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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Packet Engines (WA) Incorporated, by merger and change of name from Packet Engines Incorporated[1]

Serial No. 74/476,641

David H. Jaffer of Rosenblum, Parish & Isaacs for Packet Engines Incorporated.

Amos T. Matthews, Trademark Examining Attorney, Law Office 108 (David Shallant, Managing Attorney).

Before Simms, Seeherman and Chapman, Administrative Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

On January 5, 1994, Packet Engines Incorporated filed an intent-to-use application to register on the Principal Register the mark PACKET ENGINES for "computer hardware and computer programs for data communications, storage and image applications" in International Class 9.

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[1] The records of the Assignment Branch of this Office indicate that the involved application is currently owned by Packet Engines (WA) Incorporated by merger and change of name from Packet Engines Incorporated (recorded at reel 1805, frame 470).

In the first Office action (dated June 9, 1994), the Examining Attorney refused registration of the mark as merely descriptive under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1). In response, applicant argued the mark is suggestive. The Examining Attorney made the refusal to register under Section 2(e)(1) final on March 15, 1995.

On September 15, 1995, applicant filed a notice of appeal; and on November 14, 1995 applicant filed a request for remand to the Examining Attorney, an amendment to allege use, and an amendment to the Supplemental Register.

The Board remanded the application, and on February 14, 1996, the Examining Attorney accepted applicant's amendment to allege use, and refused registration on the Supplemental Register under Section 23 of the Trademark Act, 15 U.S.C. §1091, on the basis the applied-for mark is generic and incapable of serving as a source identifier. In response applicant argued the mark was registrable on the Supplemental Register and offered evidence of acquired distinctiveness under Section 2(f), 15 U.S.C. §1052(f). The Examining Attorney issued a final Office action based on his refusal to register under Section 23 on November 4, 1996.

Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested.

The issues before the Board are (1) whether the term PACKET ENGINES is generic for applicant's goods and thus, incapable of serving as a source identifier and unregistrable on the Supplemental Register, and (2) if not, whether applicant has submitted sufficient evidence of acquired distinctiveness under Section 2(f) for registration on the Principal Register.[2]

I. The Burden of Proof

The Office bears the burden of proving that the proposed trademark is generic, and genericness must be demonstrated through "clear evidence." See In re Merrill Lynch, Pierce, Fenner, & Smith, Inc., 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987); and In re Analog Devices Inc., 6 USPQ2d 1808 (TTAB 1988), aff'd, unpubl'd, but appearing at 10 USPQ2d 1879 (Fed. Cir. 1989). The evidence of the relevant public's perception of a term may be acquired from any competent source, including newspapers, magazines, dictionaries, catalogs and other publications.

[2] For a more thorough procedural history of this application, and an explanation of why the issue of acquired distinctiveness is before us, see the Board interlocutory order dated February 13, 1997. For a discussion of "Alternative Positions" taken by an applicant in an ex parte matter, see TBMP §1215.

See Magic Wand Inc. v. RDB Inc., 940 F.2d 638, 19 USPQ2d 1551 (Fed. Cir. 1991); and In re Leatherman Tool Group, Inc., 32 USPQ2d 1443 (TTAB 1994), citing In re Northland Aluminum Products, Inc., 777 F.2d 1566, 227 USPQ 961 (Fed. Cir. 1985).

The Office also bears the burden of establishing that a mark is merely descriptive. However, applicant has amended its application to one on the Supplemental Register, thus conceding that the applied-for mark is not inherently distinctive. See Yamaha International Corp. v. Hoshino Gakki Co. Ltd., 840 F.2d 1572, 6 USPQ2d 1001 (Fed. Cir. 1988).

Applicant carries the burden of proving its asserted claim of acquired distinctiveness. "The burden of proving secondary meaning is on the party asserting it, whether he is the plaintiff in an infringement action or the applicant for federal trademark registration." 1 Gilson, Trademark Protection and Practice, §2.09, at 2-72 (1987), quoted in the *Yamaha* case, supra at 1006.

