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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

Applicant: The Right Brain Trust, LLC



Serial No: 75/757,251

12-14-2001

U.S. Patent & TMO/TM Mail Rcpt Dt. #22

Filed: July 21, 1999

Mark: THE SENIOR CHANNEL

Classes: 38 & 41

Our Ref: RTBR-01/04759

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BRIEF IN SUPPORT OF APPEAL

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Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

REQUEST FOR ORAL ARGUMENT

Applicant hereby requests oral argument before a panel of the Trademark Trial and Appeal Board.

PROCEDURAL HISTORY

This application was filed on July 21, 1999. The first Office Action, containing a refusal to register, was issued on December 22, 1999. A Response to Office Action was filed on June 22, 2000. On January 30, 2001, the Examining Attorney made FINAL the refusal to register, claiming that the mark THE SENIOR CHANNEL is merely descriptive of the services recited in

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the application namely television, cable television and radio broadcasting, and related services in International Class 38 and production of television, cable television and radio programming; syndication of television, cable televisions, and radio programs in International Class 41. A Request for Reconsideration was filed on July 17, 2001, which was denied by the Examining Attorney in an Office Action continuing the refusal to register on September 20, 2001.

The Applicant respectfully disagrees with the refusal to register, for the reasons indicated in the Response and Request for Reconsideration.

ARGUMENTS IN FAVOR OF REGISTRATION

The Suggestive Nature of the Applicant's Mark.

The mark for which registration is sought is THE SENIOR CHANNEL for services identified as "television, cable television and radio broadcasting, and related services" in Class 38 and "production of television, cable television and radio programming; syndication of television, cable televisions, and radio programs" in Class 41. The Applicant intends to provide such services under this mark to a wide range of audiences. While a portion and likely a significant portion of the programming will be of interest to senior citizens, it will be equally available and of interest to viewers of all ages. The mark is intended to suggest programming on a general range of subjects which are associated with leisure time, including gardening, hobbies, sports, health and fitness, nutrition, personal finance, travel, current events, automobiles, computers, education, music, film, pets, volunteerism and religion. The Applicant is willing to make the appropriate amendment to the identification of services to so indicate.

The Examining Attorney had inquired whether Applicant intends to produce, syndicate, and/or broadcast programming for senior citizens. In answering this inquiry in the affirmative, Applicant does not concede that the mark is merely descriptive for the services that are identified in the application. The proper inquiry is not whether these activities are intended by the Applicant, but rather, whether the mark itself merely describes those activities, and all of the activities which are undertaken by the Applicant as encompassed by these services. That distinction is the core of the issue here, and is properly resolved in favor of the Applicant.

Evidence of the Definitions and Connotations of SENIOR.

The term SENIOR is not merely descriptive of the services which are identified in the application. The mark is not SENIOR CITIZENS CHANNEL. Nor is it CHANNEL FOR SENIOR CITIZENS. If it were, then perhaps the mark would be merely descriptive of the services. Here, the mark is THE SENIOR CHANNEL. SENIOR and SENIOR CITIZENS are not synonymous. The word SENIOR has different meanings, and Applicant has already made of record a dictionary definition in support of this contention.

These definitions include a twelfth grader, someone in his last year of college, someone who has been employed at a position for many years, a person older than another, a person with higher standing or ranking, a "senior" fellow of a college at an English university, a student in the year preceding graduation from a school of secondary or higher level, a member of a program of the Girl Scouts for girls in the ninth through twelfth grades, being of prior birth or establishment (for example, trademark lawyers would think of senior user in this context), higher ranking such as superior, of or relating to seniors (for example, the senior class), and having a claim on corporate assets and income prior to other securities. Not one of these definitions

addresses the notion of “senior citizen.” Applicant recognizes that the Examining Attorney has made of record a definition of “senior” from another dictionary indicating that it means “a senior citizen.” However, in viewing all of the relevant evidence, it is clear that the term SENIOR has numerous meanings, all of which must be considered. SENIOR has different meanings, and therefore multiple connotations. When considered as a whole, THE SENIOR CHANNEL is not merely descriptive of the subject services.

