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Mailed:  
September 28, 2004  
Bucher

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

In re Final Mix, Inc.

Serial Nos. 76438030 and 76438032

Anthony M. Keats of Keats McFarland & Wilson LLP for Final  
Mix, Inc.

Zhaleh Sybil Delaney, Trademark Examining Attorney, Law  
Office 116 (Meryl Hershkowitz, Managing Attorney).

Before Seeherman, Bucher and Drost, Administrative Trademark  
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Final Mix, Inc. seeks registration on the Principal  
Register of the mark FINAL MIX for goods and services  
identified in the respective applications, as filed, as  
follows:

computer software for use in creating sound,  
in International Class 9;<sup>1</sup> and

audio and visual production services, in  
International Class 41.<sup>2</sup>

<sup>1</sup> Application Serial No. 76438030 was filed on August 5, 2002 based upon applicant's allegation of a *bona fide* intention to use the mark in commerce.

<sup>2</sup> Application Serial No. 76438032 was also filed on August 5, 2002 based upon applicant's allegation of a *bona fide* intention to use the mark in commerce.

These cases are now before the Board on appeal from the final refusal of the Trademark Examining Attorney to register this designation based upon the ground that applicant's mark is merely descriptive when considered in relation to applicant's identified goods and recited services, i.e., that FINAL MIX immediately informs potential consumers that applicant's goods and services are used to create final mixes or edits of sound recordings and visual images.

Applicant has appealed in both applications. Both applicant and the Trademark Examining Attorney have filed briefs, but applicant did not request an oral hearing before the Board.

Inasmuch as both of these appeals involve common questions of law and fact, and each has been treated in substantially the same manner by the applicant and by the Trademark Examining Attorney, we have consolidated these two appeals and issue a single decision herein.

We affirm the refusals to register.

A mark is merely descriptive, and therefore unregistrable pursuant to the provisions of Section 2(e)(1) of the Trademark Act, if it immediately conveys information of significant ingredients, qualities, characteristics, features, functions, purposes or uses of the goods or

services with which it is used or is intended to be used. A mark is suggestive, and therefore registrable on the Principal Register without a showing of acquired distinctiveness, if imagination, thought or perception is required to reach a conclusion on the nature of the goods or services. See In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987).

The question of whether a particular term is merely descriptive is not decided in the abstract. Rather, the proper test in determining whether a term is merely descriptive is to consider the mark in relation to the goods and services for which registration is sought, the context in which the mark is used or is intended to be used, and the possible significance that the mark is likely to have on the average purchaser encountering the goods and services in the marketplace. See In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215 (CCPA 1978); In re Intelligent Instrumentation Inc., 40 USPQ2d 1792 (TTAB 1996); In re Consolidated Cigar Co., 35 USPQ2d 1290 (TTAB 1995); In re Pennzoil Products Co., 20 USPQ2d 1753 (TTAB 1991); In re Engineering Systems Corp., 2 USPQ2d 1075 (TTAB 1986); and In re Bright-Crest, Ltd., 204 USPQ 591 (TTAB 1979).

Applicant argues at length that the term "final cut" is demonstrably much more descriptive than is "final mix" for computer software designed for the same uses as is the software herein, but that earlier-filed applications for FINAL CUT and FINAL CUT PRO were registered without objection.<sup>3</sup> Applicant also argues that the involved goods would not be used to produce a "final mix," and that its mark would simply suggest to potential customers that applicant is the source for audio and visual production goods and services.

By contrast, in support of her refusal to register, the Trademark Examining Attorney has pointed to a variety of articles and advertisements drawn from Internet websites. From these Internet sources, it is clear that in the production of music CD's, for example, one of the chief

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<sup>3</sup> The fact that a third-party applicant registered the term FINAL CUT and FINAL CUT PRO is not persuasive of a different result herein. Suffice it to say that these registrations are of little help in determining the registrability of the mark at issue in this case. As often noted by the Board, each case must be decided on its own set of facts. FINAL CUT and FINAL CUT PRO are obviously different marks from FINAL MIX, and thus the facts in those records (to which we are not privy) would obviously be different. Moreover, the Board is not bound by actions taken by Trademark Examining Attorneys. *In re National Novice Hockey League, Inc.* 222 USPQ 638, 641 (TTAB 1984) and *In re Scholastic Testing Service, Inc.*, 196 USPQ 517, 519 (TTAB 1977). While uniform treatment under the Trademark Act is highly desirable, our task here is to determine, based upon the record before us, whether applicant's asserted mark is registrable.

responsibilities of a recording engineer is to work toward the creation of a "final audio mix":

HEADING: **Audio Engineering**

Careers:

...

