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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Eric Asadoorian, Richard Arbaugh, Richard Cluelow, II and
Michael Daly d/b/a Wavelength

v.

Frederic J. Martin III and Konrad Matthaei

Opposition No. 94,196
to application Serial No. 74/362,394
filed on February 26, 1993

Roberta Jacobs-Meadway of Panitch Schwarze Jacobs & Nadel,
P.C. for Eric Asadoorian, Richard Arbaugh, Richard Cluelow,
II and Michael Daly d/b/a Wavelength

David A. Einhorn of Anderson Kill Olick & Oshinsky, P.C. for
Frederick J. Martin III and Konrad Matthaei

Before Cissel, Seeherman and Hanak, Administrative Trademark
Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Eric Asadoorian, Richard Arbaugh, Richard Cluelow, II
and Michael Daly, d/b/a Wavelength (hereafter "opposers")
have opposed the application of Frederick J. Martin, III and
Konrad Matthaei (hereafter "applicants") to register
WAVELENGTH as a mark for "prerecorded phonograph records,

audio cassettes, compact discs, video cassettes and other musical sound recording, all featuring musical entertainment" and "entertainment in the nature of live musical performances."¹ As grounds for opposition, opposers allege that since as early as 1984, which is prior to the first use date asserted by applicants in their application, opposers have continuously used the mark WAVELENGTH for musical entertainment services; and that applicants' mark WAVELENGTH, as applied to their identified goods and services, so resembles opposers' mark WAVELENGTH for their entertainment services, as to be likely to cause confusion or mistake or to deceive.

In their answer applicants have admitted that they did not use the mark WAVELENGTH in interstate commerce prior to June 2, 1991; that the marks are identical; and that opposers' use of WAVELENGTH for their services and applicants' use of WAVELENGTH for their goods and services are likely to cause confusion. Applicants also stated affirmatively that opposers' alleged date of first use in 1984 relates to use in intrastate, rather than interstate commerce, and that opposers did not use the mark WAVELENGTH in interstate commerce prior to applicants' first use in interstate commerce on June 2, 1991.

The record includes the pleadings; the file of the opposed application; and the testimony, with exhibits, of

¹ Application Serial No. 74/362,394, filed February 26, 1993, asserting first use dates of June 2, 1991.

Richard Arbaugh. Opposers have submitted, under a notice of reliance, applicants' responses to certain of opposers' interrogatories and requests for admission,² while applicants have relied on opposers' responses to certain of applicants' interrogatories.

The parties have fully briefed the case³; an oral hearing was not requested.

² Opposers submitted, pursuant to Trademark Rule 2.120(j)(5), portions of their own answer to one of applicant's interrogatories, stating that this is necessary in order to make not misleading the portion of their interrogatory response which was relied on by applicant. Applicant moved to strike this notice of reliance, and opposers opposed the motion. On May 16, 1996 the Board stated that the issue of the admissibility of opposers' interrogatory response would be deferred until final decision.

The interrogatory in question, No. 1 of applicant's amended first set of interrogatories, asked the opposers, in part A(b), to state the dates of the first three uses of opposers' mark on each product and service, and in part A(c) to state the dates of the first three uses in interstate commerce of opposers' mark on each product and service. Applicant submitted with its notice of reliance that portion of part A(c) of the interrogatory and response relating to opposers' usage of the mark on products. Opposers have submitted, with their notice of reliance, their entire response to parts A(b) and A(c) of the interrogatory, consisting of their first usage of the mark in intrastate commerce, as well as their first use of the mark in interstate commerce in connection with musical entertainment services. They assert that without this portion of the response one could erroneously conclude that opposers' use of the WAVELENGTH mark does not predate applicants' claimed date of first use of WAVELENGTH.

Applicant's objection is well taken. The portion of the interrogatory response clearly refers to opposers' interstate use of their mark on goods, and would not be read as indicating their first use on goods anywhere, nor their first use in connection with services. Thus, the additional portion is not necessary to make not misleading the portion relied on by applicants. We would also point out that our ruling has no effect on the ultimate decision herein, since opposers have provided evidence as to their first intrastate use of the mark for goods, and their first use for services, through the testimony of Richard Arbaugh.

³ Applicants moved to strike opposers' reply brief, asserting that it was filed one week late, and that the Board does not

There is no question that the use of WAVELENGTH for applicants' identified goods and services is likely to cause confusion with WAVELENGTH for musical entertainment services performed by a band. Applicants have admitted as much in their answer to the notice of opposition, and have not disputed this in their brief.

