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November 2, 2009

**VIA COURIER**

Trademark Trial and Appeal Board  
U.S. Patent and Trademark Office  
Madison East, Concourse Level Room C 55  
600 Dulany Street  
Alexandria, VA 22314

**RE: Application Serial No. 77/534075 – WHAT’S NEXT?**

To Whom It May Concern:

Please find enclosed our Reply Brief for Applicant for “WHAT’S NEXT?” (Serial No. 77/534075).

If you have any questions, please do not hesitate to contact me.

Sincerely,



Mark Litwak

Encl.

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**11-03-2009**

U.S. Patent & TMO/PTM Mail Rpt. Dt. #21

**In the United States Patent and Trademark Office  
Before the Trademark Trial and Appeal Board**

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**In re Application of  
Retirement Living TV, LLC  
Application Serial No: 77/534075  
Filed: July 29, 2008  
For: WHAT'S NEXT?**

.....

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**REPLY BRIEF FOR APPLICANT**

## TABLE OF CONTENTS

INDEX OF CITED CASES .....	2
INTRODUCTION.....	4
STATEMENT OF FACTS.....	4
ARGUMENT. ....	5
I.    THE EXAMINER’S OBJECTION TO APPLICANT’S EVIDENCE CANNOT STAND.....	6
II.   APPLICANT’S AND REGISTRANT’S MARKS DO NOT CREATE THE SAME OVERALL IMPRESSION.....	7
III.  APPLICANT’S AND REGISTRANT’S SERVICES ARE INSUFFICIENTLY RELATED .....	10
CONCLUSION .....	16

## INDEX OF CITED CASES

- Amalgamated Bank of New York v. Amalgamated Trust & Savings Bank*, 6 U.S.P.Q.2d 1305 (Fed. Cir. 1988)
- Am. Sec. Bank v. Am. Sec. and Trust Co.*, 197 U.S.P.Q. 65 (C.C.P.A. 1978)
- B.V.D. Licensing Corp. v. Body Action Design Inc.*, 6 U.S.P.Q.2d 1719 (Fed. Cir. 1988)
- Chum Ltd. v. Lisowski*, 198 F. Supp. 2d 530 (S.D.N.Y. 2002)
- Cont'l Airlines Inc. v. United Air Lines Inc.*, 53 U.S.P.Q.2d 1385 (T.T.A.B. 1999)
- Cooper Indus., Inc. v. Repcoparts USA, Inc.*, 218 U.S.P.Q. 81 (T.T.A.B. 1983)
- Elec. Data Sys. Corp. v. EDSA Micro Corp.*, 23 U.S.P.Q.2d 1460 (T.T.A.B. 1992)
- Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135 (9th Cir. 2002)
- Farberware, Inc. v. Mr. Coffee, Inc.*, 16 U.S.P.Q.2d 1103 (D. Del. 1990)
- Food Specialty Co. v. Kal Kan Foods, Inc.*, 180 U.S.P.Q. 136 (C.C.P.A. 1973)
- Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333 (Fed. Cir. 2001)
- Harvey Hubbell, Inc. v. Tokyo Seimitsu Co.*, 188 U.S.P.Q. 517 (T.T.A.B. 1975)
- Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156 (Fed. Cir. 2002)
- Inc. Publ'g Corp. v. Manhattan Mag., Inc.*, 616 F. Supp. 370 (D.C.N.Y. 1985)
- In re Lamson Oil Co.*, 6 U.S.P.Q.2d 1041 (T.T.A.B. 1987)

*Lemme v. NBC, Inc.*, 472 F. Supp. 2d 433 (E.D.N.Y. 2007)

*Lloyd's Food Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766 (Fed. Cir. 1993)

*McGraw-Hill, Inc. v. Comstock Partners, Inc.*, 743 F. Supp. 1029 (S.D.N.Y. 1990)

*Miss Universe L.P., LLLP v. Cmty Mktg, Inc.*, 82 U.S.P.Q.2d 1562 (T.T.A.B. 2007)