Third Party Registrations Show the Suggestive Connotations of SENIOR.

The Patent and Trademark Office has previously issued registrations and approved applications of SENIOR variant marks for various goods and services where SENIOR is not disclaimed. Evidence as to those registrations was properly made of record in Applicant’s previous submissions.

Note especially, U.S. Reg. No. 2,151,972 of SENIORTV THE PROFITABLE ALTERNATIVE for “distribution of broadcast and satellite television programming and distribution of local origination television programming,” which issued in 1998 from an application filed in 1996 with use alleged going back to 1996. Only the words “THE PROFITABLE ALTERNATIVE” have been disclaimed. Also, Serial No. 75/626,496 of SENIORS WITH ATTITUDE has been allowed for registration on the Principal Register without a disclaimer of SENIORS or proof of secondary meaning and serial no. 75/934,270 of SUDDENLY WE’RE SENIORS for “entertainment services, namely, production and distribution of a television program” in Class 41 has become registered (as Reg. No. 2492161) without a disclaimer of SENIORS (or any indicator that this word has acquired secondary meaning). Applicant’s mark, THE SENIOR CHANNEL, is at least as distinctive as these other

marks that encompass similar type services, and it is submitted that there is clear precedent to permit registration of the subject mark on the Principal Register for the identified services without proof of secondary meaning.

On the other hand, the SENIOR or SENIORS variant registrations that the Examining Attorney attached to the previous Office Action (where such terms have been disclaimed) recite services which are entirely different from those here, or use SENIOR as a part of a unitary phrase such as “senior citizens,” and “senior housing” and so on. These are well established terms which have come into use, and when used for goods and services that are essentially corresponding to these marks, such as the mark NATIONAL SENIOR HOUSING SEARCH for “computer services, namely, providing access to a searchable computer database in the field of senior housing for industry participants, etc.” In light of the nature of the marks as well as their respective goods, it is not surprising that a disclaimer would be entered. This does not create a precedent requiring the refusal issued by the Examining Attorney.

By contrast to the marks cited by the Examining Attorney, which are clearly descriptive, the SENIOR CHANNEL is at most strongly suggestive, not descriptive. Section 1209.01(a) of the *Trademark Manual of Examining Procedure* provides as follows:

Suggestive marks are those which require imagination, thought or perception to reach a conclusion as to the nature of the goods or services. Thus, a suggestive term differs from a descriptive term, which immediately tells something about the goods or services. *See In re Shutts*, 217 USPQ 363 (TTAB 1983) (SNO-RAKE held not merely descriptive of a snow removal hand tool). *See also In re Quik-Print Copy Shop, Inc.*, 203 USPQ 624 (TTAB 1979), *aff'd*, 616 F.2d 523, 205 USPQ 505 (C.C.P.A. 1980) (QUIK-PRINT held merely descriptive of printing services); *In re Aid Laboratories, Inc.*, 223 USPQ 357 (TTAB 1984) (BUG MIST held merely descriptive of insecticide). Suggestive marks, like fanciful and arbitrary marks, are registrable on the Principal Register without proof of secondary meaning. Thus, a designation does not have to be devoid of all meaning in relation to the goods and services to be registrable.

Here, the thought and perception required by the consumer is clear. The consumer will encounter the mark THE SENIOR CHANNEL in the context of the Applicant's programming and broadcasting services. In order to reach the conclusion that the mark refers to senior citizens, the consumer must first make the mental leap from SENIOR CHANNEL to SENIOR to SENIOR CITIZEN. This mental leap clearly demonstrates that the Applicant's mark is suggestive.