II. The Evidence

The Examining Attorney submitted the following dictionary definitions of the term "packet":

> (1) "1. Stacker. 2. A short block (1000 to 2000 bits) of data prefixed with addressing and other control information that is used to carry information through a packet-switching network." Computer Dictionary and Handbook (3rd ed.);
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> (2) "A frame or block of data used for transmission in packet switching and other communications methods." The Computer Glossary: The Complete Illustrated Dictionary (7th ed.); and
>
> (3) "A series of bits forming all or part of a data message (depending on its length) to be sent through a network. Each packet has a defined format, with some additional bits forming a 'head' preceding the data and a 'tail' following it. These carry information that the network needs to know about the packet, including its destination and source. The packets are formed by the controller in the sending data terminal equipment and the data is extracted and reassembled by the controller at the receiving end." The McGraw-Hill Illustrated Dictionary of Personal Computers (1995).

The Board takes judicial notice of the following additional dictionary definitions of "packet":[3]

> (1) "1. Generic term for a bundle of data, usually in binary form, organized in a specific way for transmission. The specific native protocol of the data network may term the packet as a packet, block, frame, or cell. A packet consists of the data to be transmitted and certain control information. The three principal elements of a packet include: 1. Header—control information such as synchronizing bits, address of the destination or target device, address of originating device,

[3] See TBMP §712.01 and the rules and cases cited therein.

> length of packet, etc., 2. Text or payload—the data to be transmitted, and 3. Trailer—end of packet, error detection and correction bits. See also Frame.
>
> 2. Specific packaging of data in a packet-switched network, such as X.25. A true packet-switched network such as X.25 involves packets of a specific and fixed length....” Newton’s Telecom Dictionary: The Official Dictionary of Telecommunications & the Internet (1999); and
>
> (2) “n. 1. A unit of information transmitted as a whole from one device to another on a network. 2. In packet-switching networks, a transmission unit of fixed maximum size that consists of binary digits representing both data and a header containing an identification number, source, and destination addresses, and sometimes error-control data. See also packet switching.” Microsoft Press Computer Dictionary (3rd ed. 1997).

The Examining Attorney also submitted the following dictionary definitions of the word “engine”:

> (1) “(1) a specialized processor, such as a graphics processor. Like any engine, the faster it runs, the quicker the job gets done. See graphics engine and printer engine. (2) Software that performs a primary and highly repetitive function such as a database engine, graphics engine or dictionary engine. (3) Slang for processor.” The Computer Glossary: The Complete Illustrated Dictionary (7th ed.); and
>
> (2) “A computer-processing platform such as a PC or Macintosh computer.” The McGraw-Hill Illustrated Dictionary of Personal Computers (1995).

The Board takes judicial notice of the following additional dictionary definition of "engine":

> "n. A processor or portion of a program that determines how the program manages and manipulates data. The term *engine* is most often used in relation to a specific program; for example, a database engine contains the tools for manipulating a database. *Compare* back-end processor, front-end processor." (Emphasis in original). Microsoft Press Computer Dictionary (3rd ed. 1997).

The Examining Attorney also submitted copies of several registrations for various trademarks, all of which included the word "engine," and were for computer programs or computer software, each including a disclaimer of the term "engine," or "search engine" or "directory engine."

Finally, the Examining Attorney made of record approximately 80 excerpted stories[4] (with publication dates from April 1988 to February 1997) from the Nexis database to show generic use of the term "packet engines." Several representative examples follow (emphasis added):

> (1) Headline: Packets are hot tickets for some, but sticky wickets for others, ...a Santa Barbara, Calif.-based startup, Prodigy Communications, Inc., is also reportedly ready to unwrap a high-speed **packet engine**. Still, International Data Corporation (Framingham, Mass.) estimates that in 1987 the sales of

[4] These included a few repeated stories. Also, a few are from wire services, and thus, are of limited probative value in assessing the reaction of the public to the term applicant seeks to register because evidence from a proprietary news source is not presumed to have circulated among the general public. See In re Manco Inc., 24 USPQ2d 1938, footnote 4 (TTAB 1992).

packet-switching gear by U.S...., Data Communications, April 1988;