*Motown Prods., Inc. v. Cacomm, Inc.*, 668 F. Supp. 285 (S.D.N.Y. 1987)

*Munters Corp. v. Matsui Am., Inc.*, 730 F. Supp. 790 (N.D. Ill. 1989)

*Parenting Unlimited Inc. v. Columbia Pictures Television Inc.*, 743 F. Supp. 221 (S.D.N.Y. 1990)

*Recot, Inc. v. Becton*, 214 F.3d 1322 (Fed. Cir. 2000)

*Therma-Scan v. Thermoscan*, 295 F.3d 623, 633 (6th Cir. 2002)

*UMC Indus., Inc. v. UMC Elecs. Co.*, 207 U.S.P.Q. 861 (T.T.A.B. 1980)

*Wella Corp. v. California Concept Corp.*, 192 U.S.P.Q. 158 (T.T.A.B. 1976), rev'd on other grounds, 194 U.S.P.Q. 419 (C.C.P.A. 1977)

*Whitco Chem. Co. v. Whitfield Chem. Co.*, 418 F.2d 1403 (C.C.P.A. 1969)

*W.W.W. Pharm. Co. v. Gillette Co.*, 984 F.2d 567 (2d Cir. 1993)

*Yankee Publ'g, Inc. v. News Am. Publ'g, Inc.*, 25 U.S.P.Q.2d 1752 (S.D.N.Y. 1992)

## INTRODUCTION

Applicant hereby responds to the Examiner's appeal brief dated October 15, 2009, and respectfully requests that the Trademark Trial and Appeal Board reverse the Examiner's decision to refuse registration for Applicant's mark *WHAT'S NEXT?* on the grounds that Applicant's mark does not create a likelihood of confusion as to the source of the mark cited by the Examiner.

## STATEMENT OF FACTS

Applicant seeks registration on the Principal Register of its mark, *WHAT'S NEXT?*, for "Entertainment in the nature of an on-going special variety reality show featuring lifestyle makeovers for middle aged people distributed by television, satellite and video media," in International Class 41. The application was filed on July 29, 2008 and received U.S. Trademark Application Serial No. 77/534075.

The Examiner first refused registration of Appellant's mark *WHAT'S NEXT?* on November 10, 2008, contending that the mark, when used with the recited services, is likely to be confused as to its source with U.S. Registration No. 3208151 for the mark *WHAT'S NEXT! WHAT'S NEXT!! WHAT'S NEXT!!!* for "Entertainment services in the nature of a continuing live television talk and variety show, featuring songs and music, comedy and satirical social commentary; Entertainment services, namely, providing web sites featuring information, videos and music in the field of comedy and satirical social commentary."

In Applicant's response to the initial refusal to register, filed on November 17, 2008, Applicant argued that the marks *WHAT'S NEXT?* and *WHAT'S NEXT! WHAT'S NEXT!! WHAT'S NEXT!!!* are distinct in appearance and provide services that target different audiences. Hence, Applicant argued that the marks are not likely to be confused as to their sources.

The Examiner further expounded his position on December 9, 2008, maintaining that Applicant's and Registrant's marks are likely to be confused. In response thereto, Applicant

requested reconsideration of the Examiner's final refusal on June 8, 2009, and amended its identification of services to limit said services to a reality show featuring lifestyle makeovers for middle aged people, thereby further distinguishing it from Registrant's website and show featuring music and comedy. Applicant further argued that other extant registered entertainment services include the words *WHAT'S NEXT*, and hence Registrant's mark deserves only narrow protection.

The Examiner denied Applicant's request for reconsideration on June 29, 2009, finding that Applicant's amended identification of services did not sufficiently alter the overall commercial similarity of Applicant's and Registrant's marks. Applicant appealed the denial of its request for reconsideration on August 17, 2009, and the Examiner filed his appeal brief on October 15, 2009.

### ARGUMENT

As Applicant here directly responds to the Examiner's appeal brief, Applicant's arguments will be organized accordingly.

