

This Opinion is not a  
Precedent of the TTAB

Mailed: November 6, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re MixRadio Limited*  
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Serial No. 79137054  
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John Peter Halski and Grace Han Stanton of Perkins Coie LLP,  
for MixRadio Limited.

Kristin Carlson, Trademark Examining Attorney, Law Office 105,  
Susan Hayash, Managing Attorney.

—  
Before Bucher, Wellington and Hightower,  
Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

MixRadio Limited (“Applicant”) seeks registration on the Principal Register of  
the special-form composite mark as follows:



for goods and services described as follows:

“computer software for providing access to pre-recorded music and video for download to smart phones, mobile phones, tablets and computers via the Internet; computer software for use in the delivery, distribution and transmission of digital music and entertainment-related audio, video, text and multimedia content;

computer software for enabling transmission, storage, sharing, collection, editing, organizing and modifying audio, video, messages, images and other data; computer software for creating searchable databases of information and data for peer-to-peer social networking databases; computer programs for use in streaming or downloading music, film, TV-programs, audio books and games” in International Class 9;

“online retail store services featuring music for download” in International Class 35;

“electronic transmission and streaming of digital media content for others via global and local computer networks” in International Class 38; and

“entertainment services, namely, providing non-downloadable prerecorded music on-line via a music subscription service” in International Class 41.<sup>1</sup>

The Trademark Examining Attorney required Applicant to disclaim the exclusive right to use the term “Mix Radio” apart from the mark as shown, on the ground that this term is merely descriptive of Applicant’s goods and merely descriptive of a feature of Applicant’s services. Applicant declined to disclaim the term “Mix Radio.” The Trademark Examining Attorney made her requirement final and, on the basis of Applicant’s failure to disclaim the term, refused registration of the mark. See 15 U.S.C. §§ 1052(e)(1) and 1056(a).

When the refusal was made final, Applicant appealed and requested reconsideration. After the Trademark Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

Merely descriptive terms are unregistrable, under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1), and, therefore, are subject to disclaimer if the mark

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<sup>1</sup> Application Serial No. 79137054 was filed on August 21, 2013, based upon a request for extension of protection filed under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141(f), on the basis of International Reg. No. 1177894. The mark consists of the wording “MixRadio” to the right of a circle within which appears two parallel vertical lines above a curved line, forming eyes and a smile.