(2) Headline: ICA to host ISDN showcase featuring 60 applications; Forty-two firms join in largest-ever demonstration designed to spur interest in evolving technology, ...can access host computers over Southwestern Bell Telephone's MicroNet II packet network service via a **packet engine** installed on the show floor, King said...., Network World, April 24, 1989;

(3) Headline: Artel puts voice and date (sic) on same fiber; time-division multiplexing ends need to packetize T1 signals; Artel communications Corp., ...ring interface board, the primary board in every FiberWay station. The next board in the station is either a **packet engine** board for a data band or a T1/Transport board for a T1 band. Each FiberWay..., EDN, January 25, 1990;

(4) Headline: Promised board links LANs to IDNX, ...NET'S technology sharing agreement with Cisco Systems, Inc. It consists of two main components: a high-speed **packet engine** and LAN interconnection logic. "The [packet] engine that we're talking about has the ability to route several thousand packets per second," which makes it competitive with any currently..., Network World, June 11, 1990;

(5) NET also demonstrated a high-speed **packet engine** that will enable its IDNX T1 switches to support frame-relay, LAN routing protocols and ISDN D-channel signaling, Computerworld, February 4, 1991;

(6) Headline: USING LGX FOR FRAME-RELAY NETWORKING – Travelers tests NET Card, ...One of the code sets incorporated into the so-called LGX is adapted from the Cisco router code sets and lets the **packet engine** act as an on-board router, CommunicationsWeek, March 11, 1991;

(7) Headline: Broadband Technology: Where Internetworking Meets Telecommunications, ...

uses cell-relay technology exclusively as the switching fabric for circuit- and packet-switched services. With this approach, the cell-relay **packet engine** serves as an arbitration mechanism to switch at high speeds between local and wide-area ports, Data Communications, March 1991;

(8) Headline: Hot Times in the InterNetworking Market, ...what all this adds up to is NSC may now have one of the fastest **packet engines** on the market and extremely competitive price/performance ratios. Its main weakness, however, is lack of support for frame relay, Data Communications, April 1991;

(9) Headline: NET explains role of LWX packet engine; Exec hints device may support IBM's Advanced Peer-to-Peer Networking to handle SNA routing, ...The LWX's **packet engine** and routing capabilities make it complementary to high-performance routers used to link local-area networks in a building or campus setting, Warmenhoven said, while the **packet engine** will enable users to make more effective use of backbone bandwidth. The LWX is a packet-switching module that fits into..., Network World, July 8, 1991;

(10) Headline: ILAN router to get key SNA support, ...It reviews each packet that traverses the ILAN to compile information about the network and to help the **packet engine** route the data most effectively, Network World, March 9, 1992;

(11) ...founder and CEO, was most recently involved in developing Network Equipment Technologies's (sic) LAN/WAN Exchange (LWX), the multiprotocol **packet engine** for NET's IDNX multiplexer, Data Communications, April 1992;

(12) Headline: Optimism is guiding force in prepping '94 budgets, ...We continue to expand our private packet network, so **packet engines** are a capital item that we're acquiring. I think we generally have a pretty good balance of mainframe and LAN technology,..., Network World, May 17, 1993;

(13) Headline: T1 Multiplexers Getting Packet Options, ... The LWX software is downloaded into the new high-speed **packet engine** of the company's Integrated Digital Network exchange multiplexers, CommunicationsWeek, June 8, 1992;

(14) Headline: BT offer Tymet services, ...The firm will also commit to using StrataCom, Inc.'s IPX switch instead of its own Tymet **packet engine**, a move that will eventually enable BT to offer users a common set of service features across its net, Network World, December 7, 1992;

(15) Headline: Chipcom, Artel add switch options, ...module is based on Intel Corp.'s i960 Reduced Instruction Set Computing microprocessor and can be configured as a **packet engine** for Ethernet switching, a bridge, a bridge/router or any combination of the three, Network World, June 29, 1993;

(16) Headline: AT&T, IBM Target ATM Arena; Unveil Products and Strategies, ...IBM'S ENTRY. IBM's flagship ATM switch is a middle-tier fast-**packet engine** called Transport Network Node (TNN). It supports 16 ports of 250 Mbps each and can also handle other interfaces..., LAN Times, September 6, 1993;