Under the heading "ARGUMENT" (page 2), the Examiner cites two cases, *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65 (Fed. Cir. 2002) and *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1336 (Fed. Cir. 2001), as stating the test of whether services are similar, commercially related, or travel in the same trade channels. In Applicant's appeal brief (page 14, full ¶ 3), Applicant specifically distinguished these two cases from the case at hand. Hence, while these two cases may adequately state the test of whether services are similar, commercially related, or travel in the same trade channels, these cases are quite different from the case at hand, and hence do not prove that Applicant's and Registrant's services are similar, commercially related, or travel in the same trade channels. Applicant noted in its appeal brief that that case-by-case, fact-specific comparisons are crucial in determining likelihood of source confusion, as noted in *In re E. I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1360-61 (C.C.P.A. 1973): "[T]he question of confusion is related not to the nature of the mark but to its effect 'when applied to the goods of the applicant.'

The only relevant application is made in the marketplace. The words ‘when applied’ do not refer to a mental exercise, but to all of the known circumstances surrounding use of the mark.” In the case at hand, the Examiner has reviewed Applicant’s application in light of Registrant’s mark in the superficial manner admonished by the *DuPont* court, by entirely ignoring qualifying descriptors in the marks’ respective identified services descriptions, and the manifestations of these descriptors in the shows as actually produced for TV.

I. THE EXAMINER’S OBJECTION TO APPLICANT’S EVIDENCE CANNOT STAND.

The Examiner objects to all of Applicant’s evidence presented in Exhibits A, B, C, and D of Applicant’s appeal brief, as well as Applicant’s arguments based thereon, on the grounds that this material was not introduced prior to Applicant’s appeal brief. Exhibit A comprises pages from Registrant’s show’s website (<http://drinkingwithbob.com/>) and externally linked blog. Exhibit B comprises pages from the QPTV (Queens Public Television) website on the general nature and distribution of the station and the show selection process, along with the station program guide. Exhibit C comprises pages from the RLTV (Retirement Living Television) website on the show *WHAT’S NEXT?*, the general nature and distribution of the network, and the network’s Emmy wins. All of these websites were referenced in Applicant’s Response to Office Action submitted to the Examiner on November 17, 2008 and/or attached as Exhibits.

Exhibit D is the record on the Principal Register for the mark *WHAT’S NEXT...NOW*, which was referenced in Applicant’s correspondence to the Examiner dated June 8, 2009. Hence, the record prior to appeal did reference the Exhibits, contrary to the Examiner’s assertion, and thus there are no grounds for ignoring them, or references to them in Applicant’s appeal brief. The Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) § 1208.02 states:

[I]f an applicant includes a listing of registrations in a response to an Office action and the examining attorney does not advise applicant that the listing is insufficient to make the registrations of record at a point when applicant can correct the error,



the examining attorney will be deemed to have stipulated the registrations into the record.

The Examiner did not advise Applicant that the listing was insufficient.

Moreover, material obtained through the Internet or from websites is acceptable as evidence in ex parte proceedings. TBMP § 1208.03. Furthermore, judicial notice may be taken at any stage of a Board proceeding, even on review of the Board's decision on appeal. TBMP § 704.13; *B.V.D. Licensing Corp. v. Body Action Design Inc.*, 6 U.S.P.Q.2d 1719, 1721 (Fed. Cir. 1988) (request for judicial notice as to fame of mark made in the briefs on appeal); *Amalgamated Bank of New York v. Amalgamated Trust & Savings Bank*, 6 U.S.P.Q.2d 1305, 1308 (Fed. Cir. 1988) (judicial notice of banking business on appeal); *Am. Sec. Bank v. Am. Sec. and Trust Co.*, 197 U.S.P.Q. 65, 67 n.1 (C.C.P.A. 1978) (judicial notice of absence of listing in local telephone directories); *Wella Corp. v. California Concept Corp.*, 192 U.S.P.Q. 158 (T.T.A.B. 1976), rev'd on other grounds, 194 U.S.P.Q. 419, 422 n.5 (C.C.P.A. 1977) (fact of common knowledge, e.g., of purchasers and channels of trade for home permanent wave kits, appropriate for judicial notice); *Food Specialty Co. v. Kal Kan Foods, Inc.*, 180 U.S.P.Q. 136, 139 n.3 (C.C.P.A. 1973) (judicial notice on appeal of general sentiment towards kittens which differs from that toward other small animal pets); and *Cont'l Airlines Inc. v. United Air Lines Inc.*, 53 U.S.P.Q.2d 1385, 1393 n.5 (T.T.A.B. 1999) (judicial notice may be taken at any time).