*Recording Engineers* work in a studio environment and listen and create the **final audio mix** of music CD's.<sup>4</sup>

In fact, the Trademark Examining Attorney has placed in the record a number of Internet stories pointing to "final audio mix" as a term of art in the context of computer software for use in creating audio recordings, as well as stories where the term is being used by those offering production services for music and other audio works. This term is frequently shortened to "final mix" where the larger context is mixing audio tracks, or where the factual situation involves combining the audio tracks with digital video tracks. The following Internet hits demonstrate that the term "final mix" is used by those in the audio, music, video and film production industries to refer to the finishing stages in the project cycle of recording, editing and mixing audio and video productions. Several examples are

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<sup>4</sup> JETS - The Junior Engineering Technical Society,  
<http://www.jets.org/publications/audio.cfm>

drawn from electronic magazines published on the Internet  
(emphasis supplied):

HEADLINE: ***The Final, Final Mix***

... *Remix* invited an international roundtable of engineers and indie-label execs to discuss mastering ... *Remix* Question: What can a home- or project-studio artist do to prepare a mix for mastering? ...

Larry Lachman, mastering engineer, Absolute Audio: Check your mixing on other systems. Do not normalize this process - it actually limits what a mastering engineer can do to a **final mix**. It can also distort the music ...

*Remix* Question: Any final tips about preparing a master or about mastering techniques?

Chris Cowie, label manager, Bellboy Records: It depends on the style of music ... You have to be careful when using compression on a **final mix** that has vocal on it ...<sup>5</sup>

HEADLINE: ***New Software/Hardware for Audio Production***

EMAGIC WAVEBURNER PRO - Emagic ([www.emagic.de](http://www.emagic.de)) releases a new, more powerful version of its WaveBurner Pro audio CD-mastering software. Upgrade highlights include the integration of mastering plug-ins and support for VST format plug-ins, along with the ability to directly load more audio formats, plus expanded driver support for a broader range of audio hardware devices. New plug-in support features allow plug-ins to be applied to individual regions, as well as to the **final mix**. Any number of plug-ins can be serially inserted, related to the amount of host processing resources available. Emagic Logic Audio plug-ins bundled with WaveBurner Pro include a compressor/limiter, multiband compressor, Fat

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<sup>5</sup> <http://remixmag.com/>

EQ and audio restoration tools. WaveBurner Pro now natively supports 24-bit/96kHz files. In addition to .AIFF and SDII files and regions, .WAV files can now also be directly loaded into WaveBurner for editing. MP3 is also supported. Audio driver support now includes ASIO and Direct I/O, in addition to SoundManager and Audiowerk8/2. Other new features include expanded edit commands, multiple level meters and an improved user interface. Price: \$299.<sup>6</sup>

At least one of the uses drawn from the Internet is an advertisement on Yamaha's website:

CAPTION: ***From Conception to CD with the AW16G***

**Burn to CD!**

Equipped with the optional CD-RW drive (CDRW16G), the AW16G [Professional Audio Workstation] lets you burn your **final mix** right to inexpensive CD-R media ...<sup>7</sup>

However, the majority of the Internet hits came from websites discussing computer software for use in mixing sound tracks or from websites promoting audio and visual production services:

HEADING: ***FAQ: Using Audio***

Question: I would like to use recorded sounds like vocals and guitar with Orion. Is this possible with Orion?

Answer: ... Now you are ready to record your vocals, etc., with great accuracy. When you are finished, you export the recorded tracks

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<sup>6</sup> Mix: Professional Audio and Music Production, Dec. 1, 2000, [http://mixonline.com/mag/audio\\_new\\_softwarehardware\\_audio\\_16/](http://mixonline.com/mag/audio_new_softwarehardware_audio_16/)

<sup>7</sup> <http://www.yamaha.com/yamahavgn/Documents/ProAudio/aw16g.pdf>

back into Orion as audio-tracks so you can do your **final mix** in Orion...<sup>8</sup>

HEADING: ***Rough Guide to Sound Post Production***

... Music scored by your composer will generally be added at the **final mix** stage of your production... Please remember, when planning your final cut that it is not recommended that you have music on an outgoing or incoming reel change...

