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Paper No. 9
RFC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re CBS Radio License, Inc.

Serial No. 75/709,027

Robert P. Lenert for CBS Radio License, Inc.

Fred Mandir, Trademark Examining Attorney, Law Office 105
(Thomas G. Howell, Managing Attorney).

Before **Cissel**, Hanak and Rogers, Administrative Trademark
Judges.

Opinion by Cissel, Administrative Trademark Judge:

On May 12, 1999, applicant filed the above-referenced application to register the mark "KMZQ" on the Principal Register for "radio broadcasting services," in Class 38. The application was based on applicant's claim of use of the mark in interstate commerce in connection with the services on or before April 30, 1996.

The Examining Attorney refused registration under Section 2(d) of the Lanham Act, 15 U.S.C. Section 1052(d), on the ground that applicant's mark, as used in connection

with the services specified in the application, so resembles the mark "WMZQ," which is registered¹ for the identical services, that confusion is likely.

With the Office Action refusing registration, the Examining Attorney also made of record copies of official United States Patent and Trademark Office records of four third-party registrations of marks registered for television and radio broadcasting services. Two of the registered marks, "WCBS" and "KCBS," are owned by the same entity, CBS Inc.² The other two marks, "WNBC-TV" and "KNBC," are both owned by National Broadcasting Co., Inc.³ The Examining Attorney argued that these registrations show that the same entities have registered such similar marks for identical services.

Responsive to the refusal to register, applicant argued that confusion is not likely because its mark is not similar to the cited registered mark in appearance, sound, meaning or connotation. As to the third-party registrations cited by the Examining Attorney wherein the

¹ Reg. No. 1,370,574 issued on the Principal Register to Viacom International, Inc. on Nov. 12, 1985. Combined affidavit under Sections 8 and 15 of the Act were accepted and acknowledged, respectively.

² Reg. Nos. 1,407,078 and 1,390,268, both valid and subsisting registrations on the Principal Register.

³ Reg. Nos. 1,382,707 and 1,382,708, both also valid and subsisting registrations on the Principal Register.

marks differ only in the first letter of the four-letter series, applicant argued that "the common letters are either found in the name of the registrant (CBS), or are an abbreviation of the name of the registrant (NBC)."

Applicant went on to argue that "a brief review of the USPTO on-line Trademark database revealed other registrations for radio station call letters that differ only in the first letter, but are owned by different entities. For example, Registration No. 1,371,752 for WINK owned by Fort Myers broadcasting Co. and Registration No. 1,510,432 for KINK owned by Portland Radio, Inc.

(subsequently assigned to the present applicant.) Another example is Registration No. 1,767,671 for WMXV owned by Bonneville International Corp. and Application No. 75-695946 for KMXV owned by the present applicant and published for opposition on February 2, 2000."⁴

The Examining Attorney was not persuaded by applicant's arguments. The refusal to register was made final in the second Office Action.

Applicant timely filed a Notice of Appeal, and both applicant and the Examining Attorney filed briefs. Applicant filed a reply to the brief of the Examining

⁴ This application subsequently matured into Registration No. 2,349.937 on May 16, 2000.

Attorney, but applicant did not request an oral hearing before the Board.

Based on careful consideration of the record in this application and the arguments presented in the briefs, we hold that the refusal to register must be affirmed.

In the case of *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), the predecessor to our primary reviewing court set out the factors to be considered in determining whether confusion is likely. Chief among these factors are the similarity of the marks as to appearance, pronunciation, meaning and commercial impression, and the similarity of the goods or services as set forth in the application and the registration, respectively.

In the instant case, the services set forth in the application are identical to those specified in the cited registration, and the mark applicant seeks to register creates a commercial impression which is similar to the one created by the cited registered mark.

Applicant argues that because the different letters with which the marks begin dominate each mark, the marks are therefore different in appearance, pronunciation, and commercial impression. Applicant points to what it views as the inconsistent past practice of the Patent and

Trademark Office with regard to registering broadcasting service call-letter marks which differ only in the first letter, and argues that advertisers, who are the actual customers for broadcasting services, are sophisticated purchasers who can readily distinguish between these two marks, particularly in view of the fact that applicant renders its services in Nevada, whereas the owner of the cited registration broadcasts from the District of Columbia. Applicant argues that these facts require the Board to find that confusion is not likely in this case.

Although these two four-letter marks share the final three letters, the initial letters are obviously different. The Examining Attorney explains that Federal Communications Commission regulations require call letters for stations east of the Mississippi River to begin with the letter "W," whereas the call letters for stations west of the Mississippi River must begin with the letter "K." He goes on to argue that in view of this fact, radio listeners attach less significance to the "W" or "K" at the beginning of a set of broadcast call letters, such that the final three letters are the dominant portion of any given call-letter mark. He contends that stations are frequently referred to by their last three letters, e.g. "KMZQ" and

WMZQ" would both be shortened to "MZQ." This argument makes sense to us.

The cited registration is not geographically restricted, nor would any registration which could issue as a result of this application be geographically restricted. It logically follows that applicant and registrant could conceivably create a situation in which their broadcasting and marketing territories overlap. Federal Communications Commission regulations may in fact be designed to preclude this, but the record in this appeal does not contain evidence establishing that such a situation could not occur.

The third-party registrations argued by both the Examining Attorney and applicant do appear to demonstrate that the Patent and Trademark Office has in the past taken inconsistent positions with respect to the issue of likelihood of confusion between call-letter marks which differ only in the initial letter. While there are obvious differences in the commercial impressions created by "WINK" and "LINK" because of the fact that these two marks make up words with different connotations, we have no ready explanation for the issuance of the "K" and "W" "MXV" registrations to different entities. Needless to say, however, this Board is not bound by prior decisions of

Examining Attorneys to pass other marks to publication. In re Nett Designs Inc., 57 USPQ2d 1564 (Fed. Cir. 2001). We must resolve every appeal with which we are presented on the basis of the record in that particular application. In re Cosvetic Laboratories, Inc., 202 USPQ 842 (TTAB 1979). While the evidence of record is inconsistent on this point, it is our view that the third-party registrations made of record by the Examining Attorney show that the public, including both radio listeners and potential radio advertisers, has a basis upon which to assume that radio stations which use call letters which differ only as to the initial "K" or "W" are affiliated or related in some way, such that the services rendered under such marks are controlled by a single entity. This is obviously the case with the registrations for "WCBS" and "KCBS," both of which are owned by a company which appears to be related to applicant.

In summary, confusion is likely in the instant case because the services set forth in the application and the cited registration are identical, and the marks at issue create similar commercial impressions. Applicant, as the newcomer, had a duty to select a mark that is not likely to cause confusion with one which was already in use by someone else in the same field. Moreover, if we had any

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doubt on this issue, such doubt would necessarily be resolved in favor of the prior registrant, and against the junior user, applicant. *Recot Inc. v. Becton*, 56 USPQ2d 1859 (TTAB 2000).

DECISION: The refusal to register is affirmed.

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