Moreover, the wording in the mark is so vague that it does not describe any specific function or feature of the services. TMEP section 1209.01(b)(4) provides that:

Combinations of merely descriptive components have been found registrable if the juxtaposition of the words is inventive or evokes a unique commercial impression, or if the term has a bizarre or incongruous meaning as applied to the goods. *See In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (C.C.P.A. 1968) (SUGAR & SPICE held not merely descriptive of bakery products); *In re TBG Inc.*, 229 USPQ 759 (TTAB 1986) (SHOWROOM ONLINE held not merely descriptive of computerized interior furnishings product information service); *In re Shutts*, 217 USPQ 363 (TTAB 1983) (SNO-RAKE held not merely descriptive of a snow removal hand tool). The issue is whether the mark considered in its entirety possesses a merely descriptive significance as applied to the goods in question, *i.e.*, whether it conveys a readily understood meaning to the average purchaser of such goods. *See In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979).

See e.g. In re Morton-Norwich Products, Inc., 209 U.S.P.Q. 791 (TTAB 1981) (holding that mark COLOR CARE is not descriptive as applied to laundry bleach); and *In re TMS Corporation of the Americas*, 200 U.S.P.Q. 57 (TTAB 1978) (mark THE MONEY SERVICE for a financial service held too vague to be descriptive).

Consumers Would Not Use the Mark as Descriptive Phrase.

Applicant's services under the mark will be provided to a broad spectrum of consumers, who would not reasonably think of a mark such as "THE SENIOR CHANNEL" as being used for programming exclusively for the elderly. In other words, if a consumer were to say "I am going to watch 'THE SENIOR CHANNEL,' "they would be referring to Applicant's brand, and nothing else." Consumers would not use this language to describe television programming related to gardening, leisure, and the other subjects referenced above. Likewise, other broadcasters would not reasonably use this language to describe their programming in the fields of gardening, leisure, etc. Again, Applicant recognizes that this is a suggestive mark, but it requires a great deal of thought on the part of the consumer to guess the particular subject matter of the programming services.

Applicant submits that for this reason as well, the mark is not merely descriptive of these services.

The Evidence Does Not Support the Refusal.

In support of the refusal to register, the Examining Attorney has attached portions of several printouts of stories from a search on a commercial database of SENIOR within three words of "elderly, senior citizen or retiree" dated after January 1, 2000. Only a handful of stories have been provided by the Examining Attorney using "senior" when it is not part of one of the established unitary phrases, such as "senior citizen" and "senior housing."

These articles do not prove that THE SENIOR CHANNEL is directly descriptive of Applicant's programming and broadcasting services, because they show use only of the unitary

phrase SENIOR CHANNEL. Therefore, it is impossible to conclude based upon these articles that SENIOR is merely descriptive when used as a component of the mark THE SENIOR CHANNEL for the Applicant's services. Accordingly, this evidence does not support the refusal to register, because it does not show descriptive use of the mark for which registration is now sought. It is requested that the Trademark Trial and Appeal Board give proper weight to this evidence and in fact, recognize that THE SENIOR CHANNEL is not merely descriptive of the services which are identified in the application.

Hence, here, where SENIOR has many suggestive connotations, and there are examples of prior registrations of SENIOR variant marks for similar services (without disclaimers or claims of secondary meaning), Applicant asks that the Trademark Trial and Appeal Board reverse the refusal to register.

Potential Amendments in Support of Registration.

Further, if the Examining Attorney does accept the arguments that SENIOR is suggestive, Applicant is willing to enter a disclaimer of the word CHANNEL apart from the mark as a whole.

The Applicant is also willing to enter the amendment to the identification of services to indicate their specific and definite subject matter, namely, gardening, hobbies etc. as listed in p. 3 of this brief, so as to allow the mark to proceed to registration.

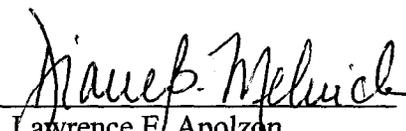
CONCLUSION

For the reasons indicated above, the Applicant respectfully requests that the Trademark Trial and Appeal Board reverse the refusal to register and allow the mark to proceed to publication in due course.

Dated: New York, New York
December 14, 2001

Respectfully submitted,

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