

Digimarc CORP
Form S-8 POS
May 11, 2018

As filed with the Securities and Exchange Commission on May 11, 2018

Registration No. 333-196035

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

POST-EFFECTIVE AMENDMENT NO. 1 TO FORM S-8

REGISTRATION STATEMENT

UNDER

THE SECURITIES ACT OF 1933

DIGIMARC CORPORATION

(Exact name of Registrant as specified in its charter)

Oregon
(State or other jurisdiction of
incorporation or organization)

9405 SW Gemini Drive

Beaverton, Oregon 97008

26-2828185
(I.R.S. Employer

Identification No.)

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(Address of principal executive offices, including zip code)

DIGIMARC CORPORATION 2008 INCENTIVE PLAN

DIGIMARC CORPORATION 2018 INCENTIVE PLAN

(Full title of the plan)

Charles Beck

Chief Financial Officer and Treasurer

Digimarc Corporation

9405 SW Gemini Drive

Beaverton, Oregon 97008

503-469-4800

(Name, address and telephone number, including area code, of agent for service)

Copy to:

Danielle Benderly

Perkins Coie LLP

1120 NW Couch Street, Tenth Floor

Portland, Oregon 97209-4128

503-727-2000

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Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, a smaller reporting company, or an emerging growth company. See the definitions of large accelerated filer, accelerated filer, smaller reporting company, and emerging growth company in Rule 12b-2 of the Exchange Act.

Large accelerated filer

Accelerated filer

Non-accelerated filer (Do not check if a smaller reporting company)

Smaller reporting company

Emerging growth company

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 7(a)(2)(B) of the Securities Act.

CALCULATION OF REGISTRATION FEE

| Title of Securities to Be Registered (1) | Amount to Be Registered (2) | Proposed Maximum Offering Price Per Share (3) | Proposed Maximum Aggregate Offering Price (3) | Amount of Registration Fee (3) |
|---|------------------------------------|--|--|---------------------------------------|
| Common Stock, \$0.001 par value, including any associated preferred stock purchase rights, under the Digimarc Corporation 2008 Incentive Plan and, to the extent specified herein, the Digimarc Corporation 2018 Incentive Plan | 1,000,000 Shares | N/A | N/A | N/A |

- (1) Each share of common stock registered hereunder includes an associated preferred stock purchase right. Until the occurrence of prescribed events, none of which has occurred, the preferred stock purchase rights are not exercisable, are evidenced by certificates representing common stock, and may only be transferred with the common stock. No additional registration fee is payable with respect to the preferred stock purchase rights. As described in the Explanatory Note below, this Post-Effective Amendment No. 1 to Registration Statement on Form S-8 (this Post-Effective Amendment) is being filed to provide that up to 770,000 shares of common stock originally registered upon filing of the Registration Statement on Form S-8 (File No. 333-196035) filed with the Securities and Exchange Commission on May 16, 2014 (the Prior Registration Statement) for issuance under the Digimarc Corporation 2008 Plan (the 2008 Plan) may be issued under the Digimarc Corporation 2018 Plan (the 2018 Plan and together with the 2008 Plan, the Plans) once they are no longer issuable pursuant to the 2008 Plan.
- (2) Includes an indeterminate number of additional shares which may be necessary to adjust the number of shares issued pursuant to the Plans as the result of any future stock split, stock dividend or similar adjustment of our outstanding common stock, and including related preferred stock purchase rights.
- (3) The filing fee for the registration of the offer of shares of common stock under the 2008 Plan was paid in full upon the filing of the Prior Registration Statement (see Explanatory Note below).

EXPLANATORY NOTE

Digimarc Corporation (the Registrant) previously filed its Registration Statement on Form S-8 (File No. 333-196035) with the Securities and Exchange Commission (the Commission) on May 16, 2014 (the Prior Registration Statement) with respect to 1,000,000 shares of the Registrant's common stock, par value \$0.001 per share (the Common Stock), issuable under the Registrant's 2008 Incentive Plan (the 2008 Plan).

On April 30, 2018 (the Approval Date), the Registrant's stockholders approved the Registrant's 2018 Incentive Plan (the 2018 Plan) and, in connection therewith, no further awards will be made under the 2008 Plan. Pursuant to the terms of the 2018 Plan, any shares currently reserved for issuance under the 2008 Plan and any shares that were subject to outstanding awards under the 2008 Plan as of the Approval Date that subsequently cease to be subject to such awards as a result of the forfeiture, cancellation or termination of such awards will become available for issuance under the 2018 Plan (the Rollover Shares).

The Company is filing this Post-Effective Amendment No. 1 to Form S-8 (the Amendment) pursuant to SEC Compliance and Disclosure Interpretation 126.43 to amend the Prior Registration Statement to also cover the offer and sale of up to 770,000 Rollover Shares under the 2018 Plan (to the extent such shares are, or become, no longer issuable under the 2008 Plan, and instead are, or become, issuable under the 2018 Plan). For avoidance of doubt, the Amendment will not cause this registration statement to cover the offer and sale of any additional shares of the Registrant's common stock that may be offered and sold under the 2018 Plan that were not previously issuable under the 2008 Plan.