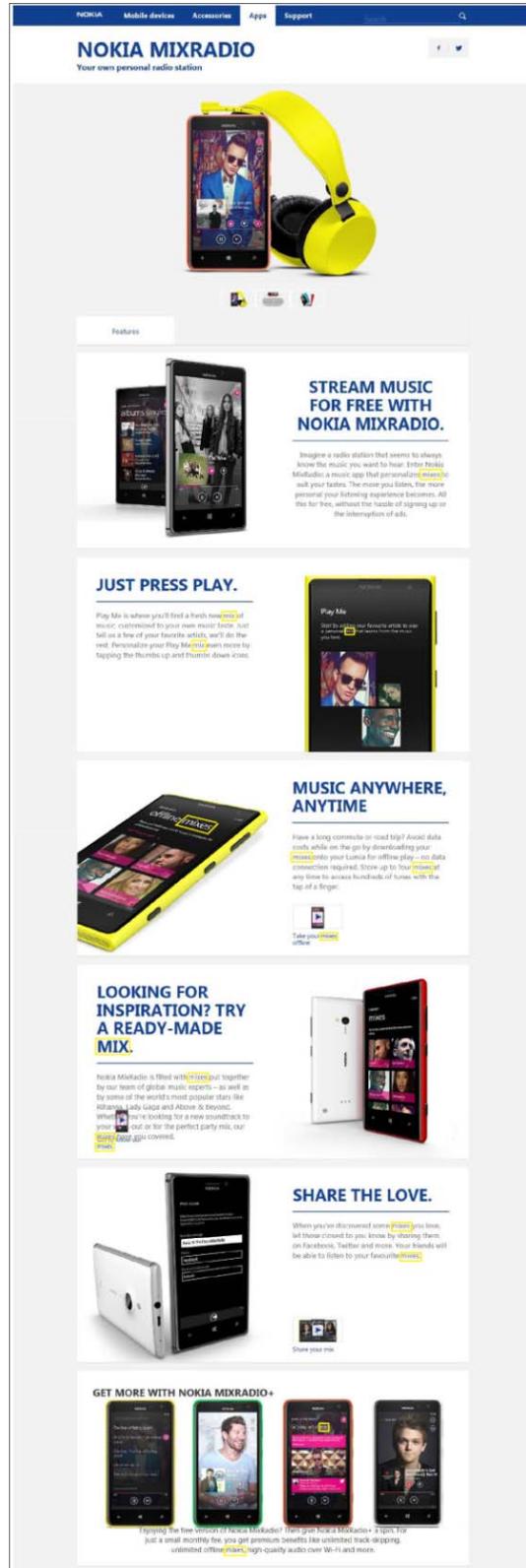
is otherwise registrable. Thus, the Trademark Examining Attorney may require that Applicant disclaim an unregistrable component of a composite mark otherwise registrable. Trademark Act Section 6(a), 15 U.S.C. § 1056(a). Failure to comply with a disclaimer requirement is grounds for refusal of registration. *See In re Omaha National Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); *In re Richardson Ink Co.*, 511 F.2d 559, 185 USPQ 46 (CCPA 1975); *In re Ginc UK Ltd.*, 90 USPQ2d 1472 (TTAB 2007).

A term must be disclaimed apart from the mark as shown if it is deemed to be merely descriptive of the subject goods or services. A term is deemed to be merely descriptive within the meaning of Section 2(e)(1) if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *See, e.g., In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978).

Applicant argues that the Trademark Examining Attorney has failed to make a *prima facie* showing of descriptiveness; that the combination of the words “Mix” and “Radio” into a compound term (“MixRadio”) results in a suggestive, if not arbitrary, term; and that the applied-for, composite mark, in its entirety, is unitary and hence its elements are inseparable.

In support of her position herein, the Trademark Examining Attorney has submitted a variety of evidence in support of mere descriptiveness, and therefore, her disclaimer requirement. We turn first to usage by Applicant and its predecessors-in-interest:

- "MixRadio: a music app that personalizes **mixes** to suit your tastes."
- "Play Me is where you'll find a fresh new **mix** of music, customized to your own music taste."
- "Personalize your Play Me **mix** even more by tapping the thumbs up and thumbs down icons."
- "MixRadio is filled with **mixes** put together by our team of global music experts ... "
- "Whether you're looking for a new soundtrack for your workout or for the perfect party **mix**, our **mixes** have you covered."
- "When you've discovered some **mixes** you love, let those closest to you know ... . Your friends will be able to listen to your favorite **mixes**."
- "For just a small monthly fee, you get premium benefits like unlimited track-skipping, unlimited offline **mixes**, high quality audio over Wi-Fi and more."



<sup>2</sup> [www.nokia.com/us-en/apps/mixradio](http://www.nokia.com/us-en/apps/mixradio), as accessed by the Trademark Examining Attorney on December 10, 2013; see also [www.microsoft.com/en-us/mobile/apps/mixradio](http://www.microsoft.com/en-us/mobile/apps/mixradio), as accessed by the Trademark Examining Attorney on January 20, 2015.

## Nokia rebrands Music service as Mix Radio, updates Windows Phone app to match

BY JON FINGAS



Nokia's [Music service](#) has been a secret weapon for [Lumia owners](#) -- they get ad-free radio streaming on their phones at no extra cost. The company is driving that advantage home today by rebranding the service as [Mix Radio](#) (reflecting the service's [main feature](#)) and launching an [updated music app](#) to match. The new Mix Radio client centers on Play Me, a personalized stream defined by a few favorite artists. There are also Pandora-style thumbs-up and thumbs-down votes to refine the selection, and it's now easy to share mixes through email, Facebook, text messages and Twitter. As before, avid listeners can spend \$4 per month to get unlimited downloads, improved quality and web listening. Current Lumia users just need to update their existing Music app to take advantage of Nokia's smarter audio experience.

