

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Paper No. 11
GFR

8/24/00

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Tree of Star's, Incorporated**

Serial No. 75/208,730

Peter M. DeJonge of **Thorpe, North & Western** for **Tree of Star's, Incorporated**.

John S. Yard, Trademark Examining Attorney, Law Office 104
(**Sidney Moskowitz**, Managing Attorney).

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

Opinion by **Rogers**, Administrative Trademark Judge:

Tree of Star's, Incorporated has filed an application to register the mark WHAT IS REALLY GOING ON? in International Class 41 for services identified, following amendment, as "production of radio and television programs relating to current events and items of general public interest."¹ The Examining Attorney refused registration of applicant's mark under Section 2(d) of the Trademark Act,

¹ Serial No. 75/208,730, filed December 5, 1996. Applicant alleges a bona fide intention to use the mark in commerce.

15 U.S.C. § 1052(d), because of the prior registration of WHAT'S GOING ON, for "radio programming" in Class 41 and "newsletters for radio listeners featuring news and information about people and events in radio," in Class 16.²

When the Examining Attorney made the refusal of registration final, applicant appealed. Both applicant and the Examining Attorney have filed briefs, but an oral argument was not requested. We affirm the refusal.

Our determination of registrability under Section 2(d) of the Trademark Act is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the analysis of likelihood of confusion presented by this case, key considerations are the substantial similarities of the marks, the legally identical nature of the services, and the presumptively similar classes of consumers for these services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Considering the services first, we note that there are no restrictions as to the type or content of radio

² Registration No. 1,858,589, issued October 18, 1994, based on a claimed date of first use in commerce of January 1, 1993.

programming offered by registrant in connection with its mark. Applicant argues that registrant's radio programs are limited in their focus to "news and information about people and events in radio." The Examining Attorney, however, is entirely correct in discounting this argument, as the limitation applies only to registrant's newsletter, not its programming. In view thereof, registrant's radio programs are presumed to include the types of radio programs produced by applicant. Moreover, there are no restrictions on the types of radio stations or radio networks that would air the programs of registrant or applicant. Accordingly, we presume that they could air, at a minimum, in similar markets and be presented to the same categories of listeners.

When the services of parties are directly competitive, as are the radio programming and production services in this case, the degree of similarity in the marks necessary to conclude that confusion among consumers is likely is not as great as when there are differences in the services. *See Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1773 (TTAB 1992). We turn, then, to the marks.

Applicant argues that there are three significant differences between its mark and registrant's. First, applicant notes that its mark uses "WHAT IS" rather than

the contraction "WHAT'S." Second, applicant notes that its mark includes the term "REALLY." Third, applicant asserts that its mark poses a question while registrant's mark presents a statement. Applicant argues that all three of these differences make the marks distinguishable in sight and sound, and that the latter two differences illustrate the different commercial impressions created by the marks. We disagree.

In appropriate cases, similarity as to any one element of the sight, sound and meaning trilogy can result in a finding of likelihood of confusion. See *Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988). Moreover, when products are frequently purchased by calling for them by name, or, as in this case, competitive radio programs are presented so that the marks for those programs typically are heard rather than read, it is appropriate to accord greater weight to the similarity of aural presentation of marks. See *Krim-Ko Corp.*, 156 USPQ at 526.

Even when compared for visual similarity, the use of "WHAT IS" rather than the contraction "WHAT'S" is an inconsequential difference between applicant's and registrant's marks. When the marks are spoken, we find it highly unlikely that radio listeners will note the

difference. In regard to applicant's use of the term "REALLY", listeners may not readily recognize that applicant's mark includes an additional term that registrant's mark does not. It is well settled that the average consumer, including the average radio listener, normally retains general, rather than a specific impressions of marks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Finally, while applicant relies greatly on its argument that its mark is a question and registrant's mark is a statement, we note that registrant's mark includes no punctuation whatsoever and might very well be spoken either as a statement or a question. Moreover, while the difference between a question and a statement is readily apparent when viewing printed words, it may not be so clear when words are spoken on the radio, when a question may be posed for rhetorical effect rather than, as in conversation, to obtain a response from the listener. In sum, we find the marks likely to be perceived as similar in sound and connotation; and we find these similarities critical in this case.

We note applicant's argument that the marks both are suggestive and weak, so that registrant's mark should be entitled to only a narrow scope of protection. Applicant has presented no evidence of weakness; even if we assume

weakness, this will not necessarily avoid a finding of likelihood of confusion. See *In re Copytele Inc.*, 31 USPQ2d 1540, 1542 (TTAB 1994) (weakness of cited mark "overbalanced by the virtual identity of the applicant's and the cited registrant's goods and the substantial similarity in the overall appearance of their marks."). Applicant, as the newcomer, has a duty to select a mark for its radio productions unlike marks that are already in use. See *Burroughs-Wellcome Co. v. Warner-Lambert Co.*, 203 USPQ 191 (TTAB 1979). It has failed to do so. In sum, given the directly competitive nature of registrant's radio programs and applicant's radio productions, and considering the context of use and prospective use of these aurally similar marks, we find a likelihood of confusion to exist.

Decision: The refusal of registration under Section 2(d) of the Trademark Act is affirmed.

R. L. Simms

R. F. Cissel

G. F. Rogers

Administrative Trademark
Judges, Trademark Trial
and Appeal Board