## II. APPLICANT'S AND REGISTRANT'S MARKS DO NOT CREATE THE SAME OVERALL IMPRESSION.

The Examiner makes a series of idiosyncratic and unfounded assertions regarding the similarity in sight, sound, and meaning of *WHAT'S NEXT?* and *WHAT'S NEXT! WHAT'S NEXT!! WHAT'S NEXT!!!* Rather than assessing the similarity of the marks in light of analogous or distinguishable cases, the Examiner simply states his personal opinion regarding the marks' similarity. The Examiner introduces *In re Lamson Oil Co.*, 6 U.S.P.Q.2d 1041, n.4 (T.T.A.B. 1987)

as standing for the proposition that only one of three factors—sight, sound, and meaning—need be present in order to support a finding of likelihood of confusion in the context of the whole record. Rather than compare the facts of *Lamson* to those of the case at hand, or discuss how similarity of sight, sound, or meaning is weighed in the context of the whole record in determining likelihood of confusion, the Examiner simply makes assertions regarding the similarity of Applicant's and Registrant's marks, and arbitrarily concludes that they consequently create the same overall impression.

The Examiner asserts that the differences in punctuation and the number of times words are repeated in Applicant's and Registrant's marks are "de minimis" differences, but cites no authority in support of this contention. Furthermore, in response to Applicant's argument that Applicant's and Registrant's marks differ even more dramatically than the marks that were deemed sufficiently dissimilar in *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1146 (9th Cir. 2002), the Examiner states:

Applicant improperly relies upon a dissection of the marks analysis that counts characters and syllables to attempt to establish differences between the marks at issue. However, this type of analysis must be considered as weak and non-supportive of the conclusions its [sic] attempts to draw since identical wording, identical sound and identical meaning as it exists in the marks in issue in this case must take precedence over merely counting characters and syllables. Page 3, full 4.

The Examiner does not interpret "dissection of the marks analysis" correctly. As Applicant noted in its appeal brief, the court in *Inc. Publ'g Corp. v. Manhattan Mag., Inc.*, 616 F. Supp. 370, 379 (D.C.N.Y. 1985) held, "In order to determine if confusion is likely, each trademark must be compared in its entirety; juxtaposing fragments...does not demonstrate whether the marks as a whole are confusingly similar." See also *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329 (Fed. Cir. 2000). Hence, "dissection of the marks" refers to arbitrarily juxtaposing fragments of two marks and determining their overall similarity accordingly. "Dissection of the marks" does not refer to counting total syllables—indeed, the court in *Entrepreneur Media* noted that, although the bulk of

the marks *ENTREPRENEUR* and *ENTREPRENEURPR* overlapped, two additional syllables (*PR*) in one mark rendered the mark different in sound and meaning from the other mark. Applicant argued that the Examiner improperly dissected Applicant's and Registrant's marks by simply juxtaposing the fragments *WHAT'S NEXT* in both marks and declaring the marks thereby virtually identical. The differences in the number of times *WHAT'S NEXT* is iterated in the marks, and the marks' punctuation, are not, in light of case law, de minimis differences. The repetition of *WHAT'S NEXT* three times in Registrant's mark, separated by increasingly more exclamation points, not only distinguishes Registrant's mark from Applicant's in appearance and sound, but also connotes an extreme feeling of urgency and excitement not communicated by *WHAT'S NEXT?* Take as whole marks, the marks are clearly distinctive in appearance, sound, and connotation, in a manner comparable to and surpassing the distinction between the marks in *Entrepreneur Media*.