(17) Headline: Menu madness; Vendors cook up a variety of new router entrees and side dishes that make it difficult to select the router best suited to users' tastes, ...some media access control layer processing. Meanwhile, the bulk of the real packet processing takes place in the device's **packet engine**. To merely compare one router to another on the basis of the total number of processors does not go far enough in the..., Network World, September 27, 1993;

(18) Headline: Navy is beta testing Alantec's modular switching hubs; PowerHub 7000; Brief Article; Product Announcement, ...mix of hot-swappable Ethernet and Fiber Distributed Data Interface (FDDI) network interface modules. The

remaining slot holds the **packet engine** module that does the switching, bridging, routing and management. The **packet engine** and network interface modules connect via what Alantec officials called an expandable backplane. As the chassis is expanded, the backplane can be..., Government Computer News, August 8, 1994;

(19) Headline: SCITEC ANNOUNCES NEW HIGH END FASTLANE, ...The PT (Packet Trunk) card which functions as a fast **packet engine** in the F10. Up to four of these can be used in parallel. These cards also contain an Ethernet AUI port which can..., M2 Communications, February 24, 1995;

(20) Headline: In brief; Alantec Lowers PowerHub Price, ...cost of LAN backbone switching. The PowerHub 7105 includes a five-slot chassis, one power supply and a **packet engine** for a pre-configured starter. Its price is $9,950, CommunicationsWeek, August 21, 1995;

(21) Headline: Alantec supports routing in PowerHub 4100 series; PowerHub 4100 LAN switch series, ...half or full duplex, the store-and-forward switches feature 2M bytes of flash memory, a three-CPU RISC **packet engine**, and support for up to 4,000 Media Access Control addresses per system, PC Week, December 4, 1995;

(22) Headline: EXCEL'S PROGRAMMABLE SWITCHING EXCEL-ENCE, ... DSP service cards for media processing and common-channel signaling **packet-engine** card. ...The PCX uses the same basic software architecture of the LNX, including the support of a common-channel signaling **packet-engine** card for ISDN communications, Computer Telephony, December 1996; and

(23) Headline: INTERNET MANAGEMENT – Packeteer PacketShaper, ...New. Make like a traffic cop and handle crowd control on the Internet with PacketShaper by Packeteer. PacketShaper is a high-speed hardware/software **packet engine** that sits on the network-access link between your router and Web server, Network Computing, February 17, 1997.

Applicant submitted approximately 50 stories from the Nexis database[5], 24 of which refer to applicant[6]; a few of which refer to a "packet capture engine," or a "packet-forwarding engine," or a "packet-filtering engine." Representative examples of statements from the articles referring to applicant follow:

> (1) Packet Engines Inc., of Spokane, is recruiting high-profile talent as it works to become a world-class high-tech startup, Journal of Business—Spokane, October 1996;
>
> (2) Well-known industry consultant, Howard W. Johnson, has committed his full support to Packet Engines Incorporated, Edge: Work-Group Computing Report, November 25, 1996; and
>
> (3) Symbios Logic Inc. and Packet Engines Inc. have formed a partnership to develop products targeted at the emerging gigabit Ethernet market, Electronic Buyers' News, December 16, 1996.;

The remainder of these Nexis articles do not include the words "packet engine(s)" together. Rather they include "packet" alone or "packet" with other words such as "site," "switch," "filter," or "losses," and others include the words "switching engine" or "fast routing engine."[7]

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[5] These included several repeated stories.

[6] Thirteen of the articles referring to applicant are from wire services (most listing "distribution" to "business editors"), and are of limited probative value. See footnote 4, supra.

[7] One of the articles refers to a breakfast cereal packet, and one refers to a packet of heroine. Obviously, these articles are of no probative value in this case.

