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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Sounds Good Broadcast Consultants, Inc.

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Serial No. 77885449

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Sounds Good Broadcast Consultants, Inc., *pro se*.

William T. Verhosek, Trademark Examining Attorney, Law Office 114 (Margaret Le, Managing Attorney).

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Before Grendel, Bergsman and Masiello, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Sounds Good Broadcast Consultants, Inc. (“applicant”) filed a use-based application for the mark NEIGHBORHOOD RADIO, in standard character form, for “radio broadcasting of information and other programs,” in Class 38. Applicant disclaimed the exclusive right to use the word “Radio.” In response to a refusal to register the mark on the grounds that NEIGHBORHOOD RADIO is merely descriptive when used in connection with “radio broadcasting of information and other programs,” applicant amended its application to the Supplemental Register.

The Trademark Examining Attorney refused to register applicant's mark on the ground that it is generic and, therefore, unregistrable on the Supplemental Register. Section 23 of the Trademark Act of 1946, 15 U.S.C. § 1091. The essence of the refusal is that NEIGHBORHOOD RADIO identifies the broadcast of a neighborhood radio program regarding local information.

When a proposed mark is refused registration as generic, the examining attorney has the burden of proving genericness by "clear evidence" thereof. *See In re Hotels.com*, 573 F.3d 1300, 91 USPQ2d 1532, 1533 (Fed. Cir. 2009); *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987); and *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1111 (Fed. Cir. 1987).

The issue before us is to determine whether the record shows that members of the relevant public primarily use or understand the term sought to be registered to refer to the category or class of goods [or services] in question. *H. Marvin Ginn Corp. v. International Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986); *In re Women's Publishing Co. Inc.*, 23 USPQ2d 1876, 1877 (TTAB 1992). Making this determination "involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered ... understood by the relevant public primarily to refer to that genus of goods or services?" *Ginn*, 228 USPQ at 530. Evidence of the public's understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers and other publications. *See Merrill Lynch*,

4 USPQ2d at 1143; *In re Northland Aluminum Products, Inc.*, 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985).

We begin by finding that the genus of the services at issue in this case is “radio broadcasting of information and other programs.” *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991) (“[A] proper genericness inquiry focuses on the description of [goods or] services set forth in the [application or] certificate of registration.”).

Applicant argues that “[i]f someone asked what services applicant performs, the answer would not be “neighborhood radio services.”¹ However, determining the class or category of the services at issue is not dependent on how someone would answer the question what services does applicant perform. In this case, applicant is seeking registration for “radio broadcasting of information and other programs” and, therefore, that is the genus of the services at issue.

Turning to the second inquiry, how the public understands the term NEIGHBORHOOD RADIO, the relevant public consists of ordinary consumers who listen to “radio broadcasting of information and other programs.”

As noted above, in making the determination of how the public understands the term NEIGHBORHOOD RADIO when used in connection with “radio broadcasting of information and other programs,” the evidentiary burden of establishing that a term is generic rests with the USPTO and the showing must be based on clear evidence. *Merrill Lynch*, 4 USPQ2d at 1143.

¹ Applicant’s Brief, p. 1.

Based on the record described below, we find that there is clear evidence to support a finding that the relevant public, when it considers NEIGHBORHOOD RADIO used in conjunction with “radio broadcasting of information and other programs,” readily understands the term to identify a type of radio broadcasting service.

1. Applicant’s specimen of use is a printout of its home page posted on its website. The website provides the following information:

Welcome to Neighborhood Radio - - your community radio station!

We serve the residents of Ocean Colony, Ocean Corner, Canada Cove and Moonridge with news, information and special features.

And this is where you come in. If you would like to be part of the excitement of local radio then we need to talk! There are openings for neighborhood reporters.

2. March 8, 2010 Office action

A. Radio Outlaw (radiooutlaw.com), a website for “Do It Yourself Broadcasting.” The website displays the service mark RADIO OUTLAW above the information “Start Your Very Own Neighborhood Radio Station!” The website explains that “A Part 15 FM radio station is perfect for covering a medium sized condo community.” There are photographs of small studios with captions such as “Not all neighborhood radio studios are simple!” and “Studios of 104.7 FM, a small neighborhood radio station that provides News/Talk weekdays and Oldies on weekends.”

B. An excerpt from the Last.fm website featuring an online discussion under the headline “Neighborhood radio gone?” One subscriber wrote that he “just updated to 2.0 and now I can’t find the my [sic] neighborhood radio station anymore.” Another subscriber responded that “that’s the first thing I noticed in the new version! Neighborhood radio is the radio I use the most far ahead of my collection or tag or artist radio. ...”