In addition, and crucially, the Examiner wholly disregards Applicant's observation that *WHAT'S NEXT?* is Applicant's show's title, whereas *WHAT'S NEXT! WHAT'S NEXT!! WHAT'S NEXT!!!* is merely a tagline for Registrant's show titled *DRINKING WITH BOB*. Applicant first made this observation on November 17, 2008 in its response to the initial refusal to register. The Examiner hence wholly fails to respond to Applicant's arguments that the average viewer would not confuse two shows with completely different titles as coming from the same source, nor would they substitute Registrant's show's title with its tagline, since the tagline is not prominent in either the show or the show's website.

Finally, the Examiner, citing *Lamson, supra*, acknowledges that similarity of appearance, sound, and meaning between the marks needs to be considered in the context of the whole record. Indeed, as Applicant noted several times in its appeal brief, identical marks for similarly themed entertainment services have been deemed not likely to be confused. *E.g., Lemme v. NBC, Inc.*, 472 F. Supp. 2d 433, 438 (E.D.N.Y. 2007). The Examiner at no point discusses how any similarities in

appearance, sound, or connotation of the marks at issue are to be considered in light of the different services to which they point, and merely asserts in a spirit of blind conviction that the marks create the same overall impression.

### III. APPLICANT'S AND REGISTRANT'S SERVICES ARE INSUFFICIENTLY RELATED.

The Examiner, in sum, fails to adequately respond to arguments and analyses Applicant discussed in its appeal brief, and simply restates assertions the Examiner made in his previous correspondence regarding the relatedness of Applicant's and Registrant's entertainment services. The Examiner states in his appeal brief, "If the cited registration describes the...services broadly and there are no limitations as to their nature, type, channels of trade or classes or purchases, then it is presumed that the registration encompasses all...services of the type described, that they move in all normal trade channels of trade, and that they are available to all potential customers." Page 4, ¶

#### 3. The Examiner then argues,

There is a readily discernable overlap in the nature and/or type of services specified in the cited registration and in the instant application, namely variety shows that are available to the viewing...public....Clearly, these services are the same, similar and/or highly related services, namely variety shows viewable on identical forms of media that compete for the attention of audiences....Since there are no limits described in the cited registration as to the scope of the audience...it must be presumed that the services in the cited registration are available to all types of audiences. Page 5, ¶ 1-2.

Applicant addressed each of the claims the Examiner makes above, in its appeal brief.

First, Applicant noted that Registrant's services are not broadly defined in nature or type, but are limited to the fields of comedy and satirical social commentary. The Examiner argues in his appeal brief that *Miss Universe L.P., LLLP v. Cmty Mktg, Inc.*, 82 U.S.P.Q.2d 1562 (T.T.A.B. 2007) is analogous to the case at hand, in that the shows at issue in *Miss Universe* were both beauty pageants where one show could be seen as an offshoot of the other, and the shows in the case at hand "are for the same type of services, entertainment television-type variety shows with essentially the same format." Page 5, ¶ 3. The Examiner goes so far as to state that the services at hand "should be

considered by this Board to be identical services offered in connection with the marks in issue for the purposes of confusion analysis.” *Id.* Neither the descriptions of the marks’ services nor their actual manifestations on TV support the claim that Applicant’s and Registrant’s services have essentially the same format. Indeed, *all* shows on television—even news programs—could fit under the description “entertainment variety show.” The Examiner repeatedly and inexplicably chooses to focus on these most generic terms, rather than the entirety of Applicant’s and Registrant’s respective identified services descriptions. Whereas Registrant’s show is limited to comedy and satirical social commentary, Applicant’s show is, in contrast, a reality lifestyle makeover program for middle aged people. In no way can Applicant’s show, as described or realized, be mistaken by the average viewer as an offshoot of Registrant’s show in the way two world-wide beauty pageants could be seen as affiliated.