PART II

INFORMATION REQUIRED IN REGISTRATION STATEMENT

Item 3. INCORPORATION OF CERTAIN DOCUMENTS BY REFERENCE

The following documents filed with the Commission are hereby incorporated by reference into this Registration Statement:

- (a) The Registrant's Annual Report on Form 10-K for the year ended December 31, 2017, filed with the Commission on February 22, 2018;
- (b) The Registrant's Quarterly Report on Form 10-Q for the quarter ended March 31, 2018, filed with the Commission on April 26, 2018;
- (c) The Registrant's Current Report on Form 8-K, filed with the Commission on May 3, 2018; and
- (d) The description of the Registrant's capital stock contained in the following Registration Statements filed under Section 12(b) of the Securities Exchange Act of 1934, as amended (the Exchange Act): Registration Statement on Form 10 filed with the Commission on June 23, 2008; Amendment No. 1 thereto, filed with the Commission on July 22, 2008; Amendment No. 2 thereto, filed with the Commission on August 13, 2008; Amendment No. 3 thereto, filed with the Commission on September 9, 2008; Amendment No. 4 thereto, filed with the Commission on October 2, 2008; Amendment No. 5 thereto, filed with the Commission on October 7, 2008; and Amendment No. 6 thereto, filed with the Commission on October 14, 2008; and any amendments or reports filed for the purpose of updating such description.

All documents the Registrant files pursuant to Sections 13(a), 13(c), 14 and 15(d) of the Exchange Act after the date hereof, and prior to the filing of a post-effective amendment which indicates that the securities offered hereby have

been sold or which deregisters all securities covered hereby then remaining unsold, shall also be deemed to be incorporated by reference into this Registration Statement and to be a part hereof commencing on the respective dates on which such documents are filed.

Item 4. DESCRIPTION OF SECURITIES

Not applicable.

Item 5. INTERESTS OF NAMED EXPERTS AND COUNSEL

None.

Item 6. INDEMNIFICATION OF DIRECTORS AND OFFICERS

As an Oregon corporation, Digimarc (Digimarc, we, us, our) is subject to the Oregon Business Corporation Act (the OBCA) and the exculpation from liability and indemnification provisions contained therein. As authorized by Section 60.047(2) of the OBCA, Article IX of our articles of incorporation eliminates the liability of our directors to us or our shareholders for certain acts or omissions. Our articles of incorporation do not eliminate the liability of our directors to the extent that the OBCA does not permit corporations to limit directors' liability.

Section 60.387 et seq. of the OBCA authorizes corporations to indemnify their directors and officers against liability where the director or officer has acted in good faith and with a reasonable belief that the actions taken were in the best interests of the corporation or at least not opposed to the corporation's best interests and, if in a criminal proceeding, such individual had no reasonable cause to believe the conduct in question was unlawful. Under the OBCA, corporations may not indemnify a director or officer against liability in connection with a claim by or in the right of the corporation if (i) the director or officer has been adjudged liable to the corporation or (ii) the proceeding charged the director or officer with (and adjudged the director or officer liable for) improperly receiving a personal benefit. Nor may corporations indemnify directors or officers against breaches of the duty of loyalty, acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, any unlawful distribution under O.R.S. 60.367, or any transaction from which the director or officer derived an improper personal benefit. The OBCA mandates indemnification against all reasonable expenses incurred in the successful defense of any claim made or threatened whether or not such claim was by or in the right of the corporation. Finally, a court may order indemnification if it determines that the director or officer is entitled to mandatory indemnification, or is otherwise fairly and reasonably entitled to indemnification in view of all the relevant circumstances, regardless of whether the director or officer met the good faith and reasonable belief standards of conduct set forth in the statute.

The OBCA also provides that the statutory indemnification provisions are not exclusive of any other rights directors or officers may be entitled to under a corporation's articles of incorporation or bylaws, any agreement, general or specific action of the board of directors, vote of shareholders or otherwise. Article VIII of our articles of incorporation requires us to indemnify our directors, officers, agents and other representatives from losses suffered while acting on our behalf. Article VIII specifies that such representatives are to be indemnified to the fullest extent permitted by law, and that their right to indemnification shall not be affected by subsequent amendments to our articles of incorporation or the end of the representative's service to Digimarc.

Additionally, we have entered into indemnity agreements with certain of our officers and directors. The indemnity agreements require us to, among other things, indemnify the officer or director against all expenses (including attorneys' fees, judgments, fines and penalties, among others) incurred by such officer or director as a result of being named or threatened to be named as a party to any proceeding as a result of such officer or director's service in such capacity. The indemnity agreements also require us to indemnify the officer or director to the fullest extent permitted by law. However, the indemnification agreements prohibit us from indemnifying any director or officer who is determined to be liable under Section 16(b) (or similar provisions of any federal, state or local laws) for an accounting of the profits made on the purchase or sale of shares of the corporation.