In addition, applicant submitted a large amount of evidence in an attempt to prove distinctiveness under Section 2(f) of the Trademark Act, or to show that the term is at least capable of serving as a trademark, and is registrable on the Supplemental Register. In its supplemental brief applicant listed this evidence (pp. 10-11), and which we summarize as follows:

(1) applicant's use of the applied-for mark for four years;[8]

(2) thirty-two signed letters[9] from members of the relevant purchasing public who attest to their familiarity with the asserted mark and that they associate it with applicant;

(3) the results of an advertisement survey (Starch Readership Report) showing that 45% of the readers of a particular issue of LAN magazine remembered seeing applicant's advertisement, 39% actually read some part of the advertisement, and compared to other advertisements in the same category of products, applicant scored 88% above

[8] It was less than three years from applicant's claimed date of first use (November 1, 1995) to the date applicant filed its supplemental brief (September 25, 1998).

[9] Applicant inaccurately refers to the letters as "declarations."

the median among polled readers who were in the "read most" (i.e., read one-half or more of the written material in the advertisement) category;

(4) the results of a survey conducted by BrandSolutions which show that applicant had a 47% awareness level (6th among 11 companies specializing in computer networking products);

(5) approximately 50 unsolicited media articles "chronicling Applicant's successes and its increased recognition by consumers in the computer networking community";

(6) applicant's itemized advertising expenses report (essentially for ads in various magazines, but also including costs for, inter alia, photography portrait sessions for officers of applicant, and purchase of a digital camera) of $900,000 from June 1996 through September 1997 for products offered under the mark;

(7) applicant's itemized marketing-related expenses report (which includes items such as recruiting ads, portrait sessions, booth design, booth space, booth installation, booth management, advertising inserts, news release distribution, business cards, envelopes, polo-

style shirts, wooden train whistles, direct mail) of over $1,000,000 from June 1996 through September 1997; and

(8) marketing tools such as applicant's brochures and product data sheets, as well as photographs of t-shirts, wooden whistles, and calendars.

Applicant also submitted several advertisements it placed in 1997 in industry publications such as, Data Communications and Network World.

III. Genericness

Generic terms are by definition incapable of indicating source and thus can never attain trademark status. See In re Merrill Lynch, supra; and In re Web Communications, 49 USPQ2d 1478 (TTAB 1998). That is, "[o]nce determined to be a generic designation of a class of goods, no amount of evidence of purported secondary meaning can give legal protection to that generic name." 2 J. McCarthy, McCarthy on Trademarks and Unfair Competition, §15:24 (4th ed. 1999).

The test for determining whether a designation is generic, as applied to the goods in the application, turns upon how the term is perceived by the relevant public. See

Loglan Institute Inc. v. Logical Language Group, Inc., 962 F.2d 1038, 22 USPQ2d 1531 (Fed. Cir. 1992). Determining whether an alleged mark is generic involves a two-step analysis: (1) what is the genus of the goods or services in question? and (2) is the term sought to be registered understood by the relevant public primarily to refer to that genus of goods or services? See In re The American Fertility Society, __ F.3d __, __ USPQ2d __ (Fed. Cir. August 19, 1999); and H. Marvin Ginn Corporation v. International Association of Fire Chiefs, Inc., 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986). In determining whether a term is generic we consider all of the evidence before us, including that submitted by an applicant in support of a claim of distinctiveness. See In re Seats, Inc., 757 F.2d 274, 225 USPQ 364 (Fed. Cir. 1985).

The Examining Attorney contends that the genus of goods at issue in this case is “products designed to allow computer networks to exchange information at extremely high rates of speed.” He further asserts that the genus “is collectively referred to as packet engine”; and PACKET ENGINE “is the name of a type of computer hardware and software which facilitate the exchange of information at a high rate of speed.” (Examining Attorney’s brief, p. 8). The Examining Attorney points to the dictionary definitions

of the words, the Nexis evidence, and applicant's brochures and advertisements in support of his position.

Applicant contends that the generic terms for applicant's goods are "switches, repeaters, network interface cards and routers" (reply brief, p. 3); that the evidence as a whole shows that "consumers in the computer networking industry associate goods bearing the mark PACKET ENGINES with Applicant" (applicant's supplemental brief, p. 10); and that the "Examining Attorney continues to apply an unnecessarily high standard of proof" for applicant to establish that the applied-for mark is entitled to registration on either the Principal or the Supplemental Register (reply brief, p. 1).