... Your **Final Mix** will be first mixed to simultaneous stereo Dialogue, Music and Effects stems on a Tascam 8-track machine ... Your stems will then be mixed together to your **final mix** format...<sup>9</sup>

HEADING: ***Article: final mix***  
**final mix** of film sound track; pre-dubs, pyramid progression to reduce tracks, final mixdown, DM & E and stereo mixing.<sup>10</sup>

HEADING: ***Harrison Magic on Track: Harry Potter post production on MPC Console***

... The final soundtrack [for Harry Potter and the Chamber of Secrets] is being mixed on the Harrison MPC console in Theater Four at Shepperton in the UK ...

Supporting what is undoubtedly a very complex mix, the award-winning duo of Mike Dowson and Mark Taylor worked ... preparing the pre-mixes for the **final mix**.<sup>11</sup>

HEADING: ***The Way We Work***

Our method of working offers unparalleled efficiency throughout the process. For example, rather than adhere to the typical

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<sup>8</sup> <http://www.orion-central.com/>

<sup>9</sup> <http://www.dbpost.com/rough.htm> We also note that this is one of several Internet sites that appear to use the terms "final cut" and "final mix" interchangeably.

<sup>10</sup> <http://www.postproducer.com/Article/>

<sup>11</sup> [http://www.crmav.com/video/41/harrison m...rry\\_potter\\_post\\_production\\_on\\_mpc .shtml](http://www.crmav.com/video/41/harrison_m...rry_potter_post_production_on_mpc_.shtml)

timeline of edit-then-mix, we pre-mix the film throughout the edit/design phases so that when the film is ready for the **final mix** and output, most of the work is already done. The pre-mixes become the **final mix**. There is no loss of work, and the "final mix" becomes more of a final tweak/check. If the film is to go to a larger mix house for the **final mix** and print mastering ... then you will even more greatly appreciate this method of working since it will enable the mix to take place in 2-5 days ...<sup>12</sup>

HEADING: ***A Day In the Life: Creating a New Kind of Music***

... "For the 2:30 music video and the 5.1 surround mixes [of Nike TV spots] I did more of a record mix than a traditional [commercial] post-production **final mix**. I'd say fully 30% of the final track was accomplished in the **final mix**, because I went into the studio with the idea that we were mixing a record, not a soundtrack for a commercial. We finished the **final mix** and it was laid-back to CD at the Village ..."<sup>13</sup>

HEADING: ***From Start to Finnish***

... This is how Paul Jyrälä describes his move to the world of the digital four track Nagra-D, about five years ago. Mr. Jyrälä has worked as a sound mixer all over the world for almost 38 years. He has always insisted doing [sic] the whole production chain by himself, from the first location recording to the **final mix**. Mr. Jyrälä jumped on the digital bandwagon in 1988 with Sony's PCM 2000, but it was the Nagra-D that changed his way of working crucially.

...

The dialog fixing also takes place at this point. One screwed word or even a phoneme can

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<sup>12</sup> <http://www.soundspacestudio.com/studio.htm>

<sup>13</sup> <http://www.endlessnoise.com/>

be fixed by taking that same part from another take or from another track. All this, like the other sound work apart from the **final mix**, takes place in Pro Tools.

...

"One thing worth to note [sic] is also the fact that once the sound has gone through the Nagra's A/D converters, it stays a 24-bit digital signal all the way through the whole chain until the **final mix** ..."<sup>14</sup>

HEADING: ***ProTools Mix To Picture and Sound Design***

Our ProTools system provides clients with the industry standard format for video or film mixing. Our experienced mixers can provide you with a **final mix** that exceeds your expectations but meets your budget. Talk to us about a package that includes an Avid offline edit at Downtown Avid and audio post at City Sound.<sup>15</sup>

HEADING: ***We are also looking for Back End Deals***

*Clear Gravy Productions* will fund all your recording costs up front and produce your entire project at our discretion, but not without some conditions:

#1 *Clear Gravy Productions* will retain all rights to the data tracks, the **final mix** of the recording and the master produced from the same...<sup>16</sup>

