12/06/01

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Paper No. 14
EJS

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Adaptive Broadband Corporation, assignee of California Microwave, Inc.

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Serial No. 75/590,849

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Julia Anne Matheson of Finnegan, Henderson, Farabow, Garrett & Dunner LLP for Adaptive Broadband Corporation.

Kelly F. Boulton, Trademark Examining Attorney, Law Office 102 (Thomas Shaw, Managing Attorney).

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Before Cissel, Seeherman and Bottorff, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Adaptive Broadband Corporation, assignee of California Microwave, Inc., has appealed from the final refusal of the Trademark Examining Attorney to register ADAPTIVE BROADBAND for the following goods:

> Communications equipment, components and test equipment, namely, microwave signal sources, transceivers, frequency converters, digital signal modulators, digital demodulators, burst modems, digital signal processors, computers

> and computer software for bandwidth management, ATM (Asynchronous Transfer Mode) processing equipment, namely, ATM access switches and ATM edge switches, computers and computer software for network management, TCP/IP packet devices, namely, computers and computer software to encrypt communications traffic, digital protocol converters, digital switches."[1]

Registration has been refused pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. 1052(e)(1), on the ground that applicant's mark is merely descriptive of the identified goods. Specifically, the Examining Attorney contends that ADAPTIVE BROADBAND immediately conveys to consumers that the identified goods are devices that are scalable to larger or smaller operations for use or management of broadband frequencies.

Applicant filed an appeal brief and, after the Examining Attorney's decision on applicant's request for reconsideration, a supplemental appeal brief. The Examining Attorney submitted a brief after applicant filed its supplemental appeal brief. No reply brief was submitted, and an oral hearing was not requested.

A mark is merely descriptive, and therefore prohibited from registration by Section 2(e)(1) of the Act, if it

[1] Application Serial No. 75/590,849, filed November 18, 1998, based on an asserted bone fide intention to use the mark in commerce.

immediately conveys information concerning a quality, characteristic, function, ingredient, attribute or feature of a product or service. The question of mere descriptiveness is not decided in a vacuum, but in relation to the goods on which, or the services in connection with which, it is used. **In re Venture Lending Associates**, 226 USPQ 285, 286 (TTAB 1985).

In support of the refusal of registration the Examining Attorney has made of record dictionary definitions, excerpts from the NEXIS date base, and excerpts from websites, including the following:

Definitions

> adaptive: tending to, designed, for, suitable for, or having a capacity for adaptation; *created adaptive clothing for children and young adults with special needs*[2]
>
> broadband: of, relating to, or having a wide band of electromagnetic frequencies: *broadband communications*[3]
>
> broadband: a transmission medium that can carry signals from multiple independent network carriers on a single coaxial or fiber optic cable, by establishing different bandwidth channels. This technique is called frequency-division multiplexing. Broadband technology can support a wide range of frequencies and is used to

[2] The American Heritage Dictionary of the English Language, 3d ed. © 1992.
[3] Id.

> transmit data, voice, and video over long distances. Contrast with baseband.[4]
>
> broadband: (1) High-speed transmission. The term is commonly used to refer to communications lines or services at T1 rates (1.544 Mbps) and above. As we reach into the OC-12 stratosphere and beyond, many like to push the beginning of broadband much higher than T1, so the actual demarcation point will always be subjective.
> (2) A method of transmitting data, voice and video using frequency division multiplexing (FDM), such as used with cable TV. Modems are required to modulate digital data streams onto the line. Broadband in this context is used in contrast with baseband, which is all digital transmission and uses time division multiplexing (TDM). However, the term is most used in definition #1 above.[5]

Nexis excerpts

> Products are also available that allow a 10M bit/sec Ethernet channel to be established on a broadband network and operate concurrently with broadband applications. Both Bridge Communications, Inc. and Chipcom Corp. offer products that will adapt broadband local nets to support the Ethernet channel.
> "Network World," September 15, 1986
>
> California-based start-up Ensemble Communications, Inc., developer of adaptive broadband wireless solutions, cites an Ovum forecast that the BWA

[4] High-Tech Dictionary Definition, www.computeruser.com/resources/dictionary/definition
[5] TechEncyclopedia, www.techweb.com

equipment business will be worth $16 billion by the year 2005.
“Global Telephony,” April 2000

