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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Cumulus Broadcasting, Inc.

Serial No. 76353037

Sidney R. Brown of Jones Day for Cumulus Broadcasting, Inc.

John D. Dalier, Trademark Examining Attorney, Law Office
105 (Thomas G. Howell, Managing Attorney).

Before Seeherman, Chapman and Holtzman, Administrative
Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

On December 26, 2001, Cumulus Broadcasting, Inc. (a Nevada corporation) filed an application to register on the Principal Register the mark 106.5 THE ZONE for "radio broadcasting services." The frequency number "106.5" is disclaimed. The application was based on applicant's assertion of a bona fide intention to use the mark in commerce. On November 22, 2002, applicant filed an Amendment to Allege Use (asserting a date of first use of

November 2001), which was accepted by the USPTO on January 12, 2003.

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used in connection with its identified services, so resembles the registered mark 94.1 FM THE ZONE ("94.1 FM" is disclaimed) for "radio broadcast services,"¹ as to be likely to cause confusion, mistake or deception.

When the refusal was made final, applicant appealed. Briefs have been filed, but an oral hearing was not requested.²

Our determination of likelihood of confusion is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476

¹ Registration No. 2172900, issued July 14, 1998, Section 8 affidavit accepted, Section 15 affidavit acknowledged.

² Applicant included in both its brief and its reply brief a "request for publication of decision and guidance with respect to radio broadcasting services applications." Applicant's request is denied. The Board determines whether to "publish" a decision as citable as precedent based on many factors. In this particular case, we see no reason to designate the decision as one which is citable precedent. Our decision is based on the particular facts of this case and we are not suggesting a general policy with regard to the examination of all applications for marks involving radio broadcasting services. In any event, the Board has provided some general discussion on the issue of likelihood of confusion with respect to radio station call letter marks in In re Infinity Broadcasting Corp. of Dallas, 60 USPQ2d 1214 (TTAB 2001).

F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities of the marks and the similarities of the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). Based on the record before us in this *ex parte* appeal, we find that confusion is not likely.

There are some du Pont factors which favor a finding of likelihood of confusion. The involved services are identical, "radio broadcast services" and "radio broadcasting services." Because the services are identical, the channels of trade and classes of customers are legally identical as well.

Applicant argues that the "purchasers" of its services are advertisers who purchase applicant's and registrant's radio broadcasting services. That is certainly one class of consumers for the involved services. However, we find that the public who listens to radio broadcasts comprise another class of consumers of the involved services because the services are certainly directed to these "users" of the services and likelihood of confusion among listeners is

relevant. See *In re Infinity Broadcasting*, 60 USPQ2d at 1218.

But the marks themselves, and specifically the widespread use of the common element in both marks, militates against a finding of likelihood of confusion. It is well settled that marks must be considered and compared in their entireties, not dissected or split into component parts so that each part is compared with other parts. This is because it is the entire mark which is perceived by the purchasing public and, therefore, it is the entire mark that must be compared to any other mark. It is the impression created by each of the involved marks, considered as a whole, that is important. See *Kangol Ltd. v. KangaROOS U.S.A. Inc.*, 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992); and *Franklin Mint Corp. v. Master Manufacturing Co.*, 667 F.2d 1005, 212 USPQ 233 (CCPA 1981). See also, 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, §23:41 (4th ed. 2001).

The Examining Attorney contends that the dominant feature of both applicant's and registrant's marks are the words "THE ZONE"; and that he is not persuaded by applicant's argument that the wording "THE ZONE" is weak because the only registration for radio broadcasting

services which includes the wording "THE ZONE" is the cited registration.

Applicant acknowledges that "THE ZONE" is the dominant portion of both applicant's and registrant's marks (brief, p. 4), but contends that the marks must be viewed in their entirety and when so viewed, the separate frequencies create a sufficient difference in the marks to avoid a likelihood of confusion among consumers. In particular, it asserts that the frequency designations, though descriptive, represent to consumers that the marks indicate different radio stations located at different places on the radio dial.

Marks are compared in terms of their appearance, sound, connotation, and commercial impression. In this case we find that the marks are similar in sound, appearance and connotation to the extent that each contains the words "THE ZONE," and precedes these words with a number denoting a radio frequency. Overall, we find that the marks are similar and, if there were no other evidence of record, we would find a likelihood of confusion. However, there is evidence going to other du Pont factors.

Applicant's pivotal argument is that the Examining Attorney considered only the two du Pont factors of the marks and the services, while he erroneously stated that

"no relevant evidence concerning [any other du Pont] factors is contained in the record" (Examining Attorney's brief, unnumbered page 2), when the record includes numerous third-party uses of "THE ZONE" for radio broadcasting services.