The issue before us, thus, is whether opposers have established rights in the mark WAVELENGTH prior to the February 26, 1993 filing date of applicant's application which, in the absence of evidence of use, is the earliest date on which applicants can rely. **E-Systems v. Environmental Communications**, 207 USPQ 443 (TTAB 1980).

have discretion to accept a late-filed brief because the time for filing reply trial briefs is specifically set forth in the Trademark Rules. Opposers argue that the brief was timely filed and, in any case, should be considered.

The confusion over the deadline for filing the reply brief stems from a stipulation which allowed applicants to make of record opposers' supplemented response, which further provided for additional testimony and extensions of briefing dates.

Given the confusing provisions of the stipulation, and opposers explanation as to their belief that that their reply brief was not due until August 29, 1996, (15 days after the brief was actually filed), we will consider the reply brief. Further, contrary to applicants' assertion, the Board does have authority to consider briefs which are untimely filed. See TBMP § 540, "if a brief on the case is not timely filed ... it may be stricken" (emphasis added). The use of the word "may" indicates that the Board has discretion to consider untimely filed briefs. See also, **Ariola-Eurodisc Gesellschaft v. Eurtone International Ltd.**, 175 USPQ 250 (TTAB 1972)(Implicit in the Board's granting of a motion to strike applicants' brief because applicant did not file a response to the motion and did not offer an explanation for the late filing of its brief is the authority of the Board to consider untimely filed trial briefs.)

Applicants' motion to strike the brief is denied.

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Opposers Arbaugh, Cluelow and Daly formed a band in 1982, when they were in high school. They chose the name WAVELENGTH for this band in either 1983 or 1984. According to the testimony of Mr. Arbaugh, the group began performing publicly under the mark WAVELENGTH in 1984, appearing at a "battle of the bands" school concert and at a fair held annually in a Philadelphia suburb. During the mid-to-late 80's the group played in nightclubs, college and fraternity parties, high school concerts and proms, and private parties. These performances primarily took place in the greater Philadelphia area, but on occasion extended to New Jersey (Princeton University), Delaware (Delaware University) and the Poconos. Although Mr. Arbaugh could not, in general, remember the dates and some details of these performances, he did provide documentary proof to substantiate his testimony. For example, WAVELENGTH is listed as one of the bands performing at a radio station-sponsored event held at Temple University on April 24, 1987.

At the band's performances the name WAVELENGTH was prominently displayed, appearing on a banner, poster and drumhead.

Performances by the WAVELENGTH band were advertised through fliers. In addition, the sponsors of the events (for example, the schools where concerts were held) sometimes advertised the group's appearance in local newspapers and on local radio stations. The band itself also promoted their entertainment services by giving

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WAVELENGTH T-shirts to people in the music business, such as disc jockeys and bar owners. They produced a demo tape in 1984, and, in addition to giving and selling the cassettes to family, friends and fans, they sent them to radio stations in Philadelphia as well as one New Jersey station. Mr. Arbaugh testified that these cassettes, which bore the name WAVELENGTH, were distributed from 1984 until 1989, although it is not clear from Mr. Arbaugh's testimony whether they continued to be distributed to radio stations throughout this period.

The band prepared a publicity picture sometime between 1989 and 1991 in which the name WAVELENGTH is displayed, and it was sent out to people in the music business throughout the United States.

In 1993 the group released an album which was distributed nationally and overseas, including to record stores such as Tower Records. This album, in which the band's name WAVELENGTH is prominently displayed, is still available. A number of promotional activities were undertaken in connection with the album, including the distribution of a poster, featuring the mark WAVELENGTH, which was designed to be displayed by the record stores; advertisements for the CD on radio stations; promotional materials sent to record companies and promoters and music agents; and an advertisement in a trade magazine.

Mr. Arbaugh testified that the band performed publicly under the mark WAVELENGTH every year from 1984 through 1989.

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In the 90's, he described the performances as having more activity, in terms of promotion, and that the focus of the group has been on its CD. He also said that the group is playing more at nightclubs and concert-type venues, and less at fraternity parties. Mr. Arbaugh provided a ticket showing WAVELENGTH appearing at the Barbary, a Philadelphia nightclub, on April 30, 1993, in connection with the annual Philadelphia Music Conference. The band also performed there the following year.

Section 2(d) of the Trademark Act prohibits the registration of a mark which so resembles a mark or trade name previously used in the United States by another and not abandoned as to be likely, when used on or in connection with the goods [or services] of the applicant, to cause confusion.