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The evidence indicates that Nokia “rebranded” its service, dubbing it “Mix Radio” to reflect the app’s “main feature,” namely a personalized stream of music presented in a radio format. The music software permits the user to access music, music downloads, music transmission and music streaming, featuring ready-made mixes as well as personalized mixes of songs. Other online entries show similar uses by Applicant and its predecessors, Nokia Corporation and Microsoft Mobile OY:

<sup>3</sup> <http://www.engadget.com/2013/11/20/nokia-rebrands-music-service-as-mix-radio/>, as accessed by the Trademark Examining Attorney on December 10, 2013.

music + video

# Nokia MixRadio



Introducing the next generation of Nokia Music, Nokia MixRadio, bringing you free, personalized music with no advertising. Listen to the music you want to hear with Play Me, a constant stream of music created just for you. Use Thumbs up and Thumbs down to tell us what you like so that your **mix** gets better and better every time you play. It's like having your own personal radio station. Also includes the features you know and love – my music, mp3 store, create a **mix**, gigs and offline playback – so that you can store your favorite **mixes** on your phone and enjoy anywhere, even without a connection.

[show details](#)



★★★★☆  
2576 reviews

Sign in to see if this app is available for your phone.

 Like | 1.1k

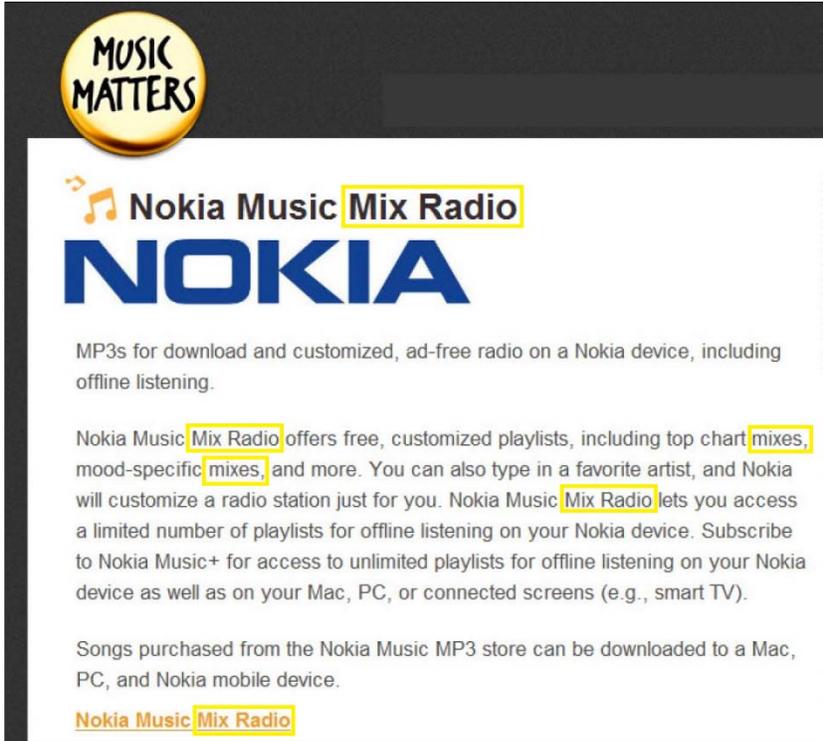
 Tweet | 136

Publisher  
Nokia Corporation

Download size  
8 MB

Last updated

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## MUSIC MATTERS

# Nokia Music Mix Radio

# NOKIA

MP3s for download and customized, ad-free radio on a Nokia device, including offline listening.