In support of its argument regarding the numerous uses of the words "THE ZONE" in connection with radio stations, applicant submitted (i) excerpts from three issues of "R&R Radio and Records" (a trade industry magazine); (ii) the first pages of Internet searches on three search engines (Yahoo, Excite, and Google); and (iii) printouts of pages from nine websites.³ Examples of the results of the

³ In its response to the first Office action, applicant referred to several third-party registrations, but did not provide photocopies or printouts from the USPTO's Trademark Electronic Search System (TESS). See *In re Duofold*, 184 USPQ 638 (TTAB 1974). However, the Examining Attorney did not object to the listings and considered them as if they were of record. Later in the prosecution, applicant submitted copies of some third-party registrations from a private database. Again the Examining Attorney did not object, but treated them on the merits. See *In re Dos Padres Inc.*, 49 USPQ2d 1860, footnote 2 (TTAB 1998). See also, TBMP §1208.02 (2d ed. rev. 2004). The Board has considered applicant's references to and the private database copies of third-party registrations as stipulated into the record by the Examining Attorney.

Nonetheless, we are not aware of what was involved in the decisions to register those marks. (We are aware of applicant's statement that it provided copies of the file histories of two of its own applications involving other marks. However, Exhibit B to applicant's request for reconsideration consists of copies of only a couple of pages from each of the two applications, and the exhibit does not include the entire file histories.) In any event, we are basing our decision herein on the specific evidence in this case regarding this mark, and not on any asserted

searches from the search engines and the printouts from websites include the following:

Sports Talk 790 The Zone - Atlanta's Sports Leader ... All the Zone guys will be on site to greet the fans and keep listening all week as we'll be giving away tickets on air! ...
www.790thezone.com;

101.5 KZON - The Zone
Arizona's Rock Alternative 101.5 FM, provides DJ profiles, promotion and events schedule, concert and music news, and contests. ... Freeloader Zone Giveaways, Zone Card, Zone Music ...
Viacom/Infinity Broadcasting Takes Awareness to New Levels
www.kzon.com.

1510 The Zone Boston's Sports Station
1510 The Zone Caller Line: (866...) The Zone Contest Line: (866...)
Zone Shows ...
In the Zone ...
www.1510thezone.com;

The Zone 96.3 Today's New Rock
The Zone Picture of the Day!
The Zone Happenings ...
The Zone has the Community Covered ...
www.thezone963.com;

103-3 the Zone has changed...103-3 the Zone is now New Mexico's Alternative Rock ... you can hear some bands that are new to the Zone like Linkin Park, System of a Down, ...
www.1033thezone.com;

KVET 1300 - sports radio from the Zone
The Zone Sports Radio 1300AM

"policy" regarding other marks and radio broadcasting services in general.

Texas Women's basketball Wednesday
night on The Zone. ...
Zone Line up, Zone Events, Zone
Contests, Zone Photos, ...
www.sportsradio1300.com;

The Zone 1300 am Sports Radio
The Zone is the flagship station of the
Bridgeport Sound Tigers! Hear all their
games on The Zone, ...
www.wavz.com; and

1620am the ZONE Omaha's ESPN Radio...
KOZN RADIO A Waitt Media Radio Station
www.1620thezone.com.

The record shows that there is widespread use in the radio broadcasting industry of the term "THE ZONE" (generally with reference to rock and roll stations or sports stations). As a result, consumers (both advertisers and listeners) are accustomed to looking to other elements of ZONE marks to make distinctions between the marks. Stated another way: "Evidence of widespread third-party use, in a particular field, of marks containing a certain shared term is competent to suggest that purchasers have been conditioned to look to the other elements of the marks as a means of distinguishing the source of goods or services in the field." In re Broadway Chicken Inc., 38 USPQ2d 1559, 1565-1566 (TTAB 1996). See also, Steve's Ice Cream v. Steve's Famous Hot Dogs, 3 USPQ2d 1477, 1479 (TTAB 1987); and Color Key Corp. v. Color Associates, Inc., 219 USPQ 936, 943 (TTAB 1983).

The predecessor to our primary reviewing Court stated in the case of *Sure-Fit Products Company v. Saltzson Drapery Company*, 254 F.2d 158, 117 USPQ 295, 297 (CCPA 1958): "Where a party chooses a weak mark, his competitors may come closer to his mark than would be the case with a strong mark without violating his rights. The essence of what we have said is that in the former case there is not the possibility of confusion that exists in the latter case." See also, 2 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, §§11:85 and 11:88 (4th ed. 2001).

Thus, despite the fact that both applicant's and the cited mark consist of the words THE ZONE preceded by radio frequency numbers, the words THE ZONE are in such widespread use that consumers will look to the frequency numbers to distinguish the marks. As a result, we conclude that confusion is not likely in these circumstances.

As a final note, we have considered applicant's attorney's statement that applicant is not aware of any instances of actual confusion in the few years since applicant commenced use of its mark. However, because of the limited time during which applicant has used its mark, and the lack of evidence as to the extent of applicant's use, we do not consider this du Pont factor to weigh in

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applicant's favor. See *In re Majestic Distilling Company*, supra.

Despite the identical services and the similarities of the marks, because applicant has established significant third-party use of the words "THE ZONE" in connection with radio broadcasting services, we reverse the refusal to register.

Decision: The refusal to register under Section 2(d) of the Trademark Act is reversed.