAB 1983).

In summary, we find that applicant's mark is merely descriptive of the goods identified in the application, and that the Trademark Examining Attorney's refusal to register the mark is proper.

Decision: The refusal to register is affirmed.