C. An article posted on the Slashdot website (Slashdot.org) (February 21, 2004) with the title “FCC Supports Neighborhood Radio” reporting that the FCC recommends easing restrictions on low-power FM stations.

D. The WVIJ webpage on the USTREAM.tv website. In the section entitled “About WVIJ,” WVIJ states that it “was not much more than a neighborhood radio station when it went on the air in July of 1987.”

E. An advertisement for a course entitled “Introduction to radio communications” at the Seattle Pacific University posted on TheRadioClass.com website. “This session is for neighborhood groups, block watch captains, and workers in non-profit organizations and business who know almost nothing about radio, but want to get a basic understanding of what’s what” including “tips for creating your own neighborhood radio network.” Other available classes include “How to create and run your own neighborhood radio network.”

3. June 29, 2010 Office action

In the June 29, 2013 Office action, the Trademark Examining Attorney submitted excerpts from “60 news articles from LexisNexis® [to] show that

‘neighborhood radio’ merely describes the applicant as provider of such services.” The problem that we have with this evidentiary submission is that the excerpts from the articles made of record are so truncated (*i.e.*, five or six words on either side of “neighborhood radio”) that it is difficult to appreciate the context in which the term is used. For example,

1. *The Berkshire Eagle* (Pittsfield, Massachusetts) (February 19, 2010)

... power, all-volunteer neighborhood radio operation at the 97.7 ...

2. *Times-Picayune* (New Orleans) (October 22, 2008)

... training institute at the neighborhood radio station - - 89.5 - - ...

3. *Omaha World-Herald* (Nebraska) (April 3, 2008)

... used to this stage. Our friendly neighborhood radio sports talk guy ...

See In re Bayer AG, 488 F.3d 960, 967, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007) (deeming Google search results that provided very little context of the use of ASPIRINA to be “of little value in assessing the consumer public perception of the ASPIRINA mark”); *In re Tea and Sympathy, Inc.*, 88 USPQ2d 1062, 1064 n.3 (TTAB 2008) (finding truncated Google search results entitled to little probative weight without additional evidence of how the searched term is used); *In re Thomas*, 79 USPQ2d 1021, 1026 (TTAB 2006) (rejecting an applicant’s attempt to show weakness of a term in a mark through citation to a large number of Google “hits” because the “hits” lacked sufficient context). Nevertheless, the Trademark Manual of Examining Procedure instructs that “[w]hen evidence is obtained from a research database, the examining attorney does not have to make all stories of record. It is

sufficient to include only a portion of the search results, as long as that portion is a representative sample of what the entire search revealed. *In re Vaughan Furniture Co.*, 24 USPQ2d 1068, 1069 n.2 (TTAB 1992). *See also In re Federated Dep't Stores Inc.*, 3 USPQ2d 1541, 1542 n.2 (TTAB 1987).” TMEP § 710.01(a) (April 2013). Accordingly, we review the LexisNexis evidence for whatever probative value it may have.

Based upon our review of the LexisNexis articles, we view several as showing the authors of those news stories use the term “neighborhood radio” to identify a type of radio broadcasting service. For example,

1. *Chicago Tribune* (April 9, 2004)

... community. It became the neighborhood radio station.”

2. *Palm Beach Post* (Florida) (January 26, 2004)

... “It’s neighborhood radio,” he said, We are not formula ...

3. *Press Journal* (Vero Beach, Florida) (December 2, 2001)

... WIRA is truly a neighborhood radio station, reaching out to ...

Based on the evidence before us, we find that NEIGHBORHOOD RADIO identifies a type or category of “radio broadcasting of information and other programs” and that the relevant public understands the term NEIGHBORHOOD RADIO to refer to that class of radio broadcasting. Applicant’s own use of the term NEIGHBORHOOD RADIO (*e.g.*, “your community radio station”) and the third-party uses (*e.g.*, “Start Your Very Own Neighborhood Radio Station!”; “FCC Supports Neighborhood Radio”; “How to create and run your own neighborhood

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radio network”) demonstrate that the public understands that NEIGHBORHOOD RADIO identifies radio broadcasting services. We accordingly find that NEIGHBORHOOD RADIO is generic for “radio broadcasting of information and other programs.”

Decision: The refusal to register is affirmed and registration to applicant is refused.

Masiello, Administrative Trademark Judge,
dissenting:

I respectfully dissent from the Board’s decision, as I do not believe the examining attorney has met his burden of demonstrating by clear evidence that the expression NEIGHBORHOOD RADIO is generic.