Nokia Music **Mix Radio** offers free, customized playlists, including top chart **mixes**, mood-specific **mixes**, and more. You can also type in a favorite artist, and Nokia will customize a radio station just for you. Nokia Music **Mix Radio** lets you access a limited number of playlists for offline listening on your Nokia device. Subscribe to Nokia Music+ for access to unlimited playlists for offline listening on your Nokia device as well as on your Mac, PC, or connected screens (e.g., smart TV).

Songs purchased from the Nokia Music MP3 store can be downloaded to a Mac, PC, and Nokia mobile device.

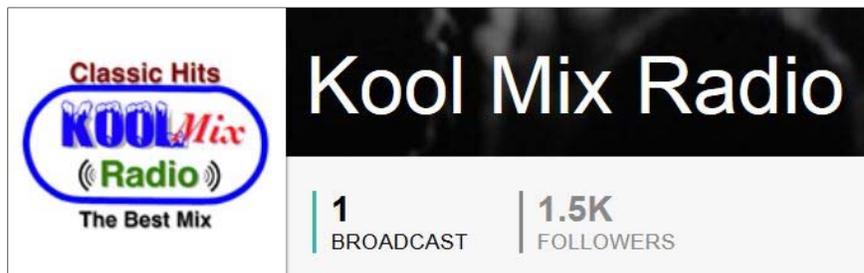
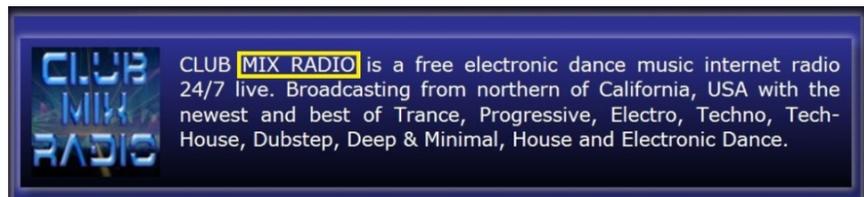
[Nokia Music Mix Radio](#)

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<sup>4</sup> [www.windowsphone.com/en-us/store/app/nokia-mixradio/](http://www.windowsphone.com/en-us/store/app/nokia-mixradio/), as accessed by the Trademark Examining Attorney on December 10, 2013.

<sup>5</sup> <http://whymusicmatters.com/find-music/>, as accessed by the Trademark Examining Attorney on December 10, 2013.

The Trademark Examining Attorney also provided for the record a variety of third-party uses of the term “Mix Radio”:



<sup>6</sup> <http://www.a-1mix.com/>, as accessed by the Trademark Examining Attorney on June 30, 2014; see also <http://www.a-1mix.com/about.html> as accessed on January 20, 2015.

<sup>7</sup> <http://www.clubmixradio.net/>, as accessed by the Trademark Examining Attorney on January 20, 2015.

<sup>8</sup> <http://tunein.com/radio/Kool-Mix-Radio-s67026/>, as accessed by the Trademark Examining Attorney on January 20, 2015.



Online radio station out of Fort Wayne, Indiana. We are looking for the opportunity to expand our station and the things we can do.

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Gospel

HOME SCHEDULE DJ's ARTISTS STORE

Mr. Kerry Douglas Presents The Gospel Mix Radio

**Welcome to The Gospel Mix Radio!**

Welcome to TheGospelMixCD.com! SHOP, LISTEN & ENJOY! Find your favorite artist bios, albums and pictures. Listen to the gospel mix radio station, make song requests and buy your favorite CD! All that and more @TheGospelMixCD.com.

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<sup>9</sup> <https://www.kickstarter.com/projects/austinwiard7/my-mix-radio>, as accessed by the Trademark Examining Attorney on June 30, 2014.

<sup>10</sup> <http://thegospelmixcd.com/gospelmixradio/>, as accessed by the Trademark Examining Attorney on June 30, 2014.