As noted earlier, "the correct legal test for genericness, as set forth in *Marvin Ginn*, supra, requires evidence of 'the genus of goods or services at issue' and the understanding by the general public that the mark refers primarily to 'that genus of goods or services.'" *American Fertility Society*, supra. That is, do the members of the relevant public understand or use the term to sought to be protected to refer to the genus of the goods in question?

In this case, applicant defined the relevant purchasers as follows (applicant's supplemental brief, p. 8):

> While the computer industry as a whole has grown into a vast market, the Gigabit Ethernet[10] networking community is a smaller segment of that larger market. Thus, Applicant's primary targets are companies utilizing networking products, in particular Gigabit Ethernet products. The individuals who purchase these very expensive products are highly sophisticated and well educated with respect to networking technology. Applicant sells specialized products in a specialized field. (Footnote added).

The problems we have with applicant's definition of the relevant public are twofold. First, applicant's goods are identified as "computer hardware and computer programs for data communications, storage and image applications." This broad identification of goods is not limited to specialized products, but rather encompasses the "vast market" of the computer industry. See Octocom Systems Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990). Thus, we find the relevant public to be anyone interested in computer hardware and computer programs. Second, even if we were to consider the relevant purchasers to be highly sophisticated, well educated,

[10] According to The Computer Glossary: The Complete Illustrated Dictionary (8th ed. 1998), "Ethernet" is defined as "the most widely used LAN technology"; and "Gigabit Ethernet" is "the newest Ethernet standard used for network backbones."

networking technology specialists (which we cannot do on this record), those specialists would recognize the term “packet engines” as generic for the involved goods.

The dictionary definitions submitted by the Examining Attorney, as well as those of which we take judicial notice, coupled with the Examining Attorney’s submission of Nexis stories showing generic use of the terms “packet engine” or “packet engines” from 1988 to 1997 (two years after applicant’s claimed date of first use) convince us that this term is generic for these goods. Applicant has not explained why the term has been used in a generic manner in the Nexis evidence submitted by the Examining Attorney. For example, applicant has not indicated that its goods are different from those encompassed by the term “packet engines” in the excerpts of record. Rather, applicant only submitted other excerpted stories from its own Nexis search, and, as indicated previously, these references have either been for terms other than “packet engines” or have used “Packet Engines” to refer to applicant in connection with its general business efforts.

Applicant’s evidence of distinctiveness of the asserted mark under Section 2(f) does not convince us otherwise because, while the evidence clearly shows the success and growth of applicant’s company, and a certain

popularity of applicant's products, it does not establish that the relevant purchasers and prospective purchasers recognize this term as a trademark identifying the source of the goods. Applicant's evidence, while voluminous, when closely reviewed, is generally weak or flawed, and thus, is not persuasive.

The 32 letters are all in a similar form, giving the person's current job (e.g., engineer, engineering professor, network design consultant, investment consultant, certified public accountant, insurance agent), followed by a statement that the person is "familiar with" applicant's products, and then a statement that the person identifies the term PACKET ENGINES with applicant and the person "perceives the term as a trademark identifying applicant."[11] Even though the form letter used was presumably drafted by applicant's attorney, we have no reason to believe the individuals who signed the letters failed to tell the truth. However, these letters must be viewed against the background of the other evidence of record. See In re Schenectady Varnish Co., 280 F.2d 169, 126 USPQ 395 (CCPA 1960); and 2 J. McCarthy, McCarthy on Trademarks and Unfair Competition, §§15:74 – 15:78 (4th ed.

[11] The letters do not indicate that these people are prospective purchasers of applicant's involved products.

1999). In this case, in view of the multitude of evidence to the contrary, their probative weight is limited. Unsolicited letters written individually to applicant about its involved computer products, expressing the person's understanding and/or recognition of the term as a trademark, might have been more persuasive.

Applicant's advertising and marketing expense reports do not indicate in any way that the purchasing public recognizes the term "packet engines" as a trademark. Nor has applicant provided any sales figures.