In the past nine years, DSR has been highly successful in the Small Business Innovation Research (SBIR) program, performing contract [sic] on projects ranging from advanced waveform design, adaptive processing techniques, software migration and advanced COTS architectures, passive automation, adaptive broadband matched filtering, flight control for UAVs, to applied research in the areas of intelligent tutoring, expert system training and embedded training concepts.
“Journal of Electronic Defense,” February 1, 2000

Ensemble Communications Inc., making preparations for field trials of its “adaptive” broadband wireless technology, today announced the closing of $13.12 million in additional financing.
“Wireless Today,” January 20, 1999

The alliance with ADC is Ensemble’s first since announcing in September the development of an “adaptive” system for LMDS and other wireless broadband access applications based on the Internet protocol (IP). “This alliance puts us another step closer to bringing our adaptive broadband products to market,” said Sheldon Gilbert, president of San Diego-based Ensemble.
“Communications Today,” December 3, 1998

Website excerpts

From www.ensemblecom.com

Ensemble Communications Announces Development of an Adaptive IP System

for LMDS with $6 million from Leading Venture Capital Firms
-Breakthrough adaptive technology uses Internet Protocol (IP) and other innovations to enable fast, cost-effective broadband access- (Headlines)

San Diego--September 21, 1998--Ensemble Communications Inc., the Adaptive Broadband Access Company, today announced the development of an Adaptive IP system for the rapidly expanding Local Multipoint Distribution Services (LMDS) and other Broadband Wireless Access (BWA) markets worldwide. …

Combining the latest RF and modem technologies with advanced software algorithms and network protocols, the Ensemble system is fully adaptive to provide carriers the maximum flexibility in deploying network assets. In real time, the Ensemble system adapts at the bit level to allow carriers to spread their bandwidth resources over large service areas and to over-subscribe their facilities and their frequencies.

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Ensemble Communications Announces Strategic Alliance with ADC Telecommunications for Broadband Wireless Access (headline)

San Diego—November 30, 1998—Ensemble Communications Inc., the Adaptive Broadband Access Company, today announced a strategic alliance with ADC Telecommunications….

...

Tailored to the unique challenges of providing broadband access to off-net

> business users, Ensemble's "Adaptive IP" architecture offers more features for lower capital expenses than competing solutions due to its instantaneous bandwidth-on-demand, statistical multiplexing, adaptive asymmetry, adaptive modulation and elimination of guard bands. Ensemble's solution will provide existing and new carriers the most cost-effective and efficient network architecture to provide current services, while enabling them to lead the market with new, innovative services. These services include LAN/WAN connectivity, high-speed data/Internet access, virtual private networks, video conferencing, ATM, voice over IP, and other telephony and entertainment video services.
>
> "Our strategy is to work with leading systems integrators to create the seamless network solutions being demanded by BWA [broadband wireless access] service providers," said Sheldon Gilbert, president of Ensemble. "ADS is a highly respected telecommunications company with vast product capabilities, and this alliance puts us another step closer to bringing our adaptive broadband products to market."

From www. Adaptivebroadband.com (applicant's website)

> Adaptive Broadband is a pioneer in the wireless broadband access market. … Founded in 1968 as California Microwave, Adaptive Broadband has sharpened our market and product focus to concentrate on wireless broadband solutions.
>
> ...

> In August 1998, the company acquired Adaptive Broadband Limited, of Cambridge, U.K. The new AB-Access™ (point-to-multipoint) system developed from that acquisition offers a solution that provides "cells" of wireless broadband access delivering up to 25 Mbps to each user based upon demand, which is 450 times faster than conventional modem networks. This revolutionary product is made possible by a patent-pending packet algorithm that adjusts efficiently to the ebb and flow of asymmetric Internet data traffic and supports the widest range of available spectrum, from 1.5 to 42GHz.
>
> _____
>
> Adaptive Broadband is a global data networking solutions company that develops leading-edge technology for the deployment of broadband wireless communication.
>
> ...
>
> And because AB-Access architecture is highly scalable,[6] the network can grow as the business grows or as bandwidth needs evolve.