HEADING: ***Editorial Review of Producing Great Sound for Digital Video***

*Producing Great Sound for Digital Video* educates beginning and experienced filmmakers on the intricacies of creating an outstanding

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<sup>14</sup> <http://www.stardustfilm.com/Articles/Paul%20Jyrala%20'...Finnish'.htm>

<sup>15</sup> <http://www.citysound.com/cspstudio/postprod.html>

<sup>16</sup> <http://www.cleargravy.com/musician.html>

soundtrack, for preproduction planning through the **final mix** ....<sup>17</sup>

HEADING: ***Too Blue with Drew Daniels and Jimmy Guitar Smith***

I use a Layla card for I/O, and I have an extremely flat JBL L250 playback system in the living room to check **final mixes** ...

... I corrected two notes a little with Cool Edit's Stretch function, and then it sounded fine. In the **final mix**, we thinned it out a lot ...

... After mixing and mastering, I listened to the **final mix** at a level that I think the end-listener will use ....<sup>18</sup>

HEADING: ***RIM 420 - Applied Digital Audio, Project Seven: Digital Audio Mix in ProTools / Vocal Comping Project***

Project 7 will introduce the use of ProTools software, the most widely used digital audio editing and mixing platform in the world. ProTools is developed by [Digidesign](#) and comprises a large family of hardware and software systems and applications. The parent company of Digidesign is [Avid](#) - a widely-used nonlinear video editing system. With this project, you will edit and mix several vocal tracks to form a completed vocal track to accompany a rough "slave" mix of a song.

...  
Note: The **final mix** of this song actually uses all of these comp tracks plus two additional tracks ....<sup>19</sup>

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<sup>17</sup> <http://www.amazon.com/>

<sup>18</sup> <http://www.drewdaniels.com//js/cep3.htm>

<sup>19</sup> Middle Tennessee State University, Applied Digital Audio, Project Seven: Digital Audio Mix in ProTools/Vocal Comping Project [http://www.mtsu.edu/~dsmitche/rim420/projects/420\\_project\\_7.html](http://www.mtsu.edu/~dsmitche/rim420/projects/420_project_7.html)

Based upon our review of these Internet materials, we find that those in the audio and video production field who are the potential consumers for these goods and services would understand "final mix" to be a distinct and critical stage of making an audio, music and/or video recording that occurs toward the end of the "recording, editing and mixing" stages, and immediately prior to "mastering." The actual recording at this point is known as the "final mix," and in many instances is an end point in a company's providing audio and visual production services.

Despite this evidence, applicant argues as follows:

The Examining Attorney has inappropriately made the analogy in Office Action No. 2 that because some members of the public use the vernacular term "final mix" to refer to the last mix of an audio or visual production, Applicant's mark FINAL MIX is descriptive of Applicant's computer software for use in creating sound. As stated in Applicant's response to Office Action No. 1, Applicant does not offer a good called a "final mix."

Applicant's appeal brief, p. 5.

Technically, of course, it is true that the product applicant intends to market is computer software, albeit a very specialized application designed to help create recorded music. While the computer program itself is not a "final mix," it is clear that a significant purpose of the identified software is to create a final mix. To the extent

that purchasers may want software for different stages of audio production, applicant's term immediately informs purchasers that the software is designed to produce a "final mix," as opposed to merely assisting with earlier tasks of editing, converting, compressing, equalizing, etc., or the later job of mastering. When one views the common meaning of the term "final mix" in the context of applicant's "computer software for use in creating sound," we find that it takes no amount of mental processing to conclude that this is software designed to create a finished audio work product at the end of the recording, editing and mixing stages of production. It is clear that someone purchasing applicant's software would understand from the mark that a significant work-product growing out of the use of this software would be the creation of a final audio mix, or a "final mix."

Similarly, the recording artists and others in the audio and visual field who are potential customers of applicant's audio and visual production services would know the meaning of "final mix" and would immediately understand, when this term is used in connection with the identified services, that it describes a significant characteristic of the services, namely, the production of a final mix.

Accordingly, we conclude that the term FINAL MIX immediately describes applicant's goods and services, and therefore registration on the Principal Register is barred by Section 2(e)(1) of the Trademark Act.

*Decision:* The refusal to register based upon Section 2(e)(1) of the Lanham Act is hereby affirmed.