The unsolicited media articles submitted by applicant are about applicant itself, e.g., its fast growth, "High-speed Networking: Gigabit Ethernet Reality Check," LANTIMES, April 28, 1997; recruiting and obtaining staff from other companies, "Packet rounds up top talent," Journal Of Business-Spokane, October 10-23, 1996; its obtaining venture capital, "Mining a high-tech legend," The Spokane-Review, June 8, 1997; and profiles of its officers, "Newsmakers: The people behind Spokane's business news in the past year," Journal Of Business-Spokane, April 24, 1997. The references in these articles are to applicant's trade name, Packet Engines, Inc., or to applicant as a corporation, or to individual founders and officers of

applicant corporation, not to PACKET ENGINES as a trademark for computer hardware and computer programs.

The fact that there are several current Nexis stories referring to applicant is not surprising in view of applicant's rapid growth and apparent success as a start-up company in the high-tech field. As noted, the Nexis stories submitted by applicant also refer to applicant itself, not to a trademark for the involved goods. In fact, many of applicant's Nexis stories appear to be based on press releases from applicant. In contrast, the many Nexis stories submitted by the Examining Attorney show that for many years the term "packet engines" has been used generically in stories about numerous companies (e.g., Prodigy Communications, Artel, Alantec, Scitec, Excel, IBM and Packeteer) to refer to their computer hardware and computer software programs which move packets of data.

The Starch Readership Report (Exhibit F to applicant's September 25, 1997 response) is characterized by applicant as a survey, but it is certainly not a trademark recognition survey. Rather, it is a "measure of print advertising effectiveness" specifically relating to advertisements appearing in the February 1997 issue of LAN magazine. The report includes the statement that it is "to provide you with a measure of the extent to which your ad

was seen and read in the study issue"; and the procedure used is described as conducting "personal interviews with a minimum sample of 100 issue readers who have already read the test issue prior to the interview." The question posed to the interviewees was "What thoughts or impressions did you get when you first read this ad? What specific idea did you get about this advertiser or about the products advertised?"

The report showed that 45% of those polled remembered seeing the ad, 39% not only saw it but read it at least in part, 30% read over one-half of the ad, and 30% read most of the ad; and that applicant's ad scored 88% above the median among those readers who fell within the "read most" category. This may establish that some people who read a particular issue of a particular magazine read at least some of applicant's ad therein. But the report simply does not relate to or prove that consumers recognize the term "packet engines" as a trademark identifying the source of computer hardware and computer programs.

The second survey submitted by applicant was one conducted by BrandSolutions in early (January/February) 1998 and titled "Packet Engines Corporation Awareness Overview." This survey evidence consists of the report of BrandSolutions based on the information it tabulated from

97 network professionals, who were selected from "GEA booth visitors in Atlanta and Las Vegas, provided by Packet Engines [Incorporated], and BrandSolution's online panel of IS professionals." The interviewing "consisted of a combination of phone-fax-phone approach"; 81 persons completed the initial questionnaire, and 50 completed the fax portion. The question asked was the following: "When you think of companies that manufacturer (sic) products that support Gigabit Ethernet, which one comes to mind first? Which others are you aware of? Have you heard of...?"

This is not a trademark recognition survey, but rather it relates to previous awareness or knowledge of the existence of a company, not a brand for a product. The fact that about half of the 97 participants (47%)[12] are aware of applicant as a corporation does not prove that the overall relevant purchasing public recognizes the term "packet engines" as the source of computer hardware and computer programs. In fact, the "Conclusions" listed in the survey were "(1) Gigabit Ethernet is still very much an emerging market, (2) The large network players have a clear awareness advantage (Cisco, 3Com, etc.), and (3) Overall

[12] This percentage includes the total of both aided and unaided awareness.

awareness of Packet Engines [Incorporated] is somewhat higher than other small Gigabit networking companies." This survey is not proof of consumer recognition of "packet engines" as a trademark for computer hardware and computer programs.

Neither of applicant's surveys provides evidence of "consumer reaction as to association between a given symbol and a single source of a product." 2 J. McCarthy, McCarthy on Trademarks and Unfair Competition, §15:42 (4th ed. 1999). See generally, Hilson Research Inc. v. Society for Human Resource Management, 27 USPQ2d 1423, 1435 (TTAB 1993).