During the course of prosecution applicant made the statement that "consumers are unlikely to be immediately aware of any particular connotation for the word 'BROADBAND," saying that term could refer to the technical

[6] Scalable is defined as "able to be changed in size or configuration to suit changing conditions. For example, a company that plans to set up a client/server network may want to have a system that not only works with the number of people who will immediately use the system, but the number who may be using it in one year, five years, or ten years." http://www.computeruser.com.

definitions given by the Examining Attorney or "it could refer to a 'broad' 'band' of anything, including but not limited to a band of gold, an electro-magnetic frequency range, etc." Response filed January 10, 2000. In its brief applicant did not pursue this argument, perhaps in view of the significant evidence in the record showing that "broadband" is a recognized term in applicant's industry. As a result, when the word "broadband" is used in connection with applicant's identified goods, we do not think consumers will understand it to mean a band of gold, but will understand it in its communications sense.

In its initial brief applicant argued that its identification does not limit or tie its equipment to broadband use. However, applicant does not dispute that its goods potentially or feasibly could be used in connection with broadband technology, and the evidence submitted by the Examining Attorney indicates that at least some of the identified communications equipment items have such a connection, i.e., that the word "broadband" is descriptive of a characteristic of them. In its supplemental brief applicant has apparently conceded this point, acknowledging that it is "in the wireless broadband access market" and recognizing that in its website

applicant has stated that it "is in the business of providing wireless broadband technology." p. 3.

Applicant's primary argument appears to be that when the two terms, ADAPTIVE and BROADBAND, are combined in the mark ADAPTIVE BROADBAND, the composite term is not merely descriptive of its goods. Applicant asserts that there is no well-understood meaning of the term ADAPTIVE BROADBAND. In reaching this conclusion, applicant dismisses the evidence submitted by the Examining Attorney which shows such use. In particular, applicant gives no weight to the references in the articles and press releases regarding Ensemble Communications, Inc., stating that Ensemble's use of the tagline "The Adaptive Broadband Access Company" "reflects nothing more than a misuse of Applicant's trademark." Brief, p. 5. We are frankly surprised that applicant would take such a position, since Ensemble's use of this phrase prior to the filing date of applicant's intent-to-use application would appear to be antithetical to applicant's claim of superior trademark rights.[7] In any event, we find that consumers would view the references to "adaptive broadband" in the articles referring to Ensemble

[7] Because it is Office policy not to refuse registration on the basis of prior common law trademark rights, there is no question as to our remanding the application to the Examining Attorney to consider a Section 2(d) ground for refusal.

as describing Ensemble's technology/products. Moreover, the fact that these articles may have been published shortly after, or as a result of, Ensemble's press releases does not negate the descriptive connotation of "adaptive broadband," or the exposure of the consuming public to such use.

Applicant also argues that the various articles do not show use of "adaptive" as modifying "broadband," but that "adaptive" modifies "solutions" in the phrase "adaptive broadband wireless solutions" and modifies "technology" in the phrase "adaptive broadband wireless technology." Thus, applicant asserts that it is mere coincidence that the words "adaptive broadband" appear in sequence. We are not persuaded by this argument. The usage in the various NEXIS and website excerpts indicates that the term ADAPTIVE BROADBAND refers to the broadband itself as being adaptive. Thus, consumers, viewing the mark in connection with the goods, will immediately understand that the mark as a whole describes a characteristic of the goods.

Finally, applicant's reliance on **Concurrent Technologies Inc. v. Concurrent Technologies Corp.**, 12 USPQ2d 1054 (TTAB 1989) is misplaced. In that case, as applicant itself states, the Board noted that the record was devoid of any showing of a descriptive use or any

meaning for "concurrent technologies" in the trade. The Board also said that the intent of Section 2(e)(1) is to protect the competitive needs of others, but found that competitors were not be unduly deprived by the registration of CONCURRENT TECHNOLOGIES CORPORATION because "there is no indication that anyone in the industry would ever need to use 'concurrent technologies' to describe his goods of similar nature." Id. At 1058. However, in the present case, the record shows that competitors have used ADAPTIVE BROADBAND in describing their products, and newspaper reporters have used the term to describe third-party uses. Thus, the record here adequately demonstrates that there is a competitive need for others to use ADAPTIVE BROADBAND to describe their goods.

Decision: The refusal of registration is affirmed.