The Examiner further argues that the case at hand is distinguishable from *Lemme v. NBC, Inc.*, 472 F. Supp. 2d 433 (E.D.N.Y. 2007), where the court deemed two shows named *AMERICAN DREAMS* were not confusable as to their sources. The Examiner argues that in *Lemme*, “the types of shows in issue were completely different, unlike the facts here before the Board.” Page 6, full ¶ 2. Ironically, to illustrate that the shows in *Lemme* were completely distinct, the Examiner describes the factual differences in the shows as they were manifested on TV. However, the Examiner continues to focus myopically on the overlap of the generic terms “entertainment variety show” in Applicant’s and Registrant’s services descriptions in concluding that the types of shows in the case at hand “are the same.” *Id.* Likewise, the Examiner distinguishes *Chum Ltd. v. Lisowski*, 198 F. Supp. 2d 530 (S.D.N.Y. 2002) from the case at hand using the same tactic, i.e., focusing on the facts of the actually produced shows and their differences in *Chum*, while claiming that Applicant’s and Registrant’s shows are defined identically. The Examiner fails to use consistent and principled analyses in making his arguments: whereas the Examiner acknowledges the actual

differences between the identically named and themed shows in *Lemme* and *Chum* that sufficed to render them not confusable as to their sources, the Examiner entirely ignores the factual differences between Applicant's and Registrant's shows as they are produced, and instead inexplicably concludes the shows are "the same" based on overlap of the three most generic terms in the shows' identified services descriptions. See *McGraw-Hill, Inc. v. Comstock Partners, Inc.*, 743 F. Supp. 1029, 1034 (S.D.N.Y. 1990) ("while [both parties] furnish products related to the broad field of finance, [they] are as completely unrelated as night and day"); *Cooper Indus., Inc. v. Repcoparts USA, Inc.*, 218 U.S.P.Q. 81, 84 (T.T.A.B. 1983) ("the mere fact that the products involved in this case (or any products with significant differences in character) are sold in the same industry does not of itself provide an adequate basis to find the required 'relatedness'"); *Elec. Data Sys. Corp. v. EDSA Micro Corp.*, 23 U.S.P.Q.2d 1460, 1463 (T.T.A.B. 1992) ("[T]he issue of whether or not two products are related does not revolve around the question of whether a term can be used that describes them both, or whether both can be classified under the same general category"); *UMC Indus., Inc. v. UMC Elecs. Co.*, 207 U.S.P.Q. 861, 879 (T.T.A.B. 1980) ("the fact that one term, such as 'electronic', may be found which generally describes the goods of both parties is manifestly insufficient to establish that the goods are related in any meaningful way"); *Harvey Hubbell, Inc. v. Tokyo Seimitsu Co.*, 188 U.S.P.Q. 517, 520 (T.T.A.B. 1975) ("In determining whether products are identical or similar, the inquiry should be whether they appeal to the same market, not whether they resemble each other physically or whether a word can be found to describe the goods of the parties"); *W.W.W. Pharm. Co. v. Gillette Co.*, 984 F.2d 567, 573 (2d Cir. 1993); *Therma-Scan v. Thermoscan*, 295 F.3d 623, 633 (6th Cir. 2002) ("Goods or services are not necessarily related...simply because they coexist in the same broad industry") (internal quotation marks omitted); *Munters Corp. v. Matsui Am., Inc.*, 730 F. Supp. 790, 798 (N.D. Ill. 1989) ("In some, albeit non meaningful, sense all products are related"); *Yankee Publ'g, Inc. v. News Am. Publ'g,*

*Inc.*, 25 U.S.P.Q.2d 1752, 1757 (S.D.N.Y. 1992) (rejecting identification of both parties' goods simply as "magazines:" "This is...too crude a characterization");