It is clear from the evidence of record that opposers began using WAVELENGTH as a mark for their musical entertainment services in the 1980's, well prior to the February 26, 1993 filing date of applicants' application (and even, we would note, applicants' claimed June 1991 use date). Moreover, this use was "open and notorious," reaching the purchasers or prospective purchasers of opposers' services. See **E. I. du Pont de Nemours and Company v. G. C. Murphy Co.**, 199 USPQ 807 (TTAB 1978). The fact that some of opposers' performances were "benefits" (i.e., they received no compensation), does not detract from their service mark usage. The concerts at which they

appeared without charge were events open to and attended by the public and were, in effect, promotional activities which made the WAVELENGTH band known and which could lead to future bookings. Moreover, opposers have provided evidence that they received payment for some of their performances. Although applicants are correct that opposers did not provide documentary proof of such payment, we find Mr. Arbaugh's testimony that they had paid engagements to be credible.

Although opposers have had a relatively limited number of bookings, during the relevant period they have been engaged in an on-going commercial enterprise, actively promoting their entertainment services to those in the music business and to the public at large. The fact situation presented here, therefore, differs from those cases cited by applicants in which parties were found to be attempting to merely reserve rights in a mark by sporadic, casual and transitory use, or through what amounted to arranged sales where products never reached the actual consuming public. Cf. **Block Drug Company, Inc. v. Morton-Norwich Products, Inc.**, 202 USPQ 157 (TTAB 1979).

Applicants assert that in order to succeed in this opposition, opposers must show use in interstate, rather than solely intrastate, commerce. Brief, p. 20. This is an incorrect statement of the law. While technical trademark or service mark use in commerce is a requisite for federal registration, the prior use to establish rights in and to a

trade designation need only be in intrastate commerce, and such use need not be in a technical trademark or service mark sense. **Liqwacon Corp. v. Browning-Ferris Industries, Inc.**, 203 USPQ 305, 308 (TTAB 1979).⁴

Finally, applicants argue that "in order to succeed in an opposition action, the senior user of an unregistered mark must show continuous use in commerce." Brief, p. 17. Applicants assert that opposers have not shown use between 1988 and 1993; that this constitutes an abandonment of the mark; and that their resumption of use in 1993, after applicants' commenced use, does not cure the period of non-use.

First, we would point out that the evidence does not support applicants' assertion of non-use during this period. Applicants make this claim because "opposers have presented no evidence of any specific performances in the years 1988, 1989, 1990, 1991 and 1992." Brief, p. 11. Although opposers have not provided evidence as to any specific performances during these years, Mr. Arbaugh testified, inter alia, that the WAVELENGTH band performed every year from 1984 to 1989 (p. 26); that opposer Asadoorian joined the group in 1989 or 1990 (p. 27); that publicity photographs of the band which displayed the mark were taken

⁴ We do not mean to imply by our setting forth the correct statement of law that opposers have failed to prove use in interstate commerce. We merely point out that such proof is not necessary in order for an opposer to succeed in a Section 2(d) claim.

in either 1989, 1990 or 1991, and were distributed to people in the music business (p. 32); and that the WAVELENGTH name has been used continuously since at least 1984 in connection with the band (p. 46). We also note that opposers' CD states that the songs were recorded in the spring, summer and fall of 1992.

More importantly, it is not necessary for opposers to prove continuous use of the mark WAVELENGTH in order to succeed in this opposition. Thus, even if opposers have not presented proof that they held performances in the early 1990's, this does not necessarily affect their claim of rights. As the Court of Appeals for the Federal Circuit pointed out in **West Florida Seafood, Inc. v. Jet Restaurants, Inc.**, 31 F.3d 1122, 31 USPQ2d 1660, 1665 (Fed. Cir. 1994), Section 2(d) "does not speak of 'continuous use,' but rather of whether the mark or trade name has been 'previously used in the United States by another and not abandoned.'

In that case, which involved a situation very like the present one, with the defendant asserting that the plaintiff had abandoned its rights in its asserted mark, the Court pointed out that the case differed from the typical case in that it was the plaintiff against whom the abandonment allegation had been lodged. The abandonment allegation was, in effect, in the stance of a defense to a prior use assertion. In the present case, as in West Florida Seafood, Inc., the issue of abandonment was never raised by

applicants until their brief. Thus, opposers were never put on notice that they were faced with an abandonment allegation. As the Court said in West Florida Seafood, Inc., it would be unfair and prejudicial to the opposers to consider the issue of abandonment in such circumstances.

Because opposers have established prior rights in the mark WAVELENGTH for musical entertainment services, and because applicants' use of WAVELENGTH for their identified goods and services is likely to cause confusion with opposers' use of WAVELENGTH for musical entertainment services, the opposition is sustained.

R. F. Cissel

E. J. Seeherman

E. W. Hanak
Administrative Trademark Judges
Trademark Trial and Appeal Board