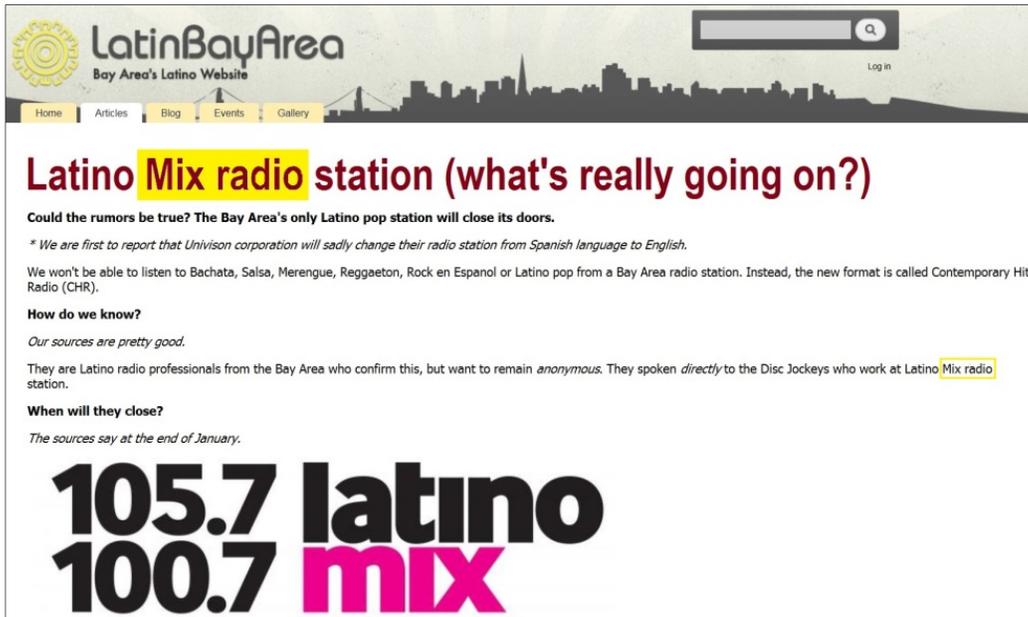
The screenshot shows the top section of the Brooklyn Mix Radio HD website. At the top, there is a navigation bar with links: HOME, ABOUT, DIS, LISTEN LIVE, MUSIC, ANNOUNCEMENTS, and MORE. Below the navigation bar is a large banner image featuring a silhouette of the Statue of Liberty and a radio tower. On the left side of the banner is a circular logo for Brooklyn Mix Radio HD. The main text in the center reads: "ABOUT BROOKLYN MIX RADIO HD". To the right, it says "BROOKLYN MIX RADIO HD" followed by three social media links: "HTTP://WWW.TWITTER.COM/BROOKLYNMIXHD", "HTTP://WWW.FACEBOOK.COM/BROOKLYNMIXRADIOHD", and "HTTP://WWW.INSTAGRAM.COM/BROOKLYNMIXRADIOHD". Below this, a paragraph states: "BROOKLYN MIX RADIO IS A VERSATILE RADIO STATION CATERING TO THE GREATER CARIBBEAN COMMUNITY WITH IN NEW YORK AND ABROAD."

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The screenshot shows the main content area of the Gospel Harmony Mix Radio website. At the top, the text "Gospel Harmony Mix" is displayed in a large, stylized font. Below this, it says "Welcome To Gospel Harmony Mix Radio". A highlighted box contains the text: "Last three songs played on our Ad-Free stream. For our regular stream [click here.](#)". At the bottom, a yellow highlighted box contains the text: "Free Desktop Playlist Is Available".

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The screenshot shows an article on the LatinBayArea website. The website header includes the logo for LatinBayArea, the tagline "Bay Area's Latino Website", a search bar, and a "Log in" link. The navigation menu includes "Home", "Articles", "Blog", "Events", and "Gallery". The article title is "Latino Mix radio station (what's really going on?)". The text of the article discusses rumors about the closure of the station and mentions that the new format is called Contemporary Hit Radio (CHR). It also includes a large graphic at the bottom with the text "105.7 latino" and "100.7 mix".