The fact that applicant has used the term for a few years (including in the marketing of collateral products, e.g., whistles, calendars) does not negate its generic nature for the involved goods. And a generic term is not subject to appropriation as a trademark, regardless of evidence of purported distinctiveness because generic terms should be freely available for use by competitors.

After reviewing all of the evidence of record, including applicant's evidence of acquired distinctiveness, we find that the term "packet engines" names the class of computer equipment involved herein. We also find that the relevant public understands the term to refer to the

involved computer hardware and software. The members of the relevant public who would be interested in computer hardware and computer programs would understand the term to refer to the type of computer hardware and software, and not to the source of the goods.

Applicant's citation to the cases of Hunter Publishing Co. v. Caulfield Publishing Ltd., 1 USPQ2d 1996 (TTAB 1986); and In re Failure Analysis Associates,1 USPQ2d 1144 (TTAB 1986) are both easily distinguished from the situation now before the Board.[13] The former case, *Hunter Publishing*, involved an inter partes record where the Board found that opposer did not prove the term SYSTEMS USER was generic with regard to applicant's goods, a periodic trade journal. The latter case, *Failure Associates*, involved an ex parte case where the refusal to register was mere descriptiveness.

Based on the record before us, we hold the term "packet engines" is generic for the class of applicant's computer hardware and computer programs for data communications, storage, and image applications. See *American Fertility Society*, supra; Micro Motion Inc. v.

[13] Although applicant cited other cases in its supplemental brief, these are the only ones in the section titled "Case Law Dictates That PACKET ENGINES Should Be Approved For Registration."

Danfoss A/S, 49 USPQ2d 1628 (TTAB 1998); In re Central Sprinkler Co., 49 USPQ2d 1194 (TTAB 1998); In re Recorded Books Inc., 42 USPQ2d 1275 (TTAB 1997); In re Pennzoil Products Co. 20 USPQ2d 1753 (TTAB 1991); In re Lowrance Electronics Inc., 14 USPQ2d 1251 (TTAB 1989); and *Analog Devices*, supra.

V. Acquired Distinctiveness

Having determined that the term “packet engines” is generic, we necessarily find that the involved registration is incapable of serving as a trademark to identify the source of the goods. However, in the event it should be determined on appeal that the term is not generic, and for completeness of the record, we now consider whether applicant’s Section 2(f) evidence is sufficient to establish that the term has acquired distinctiveness.

There is no specific rule as to the exact amount or type of evidence necessary at a minimum to prove acquired distinctiveness, but generally, the more descriptive the term, the greater the evidentiary burden to establish acquired distinctiveness. See In re Bongrain International (American) Corp., 894 F.2d 1316, 13 USPQ2d 1727 (Fed. Cir. 1990); and *Yamaha*, supra at 1008. See also, 2 J. McCarthy,

McCarthy on Trademarks and Unfair Competition, §15:28 (4th ed. 1999).

For the reasons explained above, applicant's evidence is weak and flawed. We find it insufficient to establish acquired distinctiveness.

Moreover, in this case, the record contains evidence demonstrating others' use of the term "packet engines" in a generic manner as the name of computer equipment. Much of this usage occurred prior to applicant's claimed first use in November 1995, and continues through to the present. Hence, applicant failed to show the substantially exclusive use which is a prerequisite for proving acquired distinctiveness. See Levi Strauss & Co. v. Genesco, Inc., 742 F.2d 1401, 222 USPQ 939 (Fed. Cir. 1984).

Decision: The term "packet engines" is generic and incapable of distinguishing applicant's goods from those of others. Therefore, it is unregistrable on the Supplemental Register. Even if the term is ultimately found not generic, the term is merely descriptive and applicant has failed to prove it has acquired distinctiveness under Section 2(f). Accordingly, the refusals to register on the

Supplemental Register and on the Principal Register under Section 2(f) are affirmed.

R. L. Simms

E. J. Seeherman

B. A. Chapman
Administrative Trademark Judges, Trademark Trial and Appeal Board