

Hearing:  
May 20, 1999

Paper No. 18  
T. Fleming

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB DEC. 28, 99  
U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re RCN Telecom Services, Inc.

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Serial No. 75/013,069

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Glenn A. Gundersen of Dechert, Price & Rhoads for RCN  
Telecom Services, Inc.

Barbara A. Gaynor, Trademark Examining Attorney, Law Office  
104 (Sidney I. Moskowitz, Managing Attorney).

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Before Simms, Hohein and Chapman, Administrative Trademark  
Judges.

Opinion by Simms, Administrative Trademark Judge:

RCN Telecom Services, Inc. (applicant), a Delaware  
corporation, by assignment and change of name from TMH,  
Inc., has appealed from the final refusal of the Trademark  
Examining Attorney to register the mark shown below

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for residential telecommunications services, namely, providing local and long distance telephone service, transmission of cable, radio and television, and providing telecommunications connections to a global computer network.<sup>1</sup> The Examining Attorney has refused registration under Section 2(d) of the Act, 15 USC §1052(d), on the basis of Registration No. 1,838,460, issued May 31, 1994, for the mark RCN for radio communication services. The registration is owned by Meteor Communications Corporation. Applicant and the Examining Attorney have submitted briefs, and an oral hearing was held.

With respect to the marks, the Examining Attorney has noted that applicant does not present any arguments concerning their dissimilarity (although obviously applicant's mark contains design elements not present in registrant's mark). Concerning the goods, the Examining Attorney notes that the cited registration covers "radio communication services" broadly without any limitation as to their nature, type, channels of trade or purchasers. The Examining Attorney notes that, while applicant has limited its services to various residential

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<sup>1</sup> Application Serial No. 75/013,069, filed October 31, 1995, based upon applicant's assertion of a bona fide intention to use the mark in commerce. During the prosecution of this case, applicant submitted an amendment to allege use, reciting use and use in commerce since at least as early as February 1, 1996.

telecommunications services, the registration is not limited to commercial or governmental radio communication services. Accordingly, the Examining Attorney presumes that registrant's services include residential radio communication services.

The Examining Attorney has also made of record a definition from a telecommunications dictionary indicating that "radio communication" is defined as "any telecommunication by means of radio waves." The Examining Attorney contends that cellular telephone service is a type of radio communication service. In this regard, the Examining Attorney has relied upon a dictionary definition which defines "cellular phone" as "a mobile telephone system using low-powered radio transmitters...". Further, the Examining Attorney argues, brief, 5:

Even if the applicant is correct, and the registrant's services are provided only to commercial and governmental users, that fact does not obviate the relatedness of the services. For example, a consumer may have the applicant's RCN telephone services, cable services, and internet access services at his/her house. That same consumer, when selecting a company to provide radio communication services for his/her business, may be more likely to choose the registrant's RCN radio communication services under the mistaken belief that it is the same company which provides some of his/her residential telecommunications services.

The Examining Attorney also refers to various third-party registrations which she has made of record. She notes that some of those registrants have registered the same mark in connection with radio communication services (and mobile radio communication services) and in connection with telephone services, and/or cable and radio and television transmission services. For example, Popp Telecom Incorporated has registered the mark POPP for "telephone communications services, mobile radio communications services and cellular telephone services." Western Wireless Corporation has registered the mark WESTERN WIRELESS and design for radio communications, telephone communications and cellular telephone communications services. Nextel Communications, Inc. has registered a mark in connection with radio communication services and telephone communication services. Rogers Communications Inc. has registered the mark ROGERS and design for "radio communication services, namely, transmission of video and data signals by means of coaxial cable, microwave, satellite, fibre optics, and other transmission methods; and cable television broadcasting services." SM Telecorp, Inc. has registered a mark for cellular telephone services, mobile radio communication services and telephone communication services. Amerithon

Communications, Inc. has registered a mark for wired and wireless telephone and radio communications services. Wireless America, Inc. has registered a mark for mobile telephone services, cellular telephone services and mobile radio communication services. Finally, Digital Mobile Communications, Inc. has registered a mark for cellular telephone services and radio communication and dispatch communication services.

Finally, the Examining Attorney contends that any doubt as to the issue of likelihood of confusion should be resolved in favor of the registrant and the prior user.