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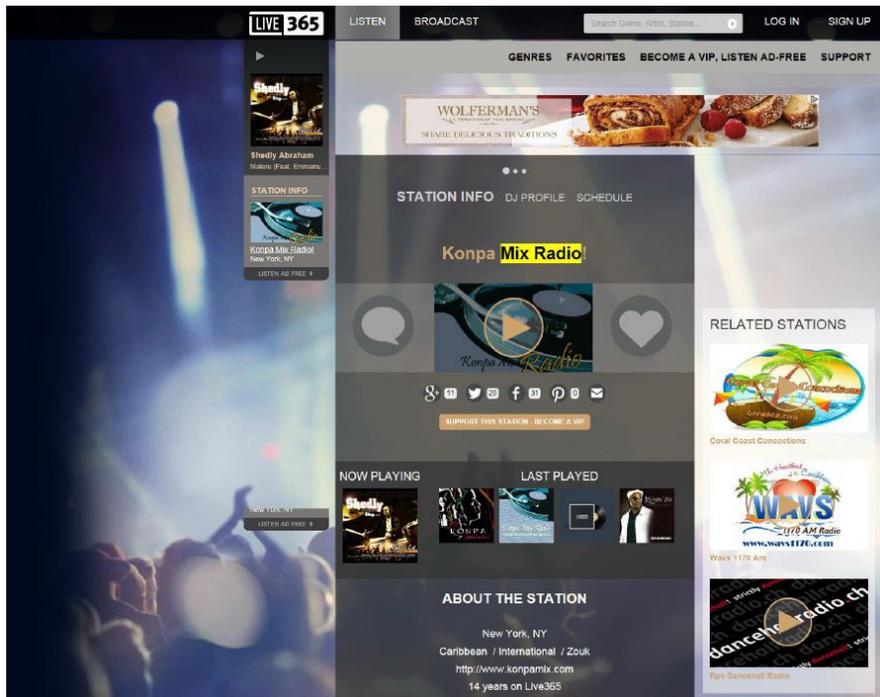
<sup>11</sup> <http://www.brooklynmix.com/music.html>, as accessed by the Trademark Examining Attorney on January 20, 2015.

<sup>12</sup> <http://www.ksgm.com/>, as accessed by the Trademark Examining Attorney on January 20, 2015.

<sup>13</sup> <http://www.latinbayarea.com/article/latino-mix-radio-station-whats-really-going-on>, as accessed by the Trademark Examining Attorney on June 30, 2014.



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<sup>14</sup> <http://www.wpkn.org/shows/wilfredo-soto-2/>, as accessed by the Trademark Examining Attorney on January 20, 2015.

<sup>15</sup> <http://www.live365.com/stations/konpamaniax>, as accessed by the Trademark Examining Attorney on January 20, 2015.



Finally, the Trademark Examining Attorney placed into the record from the Lexis-Nexis database several entries using the term “mix radio” in the context of online music presentations:

HEADLINE: *Local live music entertainment calendar jam-packed this week*

... Cary Judd delivers a poppy punch that has at least three tracks worthy [of] ***mix radio*** rotation ...

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HEADLINE: *Country music gets a new spice with Dee Jay Silver*

Silver had a productive 2013 and looks as if he will carry that over into 2014. His country ***mix radio*** show is now being syndicated and can now be heard outside of Nashville.

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<sup>16</sup> <http://rainbowmixradio.com/index.php>, as accessed by the Trademark Examining Attorney on January 20, 2015.

<sup>17</sup> <http://absolutemixradio.com/player/>, as accessed by the Trademark Examining Attorney on January 20, 2015.

<sup>18</sup> *Idaho State Journal*, July 8, 2010, at A-9.