Item 7. EXEMPTIONS FROM REGISTRATION CLAIMED

Not applicable.

Item 8. EXHIBITS

EXHIBITS INDEX

| Exhibit Number | Description |
|-----------------------|--|
| 5.1 | <u>Opinion of Perkins Coie LLP regarding legality of the common stock being registered with respect to the Digimarc Corporation 2008 Incentive Plan (incorporated by reference to Exhibit 5.1 to the Registrant's Registration Statement on Form S-8, filed on May 16, 2014 (SEC File No. 333-196035))</u> |
| 5.2 | <u>Opinion of Perkins Coie LLP regarding legality of the common stock being registered with respect to the Digimarc Corporation 2018 Incentive Plan</u> |
| 23.1 | <u>Consent of KPMG LLP</u> |
| 23.2 | <u>Consent of Perkins Coie LLP (included in opinion filed as Exhibit 5.2)</u> |
| 24.1 | <u>Power of Attorney (see signature page)</u> |
| 99.1 | <u>Digimarc Corporation 2008 Incentive Plan (incorporated by reference to Appendix A to the Registrant's definitive proxy statement on Schedule 14A with respect to the 2014 annual meeting of shareholders filed with the SEC on March 21, 2014 (SEC File No. 001-34108))</u> |
| 99.2 | <u>Digimarc Corporation 2018 Incentive Plan (incorporated by reference to Appendix A to the Registrant's definitive proxy statement on Schedule 14A with respect to the 2018 annual meeting of shareholders filed with the SEC on March 21, 2018 (SEC File No. 001-34108))</u> |

Item 9. UNDERTAKINGS

A. The undersigned Registrant hereby undertakes:

(1) To file, during any period in which offers or sales are being made, a post-effective amendment to this Registration Statement:

(a) To include any prospectus required by Section 10(a)(3) of the Securities Act of 1933, as amended (the Securities Act);

(b) To reflect in the prospectus any facts or events arising after the effective date of this Registration Statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in this Registration Statement; and

(c) To include any material information with respect to the plan of distribution not previously disclosed in this Registration Statement or any material change to such information in this Registration Statement;

provided, however, that paragraphs (1)(a) and (1)(b) above do not apply if the information required to be included in a post-effective amendment by those paragraphs is contained in reports filed with or furnished to the Commission by the Registrant pursuant to Section 13 or Section 15(d) of the Exchange Act that are incorporated by reference in this Registration Statement.

(2) That, for the purpose of determining any liability under the Securities Act, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

(3) To remove from registration by means of a post-effective amendment any of the securities being registered which remain unsold at the termination of the offering.

B. The undersigned Registrant hereby undertakes that, for purposes of determining any liability under the Securities Act, each filing of the Registrant's annual report pursuant to Section 13(a) or 15(d) of the Exchange Act (and, where applicable, each filing of an employee benefits plan's annual report pursuant to Section 15(d) of the Exchange Act) that is incorporated by reference in this Registration Statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

C. Insofar as indemnification for liabilities arising under the Securities Act may be permitted to directors, officers and controlling persons of the Registrant pursuant to the foregoing provisions, or otherwise, the Registrant has been advised that, in the opinion of the Commission, such indemnification is against public policy as expressed in the Securities Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the Registrant of expenses incurred or paid by a director, officer or controlling person of the Registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the Registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Securities Act and will be governed by the final adjudication of such issue.

SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, the registrant certifies that it has reasonable grounds to believe that it meets all the requirements for filing on Form S-8 and has duly caused this Post-Effective Amendment No.1 to the Registration Statement on Form S-8 to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of Beaverton, State of Oregon, on May 11, 2018.

Digimarc Corporation

/s/ Bruce Davis

By: Bruce Davis

Chief Executive Officer

POWER OF ATTORNEY

Each person whose signature appears below authorizes Bruce Davis, Charles Beck and Robert Chamness, or any of them, as attorneys-in-fact with full power of substitution, to execute in the name and on the behalf of each person, individually and in each capacity stated below, and to file, any and all amendments to this Post-Effective No. 1 to the Registration Statement on Form S-8, including any and all post-effective amendments.

Pursuant to the requirements of the Securities Act of 1933, this Registration Statement has been signed by the following persons in the capacities indicated below on May 11, 2018.

| Signature | Title |
|--|--|
| /s/ Bruce Davis | Chief Executive Officer and Chairman of the Board |
| Bruce Davis | (Principal Executive Officer) |
| /s/ Charles Beck | Chief Financial Officer and Treasurer (Principal Financial |
| Charles Beck | and Accounting Officer) |
| /s/ Gary DeStefano Gary DeStefano | Director |
| /s/ Richard L. King Richard L. King | Director |
| /s/ James T. Richardson James T. Richardson | Director |
| /s/ Andrew J. Walter Andrew J. Walter | Director |
| /s/ Bernard Whitney | Director |

Bernard Whitney

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