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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Positive Radio Group, Inc.

Serial No. 76602733

Cary S. Tepper of Booth, Freret, Imlay & Tepper, P.C. for
Positive Radio Group, Inc.

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(Tomas V. Vlcek, Managing Attorney).

Before Hohein, Hairston and Walsh, Administrative Trademark
Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by Positive Radio Group,
Inc. to register the mark JOY AM for services ultimately
identified as "radio broadcasting and radio program
broadcasting consisting of religious content."¹

Registration has been finally refused under Section 2(d) of

¹ Serial No. 76602731, filed July 19, 2004, alleging first use
dates of August 1, 1999. The term "AM" is disclaimed apart from
the mark as shown.

the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to the identified services, so resembles the mark JOY, which is registered for "entertainment services in the nature of a radio program series,"² as to be likely to cause confusion.

Applicant and the examining attorney have filed briefs. We affirm the refusal to register.³

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

² Registration No. 1744870, issued January 5, 1993; renewed.

³ We note that the refusal of registration in related application Serial No. 76602731 was affirmed by the Board in an opinion issued February 23, 2007.

Turning first to the services, it is applicant's position that the respective services are not related. Applicant maintains that its radio broadcasting and radio program broadcasting services consist of "full-time entertainment and educational programming that promotes Christian denominations equally" whereas registrant's radio program series consists of "hour-long inspirational classical music programs" directed to adherents of the Lutheran Church. (Brief at 16). Thus, according to applicant, "the consumers to whom [applicant's] services are marketed are not within the same channels of trade as those from [registrant] and the services are not marketed to the same relevant purchasers." (Brief at 17). In support of its position, applicant submitted an Internet printout from <http://www.classic99.com/> which describes the JOY radio program series as a weekly program of sacred music.

It is well settled that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992); and *The*

Chicago Corp. v. North American Chicago Corp., 20 USPQ2d 1715 (TTAB 1991). In this case, registrant's identified radio program series is not limited in terms of content, channels of trade or customers. Thus, for purposes of our likelihood of confusion analysis, it must be presumed that such radio program series encompasses all the usual types of content, including religious content in general.

Insofar as the channels of trade and classes of customers for registrant's radio program series are concerned, it seems to us that the direct or initial customers of such services would be radio stations. However, the ultimate recipients of a radio program series would be members of the general public. Similarly, the recipients of radio broadcasting and radio program broadcasting consisting of religious content would be members of the general public. Thus, we must also presume that applicant's and registrant's trade channels and customers overlap. We certainly cannot draw the distinctions in content, trade channels and customers urged by applicant.

Moreover, to establish a relationship between applicant's and registrant's services, the examining attorney has made of record ten use-based third-party registrations for marks which, in each instance, are

registered for "radio broadcasting" on the one hand, and "radio programs" or "radio programming", on the other hand.

Although such registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nevertheless have some probative value to the extent that they serve to suggest that the services listed therein are of a kind which may emanate from a single source. See, e.g., *In re Albert Trostel & Sons, Co.*, 29 USPQ2d 1783 (TTAB 1983); and *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467 (TTAB 1988).

Under the circumstances, we find that applicant's radio broadcasting and radio program broadcasting consisting of religious content and registrant's entertainment services in the nature of a radio program series are related services. If such services are offered under the same or substantially similar marks, confusion as to source or sponsorship would be likely to result.

Turning next to a consideration of the marks, applicant argues in its initial brief at 10:

A proper analysis reveals that the disclaimed portion of [applicant's] mark does, in fact, cause the mark[,] JOY AM, to be dissimilar to and quite distinct from the registered mark, JOY, in sound, visual appearance, connotation, pronunciation and commercial impression. The addition of the letters AM makes the mark distinct in sound, visual appearance, and pronunciation, similar to when the term NORTON

MCNAUGHTON is added to the term ESSENTIALS in the previous case. Knight Textile Corporation v. Jones Investment Co., [75 USPQ2d 1313 (TTAB 2005)].

. . . .

JOY AM clearly refers to radio programming and/or a radio broadcasting format; whereas [registrant's mark] JOY is vague and not connected to any particular service or product. One can be sure that a consumer who encounters these two marks would immediately know that JOY AM refers to a radio station, but would have no idea what JOY is related to without further information.

We find that when considered in their entireties, applicant's JOY AM mark is so similar to registrant's JOY mark that their contemporaneous use is likely to cause confusion. As the Court of Appeals for the Federal Circuit has stated, while marks must be considered in their entireties, including any descriptive matter, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Disclaimed or descriptive terms, though they must be considered when comparing marks, are typically less significant. Hewlett-

Packard Co. v Packard Press Inc., 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

In this case, when the marks are considered in their entirety, it is clear that they are highly similar in sound, appearance, connotation and commercial impression. The dominant and distinguishing portion of applicant's JOY AM mark is the word JOY due to the descriptiveness, as evidenced by the disclaimer, of the letters AM. Further, as the examining attorney correctly notes, a side-by-side comparison is not the proper test to be used in determining the issue of likelihood of confusion since such a comparison is not the ordinary way that a prospective customer would be exposed to the marks. Instead, it is the similarity of the general overall commercial impression engendered by the marks which must determine, due to the fallibility of memory and the consequent lack of perfect recall, whether confusion as to source or sponsorship is likely. The proper emphasis is thus on the recollection of the average customer, who normally retains a general rather than specific impression of marks. See, e.g., Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); Envirotech Corp. v. Solaron Corp., 211 USPQ 724 (TTAB 1981); and Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106 (TTAB 1975). This is

especially the case here because the marks typically will be "heard" rather than "seen" by the recipients of the respective services.

We find that the descriptive letters AM, while not present in registrant's mark, are insufficient to distinguish the marks because the shared term JOY renders the marks highly similar in sound, appearance and connotation. Overall, the respective marks JOY and JOY AM project substantially the same general commercial impression.

Finally, applicant's reliance on Knight Textile to support its position that the marks are dissimilar is misplaced. The marks involved in that case were ESSENTIALS and NORTON MCNAUGHTON ESSENTIALS, both for clothing. The evidence demonstrated that the shared term, ESSENTIALS, had suggestive significance as applied to items of apparel, and the Board held that:

Based on this evidence, we find that purchasers are able to distinguish among various ESSENTIAL marks by looking to other elements of the marks. In this case, that other element is the presence of applicant's house mark NORTON MCNAUGHTON. We find that ESSENTIALS is a highly suggestive term as applied to clothing, and that applicant's addition of its house mark NORTON MCNAUGHTON renders the two marks sufficiently distinguishable, when viewed in their entirety, that confusion is not likely to occur. (case citations omitted).

Id at 1316.

In this case, there is no evidence demonstrating that the shared term, JOY, has suggestive significance as applied to radio programming and/or radio broadcasting services. Thus, we have no basis for concluding that customers of such services would be able to distinguish among JOY marks. Moreover, applicant has not added a house mark or an arbitrary term to JOY. Rather, applicant has added the letters AM which have no source-indicating significance when applied to radio broadcasting services. In other words, this is not a case where the shared term has been shown to have suggestive significance and the applicant has added to that shared term a distinctive term which renders the marks distinguishable. In short, the Knight Textile case is readily distinguishable from the case at hand.

In view of the foregoing, we conclude that customers familiar with registrant's JOY mark for entertainment services in the nature of a radio program series, would be likely to believe, upon encountering applicant's mark JOY AM for radio broadcasting and radio program broadcasting consisting of religious content, that the respective services emanate from, or are sponsored by or affiliated with, the same source.

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Decision: The refusal to register under Section 2(d)
is affirmed.