Applicant, on the other hand, argues that the Examining Attorney has failed to demonstrate that "radio communication services" would be used to describe a service provided to households. Applicant argues that residential households will not be offered "radio communication services" listed in the cited registration, but that those services will only be offered to sophisticated and professional purchasers. In this regard, applicant made of record copies of the specimens of use from the file of the cited registration, which show registrant's mark used for "packetized-radio service networks for industrial and commercial services." The specimens indicate that registrant's services are typically used for "the

acquisition of meteorological and hydrological data from remote locations, remote security, air and water quality monitoring, smokestack emission control, and monitoring pipeline pressures." Applicant has also submitted an excerpt from a recent Philadelphia Yellow Pages showing that "Radio Communication Equipment & Systems" are cross-referenced in the Business To Business Directory.

Applicant offers the following specific arguments as to why registrant's services are different from applicant's (brief, 4-6):

... The scientific fact that cellular phones send signals through air rather than land lines does not mean that the cited registration encompasses cellular phone services...

... The commonly-used name for cellular telephone service is not "radio communications service"-it is cellular telephone service. This is demonstrated by the fact that nearly 500 registered or published registrations and applications in Class 38 explicitly refer to "cellular telephone" services.

Plainly, the average residential consumer does not equate his cellular phone services with a radio communications service. A cellular phone user would invite people to call him or his "mobile phone" or "cell phone," not on his "radio communications device"... By construing "radio communications services" to include residential communications services, the examining attorney is unfairly expanding the scope of the registration...

... Even the U.S. Patent and Trademark Office Acceptable Identification of Goods and Services Manual clearly identifies these services separately. It is obvious that radio communications services, telephone services, cable services, regular radio and television transmission services, and cellular telephone services are all different services, and that the examining attorney has failed to show that "radio communications services" are a consumer service...

The third-party registrations cited by the examining attorney also fail to prove that the services described in Applicant's application and the cited application have the same market. While the same corporate entity may offer two different services under the same mark, it does not follow that those services are not [sic] necessarily offered to the same customers...

Thus, in the present case, even if the handful of companies cited by the examining attorney offer both "radio communication" and "telephone" services, one cannot conclude that those services are offered to the same audience. "Radio communications services" can only be offered to those who would normally be in the market for such services, namely commercial and government users. One cannot assume there is a market overlap as a basis for refusing registration simply because two services appear in the same third party registration.

Applicant's attorney also argues that there have been no instances of actual confusion despite applicant's extensive and prominent use for several years.

In sum, applicant argues that the fact that cellular phones send signals through the air does not demonstrate

that the phrase "radio communication services" should be interpreted to include applicant's cellular phone services. Applicant also refers to TMEP Section 1207.01(a)(iii), which notes that an applicant may provide extrinsic evidence to show that a registrant's identification has a particular meaning to members of the trade and that it is improper to consider the identification in a vacuum and attach all possible interpretations to it. Applicant contends that the respective services are distinct services marketed to different, non-overlapping markets with radio communication services by their very nature being commercial services rendered to sophisticated business purchasers.

Upon careful consideration of this record and the arguments of the attorneys, we believe that, because of the differences in the services of applicant and registrant, confusion is not *likely*. While the Examining Attorney has shown that some third parties have registered marks both for some kind of radio communication service as well as for one or more of applicant's listed services, the Examining Attorney has not demonstrated, as is her burden, that these services are or would be offered to the same class of purchasers. Nor do we believe that the question of what precisely is a "radio communication service" is a matter of

which we may take judicial notice. Clearly, registrant is not offering radio *broadcasting* services, which, of course, ordinary residential households would be able to receive on their radios. Rather, registrant has registered its mark for "radio communication services," a different service. Moreover, applicant has presented persuasive reasons why registrant's radio communication services would not normally be offered to residential customers, including that radio communication services are typically used by such businesses as taxi dispatchers, courier services, airlines and the military. If, in fact, some residential customers of applicant's who, in their professional capacities, encounter registrant's RCN radio communication services, we believe that such an opportunity for confusion could best be described as of a *de minimis* nature, and that such a situation would not present an adequate basis on which to conclude that confusion is *likely*. If registrant believes that confusion is likely because of applicant's use and registration of a similar mark for its residential telecommunication services, it will be able to oppose or seek cancellation under the provisions of Section 2(d) of the Act.

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Decision: The refusal of registration is reversed.

R. L. Simms

G. D. Hohein

B. A. Chapman  
Administrative Trademark  
Judges, Trademark Trial  
and Appeal Board