<sup>19</sup> *The Valencia Source*, January 25, 2014, at 1.

HEADLINE: *Henry Rollins Joins “Sons of Anarchy”*

[Rollins] currently hosts his own music *mix radio* show on KCRW-FM. Rollins’ film appearances include Bad Boys 2 with Will Smith and Martin Lawrence and director David Lynch’s Lost Highway. <sup>20</sup>

We find that the above evidence of record demonstrates that the Trademark Examining Attorney has made a *prima facie* showing of mere descriptiveness. The various items of evidence cited above, including Applicant’s (and its predecessors’) earlier descriptions of its goods and services, confirm that the term “Mix Radio” conveys an immediate idea of Applicant’s Class 9 software for use in “providing access to pre-recorded music” and “streaming or downloading music,” namely a personalized stream of music presented in a radio-like format. Similarly, as to the Class 35 retail store services featuring “music for download,” the Class 39 services of “transmission and streaming of digital media content,” and the Class 41 services of “providing non-downloadable prerecorded music online,” the readily understood idea conveyed by the term “Mix Radio” is that these services permit the user to access music, music downloads, music transmission and music streaming, featuring ready-made mixes of music presented in a radio-like format, as well as personalized mixes of songs in a similar format. This finding is supported by the usage by third-parties of the term “Mix Radio” in a merely descriptive manner in connection with apps and radio services featuring a variety of particular mixes of music.

As argued by the Trademark Examining Attorney, the individual components (“Mix” and “Radio”) retain their descriptive meaning in relation to the goods and services when combined. Furthermore, Applicant has not articulated a new, non-descriptive meaning created by this combination of two descriptive words. Hence, the

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<sup>20</sup> *Akron Beacon Journal*, March 16, 2009.

combination results in a composite term that is itself descriptive and not registrable. *In re Petroglyph Games, Inc.*, 91 USPQ2d 1332, 1341 (TTAB 2009) (holding **BATTLECAM** merely descriptive of computer game software with a feature that involve battles and provides the player with the option to utilize various views of the battlefield); *In re Cox Enters.*, 82 USPQ2d 1040, 1043 (TTAB 2007) (holding **THEATL** merely descriptive of publications featuring news and information about Atlanta where **THEATL** was the equivalent of the nickname THE ATL for the city of Atlanta); *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1317-18 (TTAB 2002) (holding **SMARTTOWER** merely descriptive of highly automated cooling towers); *In re Sun Microsystems, Inc.*, 59 USPQ2d 1084, 1085 (TTAB 2001) (holding **AGENTBEANS** merely descriptive of computer software for use in developing and deploying application programs on a global computer network). In each of these cases, as in the case before us, the absence of a space between the compound terms did not take away from the descriptiveness of each term.

Finally, the literal component of this composite mark consists of the descriptive words “MixRadio” to the right of a circle that can be interpreted as a smiley face (or upside down headphones). In either case, we find this design component to be a distinct and separable element of this combined mark, providing Applicant with some latitude in selecting the mark it wants to register. This finding is really a corollary to a finding that Applicant could have chosen to apply to register either the design or the literal (albeit merely descriptive) element without concern that such a drawing would result in a “mutilation” of this composite mark as actually used in commerce.

**Decision:** The term “Mix Radio” is merely descriptive of Applicant’s goods in International Class 9 and its services in International Classes 35, 38 and 41. Hence, the Office’s refusal to register Applicant’s applied-for mark is hereby affirmed and registration to Applicant is refused. However, this decision will be set aside if, within thirty (30) days of the mailing date of this decision, Applicant submits to the Board the required disclaimer of the term “Mix Radio.” *See* Trademark Rule 2.142(g), 37 U.S.C. § 2.142(g); and TBMP § 1218 (2015). A proper disclaimer should read as follows:

No claim is made to the exclusive right to use the term  
“Mix Radio” apart from the mark as shown.