Second, Applicant noted that its and Registrant's shows travel in different trade channels. The Examiner argues that Applicant's and Registrant's services are identical, not only because they are both "variety shows," but also because "the classes of purchasers for these services, namely audiences, viewers, and/or sponsors and the like, are the same." Page 6, full ¶ 1. Again, this is simply untrue. For its entire seven-year on-air existence, Registrant's *DRINKING WITH BOB* show has exclusively aired on a Queens non-profit public access channel and hence has only been viewable on TV by a limited group of cable subscribers in Queens, New York (<http://www.qptv.org/qptv/?q=watch>). There is no indication that Registrant intends to expand the show's distribution, or could succeed in so doing given the low production value of the show and the inherent local community nature of public access television. In contrast, Applicant's advertiser supported commercial show reaches millions of viewers through Retirement Living Television ("RLTV"), which is distributed nationwide on cable and Direct TV. While RLTV is distributed in Queens, Applicant noted that this overlap in the broadcast of Applicant's and Registrant's shows is trivial, under *Motown Prods., Inc. v. Cacomm, Inc.*, 668 F. Supp. 285, 290, 291 (S.D.N.Y. 1987) and *Lemme, supra* at 449 n.9, considering it represents a tiny percentage of Applicant's total market.

Moreover, the Examiner's claim in his appeal brief that Registrant's and Applicant's shows target the same "sponsors" (page 5, ¶ 2) is unfounded. Registrant's show is a non-profit public access show that is not a commercial enterprise or business designed to generate revenue and compete in the marketplace, but rather an outlet for Registrant's expression of his views. As a public access show, it is a modern version of Speaker's Corner in Hyde Park, London—a soapbox

giving citizens an opportunity to publicly express their views. Applicant, on the other hand, is a commercial television network that employs a professional staff and is supported by advertisers. Any viewer watching these shows would immediately recognize the difference. It is the difference between a person handing out leaflets to passersby, compared with a Barnes and Noble store selling books. See, e.g., *Farberware, Inc. v. Mr. Coffee, Inc.*, 16 U.S.P.Q.2d 1103, 1110 n.15 (D. Del. 1990) (A substantial price difference, like a quality difference, may alert the consumer and reduce likelihood of confusion). Comparing these two shows is like comparing a community theater to a Broadway production, or comparing high school football to professional football.

Since trademark infringement is a form of unfair competition, one must remember that trademark law is premised on a party's right to protect its good will in a trade or business. Here, we only have one business, that of the Applicant. Public Access television is not a money making endeavor and does not sell advertising. Basic cable television shows like those produced by Applicant don't actually compete for viewers as much as for advertisers. And advertisers contemplating spending money are more discerning and sophisticated than a typical television viewer channel surfing. It would be difficult to believe that any advertiser or ad agency could possibly confuse these shows because their content is so different, their titles are different, and of course as a public access show Registrants' show does not even allow advertising.

Crucially, the Examiner fails to address Applicant's argument that *where* a service is distributed matters less than *what* services a mark could viably encompass in real commerce: that is, even if the services of highly similar marks travel in the same channels, the services' distinct natures will be preserved and distinguish the marks' sources. *Parenting Unlimited Inc. v. Columbia Pictures Television Inc.*, 743 F. Supp. 221, 228, 203 n.15 (S.D.N.Y. 1990); *Chum, supra* at 539;



*Lloyd's Food Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766, 769 (Fed. Cir. 1993). Even were Registrant's show to be distributed via all the same channels as Applicant's show, the existing differences in the shows' aims, tones, and contents would not diminish, and would remain readily apparent to the average viewer. Hence, the Examiner's statement that some "variety shows start off 'small' and become 'big' due to growth in popularity over a period of time" (page 6, full ¶ 1) does not demonstrate how a possible future expansion of Registrant's distribution would result in viewers becoming confused as to Registrant's and Applicant's shows' sources, and makes no reference to any supporting law. See also *Whitco Chem. Co. v. Whitfield Chem. Co.*, 418 F.2d 1403, 1405 (C.C.P.A. 1969) ("We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which trademark laws deal").

