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Paper No. 17  
DEB

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re WIXT TV, Inc.

Serial No. 75/370,316

Request For Reconsideration

Martin G. Linihan of Hodgson Russ Andrews Woods & Goodyear,  
LLP for WIXT TV, Inc.

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

Before Bucher, Holtzman and Rogers, Administrative Trademark  
Judges.

Opinion by Bucher, Administrative Trademark Judge:

WIXT TV, Inc. has requested reconsideration of the Board's April 3, 2001 decision affirming the Trademark Examining Attorney's refusal to register NEWS CHANNEL 9 on the Supplemental Register for "television program services." Registration was refused on the ground that NEWS CHANNEL 9, when used in connection with the identified services is generic and, thus, incapable of distinguishing applicant's television program services from like services of others.

Applicant maintains that in applying the first prong of the test for genericness as outlined in H. Marvin Ginn

Corporation v. International Association of Fire Chiefs, Inc.,

782 F.2d 987, 990, 228 USPQ 528, 530 (Fed. Cir. 1986), "the Board [in holding that NEWS CHANNEL 9 is generic] incorrectly found the genus of services to be 'television news programs accessible via channel 9 on one's local television dial'." In particular, applicant argues as follows:

It is well established that the essence of the inquiry on the issue of genericness is whether the term or phrase is the name of the product or service itself. 2 J. McCarthy, McCarthy on Trademarks and Unfair Competition, Section 12:1 at page 12-3 (4th ed. 1998). Here, the name of the service is television program services, the identification of services in the instant application, which was approved by the Trademark Examining Attorney. Thus, NewsChannel 9 is not generic because the service is not NewsChannel 9 but instead television program services.

Professor McCarthy's discussion of Fletcher's "Deep Bowl Spoon" example is especially helpful on this issue, *id.* at page 12-51:

Anthony Fletcher has illustrated the descriptive-generic distinction by the "Deep Bowl Spoon" example. "Deep Bowl" is descriptive of a type of spoon deep in the bowl portion. It is not "generic", since the implement is not a "Deep Bowl," but a "spoon." "Spoon" is the generic name of the eating tool. But for another article - a deep bowl - its name is "deep bowl." And, to add to his example, "Deep Bowl" as a trademark for canned soup would probably be only suggestive of quantity.

Applying this example to the situation at hand, NewsChannel 9 is not generic because the services are television program services.

Applicant respectfully disagrees with the Board's conclusion at the top of page 7 of the Decision that other television stations could not convey service attributes without using the words News Channel 9. Several alternatives immediately come to mind, such as News At 9, Channel 9 News, News From 9, News From Channel 9, News By 9, News By Channel 9, to mention a few. Thus, various alternative names are available to others to identify television programming services having the referenced attributes. The existence of such alternatives should be convincing evidence that News Channel 9 is not generic.

We have carefully considered the points raised by applicant, but are of the view that our initial decision was correct.

In our earlier opinion, in reviewing the evidence in the file, we too cited to Professor McCarthy, who in turn had cited to Judge Learned Hand, who said that the question of genericness should be "what does the relevant public think the term connotes?" 2 J. McCarthy, McCarthy on Trademarks and Unfair Competition, §12:4 at page 12-9 (4<sup>th</sup> ed. 1999). In answering Judge Learned Hand's query on the facts of this case, we found that:

... the record supports a finding that television viewers know quite well - that each local cable system, metropolitan area or other distinct geographical region has its own "Channel 9," and that these channels frequently, and sometimes exclusively, feature news programs...

... The record shows that as members of the public travel from one part of the country to another, they would view any promotion of NEWS

CHANNEL 9 as indicating only the opportunity to obtain television news programs on channel 9, whether it be through a local television cable system or from a local VHF broadcast station.

We reject applicant's position that in cases such as the present one, the Board must accept the wording of the recital of services as the genus. The wording of the recital of services in a trademark application can certainly be broader than the genus of applicant's relevant services, so long as the named genus is accurate and fits within the recited services. As to applicant's actual services, applicant admits that it broadcasts on channel 9 and that some of its content is news. The fact that its recital of services encompasses a broader range of services than the subset found to be the appropriate genus does not mean that the purported mark is not generic for that subset of services. Otherwise, we would have the ludicrous result that any applicant alleging that a generic term is a trademark or service mark could obtain a registration so long as it crafted an identification of goods or recital of services broader than the genus identified by the alleged mark.

In a parallel situation, involving goods rather than services, the Board expressly faced this very question:

The broad general category of goods involved here is sprinklers for fire protection. However, a product may be in more than one category, and here, applicant's goods also fall

within the narrower category of sprinklers for fire protection of attics. We find that the term "attic" would be understood by the relevant public as referring to that category of goods. Remington Products Inc., v. North American Philips Corp., 892 F.2d 1576, 13 USPQ2d 1444, 1449 (Fed. Cir. 1990).

In re Central Sprinkler Co., 49 USPQ2d 1194, 1197 (TTAB 1998).

Applicant's listing of other alternatives that competitors could use (e.g., News At 9, Channel 9 News, News From 9, News From Channel 9, News By 9, News By Channel 9, etc.) does not warrant approval of applicant's application, as a product or service may have more than one generic name. See In re Recorded Books Inc., 42 USPQ2d 1275, 1281-82 (TTAB 1997), citing In re Sun Oil Company, 426 F.2d 401, 165 USPQ 718, 719 (CCPA 1970) (J. Rich, concurring). As Judge Rich instructed in his concurring opinion, "[a]ll generic names for a product belong in the public domain." *Id.* (emphasis in original). 2 J. McCarthy, McCarthy on Trademarks and Unfair Competition, §12:10 (4<sup>th</sup> ed. 1999).

For the reasons discussed in our decision as well as those reviewed above, we adhere to our finding that NEWS CHANNEL 9 is generic of applicant's identified services.

**Decision:** The request for reconsideration is denied.