Third, the Examiner contends that "Applicant's commentary regarding aesthetics or supposed quality...does not merit a decision in its favor, since these are relative factors in the world of entertainment variety shows." Page 7, full ¶ 1. The Examiner cites no law in support of this statement, and contradicts *Motown, supra* at 290, where courts determined that differences in production value between the shows at issue favored a finding that confusion as to the shows' sources was not likely even though both shows had the same exact title "Nightlife" ("[e]ven a brief look at the two programs establishes beyond doubt that no 'purchaser'...could confuse the sources of the two versions....[Plaintiff's show] is a slick, network-quality production resembling such well-known programs as 'The Tonight Show' with Johnny Carson and 'Late Night' with David Letterman. [Defendant's show], by contrast, is an amateurish, one-camera, interviews-only production").

Finally, the Examiner disagrees with Applicant's argument that *WHAT'S NEXT*, as a merely descriptive or suggestive mark, merits narrow protection on the Principal Register. The Examiner

states that Applicant's position "contravenes existing case law that is on point for the issue that is before the Board, namely, that a registered mark is entitled to the full scope of consideration when it comes to the possibility of subsequent registration of confusingly similar marks as well as the presumption under Trademark Act Section 7(b)...that use of the mark extends to all...services identified in the registration." Page 7, full ¶ 2. Once again, the Examiner fails to describe which cases Applicant's arguments contravene, and the manner in which the cases are contravened. The Examiner effectively fails to address all of Applicant's analyses on this matter.

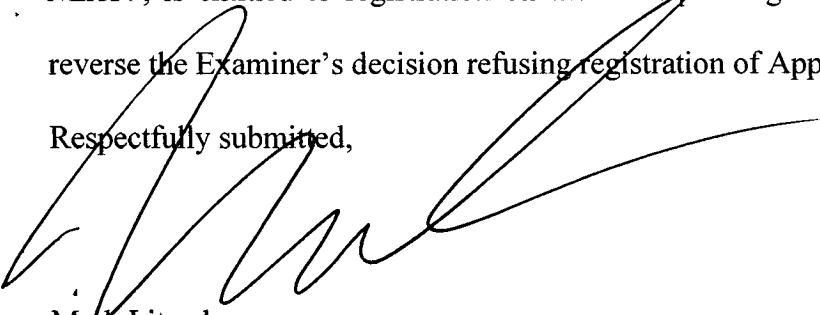
In sum, adopting the Examiner's approach to determining likelihood of confusion in the case at hand essentially means adopting a largely idiosyncratic, inconsistent approach that is almost entirely blind to facts. Were the Examiner's approach accepted, no two marks sharing merely descriptive or suggestive terms, whose identified services contain the descriptors "entertainment show" or "variety show," would merit separate registration on the Principal Register, even in the case where one mark is a show's title, and the other is a wholly different mark's tagline. Where the critical inquiry is likelihood of confusion in the average viewer's mind, case law cited by Applicant in its appeal brief mandates that we assume the average viewer is discerning as to differences in aims, tones, contents, and quality of even identically named and thematically similar TV shows. The average viewer is not reading descriptions of shows' services as filed with the Trademark Office; they are watching actual shows on TV. For all of the reasons cited in Applicant's appeal brief, which stand ineffectively countered by the Examiner, the average viewer is able to discern that Applicant's and Registrant's shows emanate from different sources.

### CONCLUSION

For the reasons set forth above, Applicant contends there is no likelihood of confusion as to the sources of Applicant's and Registrant's marks. Accordingly, Applicant's mark, *WHAT'S*

*NEXT?*, is entitled to registration on the Principal Register. The Board is therefore requested to reverse the Examiner's decision refusing registration of Applicant's mark.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Mark Litwak', is written over the text 'Respectfully submitted,'.

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