

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: January 28, 2010

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Retirement Living TV, LLC

Serial No. 77534075

Mark Litwak of Law Offices of Mark Litwak for Retirement
Living TV, LLC

Dominic J. Ferraiuolo, Trademark Examining Attorney, Law
Office 102 (Karen M. Strzyz, Managing Attorney)

Before Grendel, Kuhlke and Taylor, Administrative Trademark
Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Retirement Living TV, LLC seeks registration on the
Principal Register of the standard character mark WHAT'S
NEXT? for services ultimately identified as "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 41.¹

¹ Application Serial No. 77534075, filed July 29, 2008, alleging
first use and first use in commerce on October 11, 2007 under
Section 1(a) of the Trademark Act, 15 U.S.C. §1051(a).

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 with these services, so resembles the registered standard character 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 International Class 41,² as to be likely to cause confusion, mistake or deception.

Evidentiary Objection

The examining attorney's objection to the evidence attached to applicant's brief is sustained. The evidentiary record in an application should be complete prior to the filing of an ex parte appeal to the Board. Trademark Rule 2.142(d). Exhibits A and C consist of additional printouts from registrant's and applicant's websites respectively. During prosecution, in response to the first Office Action refusing registration, applicant referenced the websites and attached printouts from them.

² Registration No. 3208151, issued February 13, 2007.

Applicant's attempt to supplement that evidence is untimely.

Exhibit B consists of printouts from a website referenced in its response to the Office Action. At that time, applicant did not submit printouts from the website and the examining attorney did not advise applicant that a mere reference to the website did not make the website contents of record.³ While we will consider the reference and argument, the actual printouts from the website attached to the brief are untimely and have not been considered.

Exhibit D consists of the printout of a third-party's registration that was referenced by number in the request for reconsideration. An improper listing of third-party registrations will not be considered if the list is submitted at a point where applicant cannot correct the format of the submission. In re Caserta, 46 USPQ2d 1088, 1090 n.4 (TTAB 1998) (list of third-party registered marks from an unidentified source submitted with request for reconsideration, and objected to by examining attorney, not considered).

³ The cases and Trademark Manual of Examining Procedure section relied on by applicant pertain to third-party registrations, i.e., official records, not websites. See In re Boyd Gaming Corp., 57 USPQ2d 1944, 1945 n.4 (TTAB 2000).

Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

The examining attorney argues that the marks are similar in view of the common wording WHAT'S NEXT. As to the relatedness of the services the examining attorney's position is set forth below:

There is a readily discernible 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, purchasing and/or sponsoring public and/or markets that are viewable on television in the case of the cited registration and viewable by television, satellite and video media in Applicant's case...[s]ince there are no limits described in the cited registration as to the scope of audience, viewers and/or sponsors, it must be presumed that the services in the cited registration are available to all types of audiences, viewers and/or sponsors, including

those in the Applicant's more limited scope of audiences, viewers and/or sponsors. ... The subject matters of these services are offered for the same essential purpose, namely, variety entertainment, so that even though the content may slightly differ, they are competing for the same audiences, viewers and/or sponsors that make up the pool of audiences, viewers and/or sponsors for television-type entertainment variety shows. ... While there is no per se rule that entertainment variety shows are related, the factual analysis in this case does lead to that very conclusion, since the classes of purchasers for these services, namely audiences, viewers and/or sponsors and the like, are the same. The facts in this record support the conclusion that the services in the cited registration and those in the instant application are competing for the same entertainment dollar market. ... Although applicant limited its services from the time of filing to exclude news, music and comedy from its description, it still remains that the shows in issue are described as variety shows, so that with the wording variety shows goes all of the scope of subject matter included within the scope of the wording "variety show" namely, a variety of types of entertainment.

Br. pp. 3-4.

The examining attorney has not submitted any evidence in support of his position.

The marks here are similar to the extent that they both contain the phrase "What's Next" but there are also differences in appearance and possibly meaning due to the addition of the question mark in applicant's mark and the exclamation point in registrant's mark. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) quoting du

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Pont, 177 USPQ at 567 (in determining possible similarity "the marks [are analyzed] in their entirety as to appearance, sound, connotation and commercial impression.") While these differences may not be sufficient to obviate a determination of likely confusion where the services are identical, that is not the case before us.

As the examining attorney correctly states, in making our determination, we must consider the cited registrant's and applicant's services as they are described in the registration and application, and we cannot read limitations into those services. See *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987). See also *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 765 (TTAB 1986) (case must be decided based on the marks as applied to the goods identified in the application and the registration, rather than on "what extrinsic evidence shows those goods to be.") However, in this case both registrant's and applicant's identifications are, in fact, restricted by subject matter.

It is the examining attorney's position that registrant's services encompass applicant's services because they are both television variety shows. We cannot

agree with that reading of the recitation of services. As stated by applicant "all shows on television - even news programs- could fit under the description 'entertainment variety show.'" Reply Br. p. 11. Clearly both the application and the registration are limited by the content of the services. Registrant's services are not all variety shows. The identification in the registration specifically limits the type of programming to one featuring music, comedy and satirical social commentary. This identification does not encompass a reality show about makeovers for middle aged people. Therefore, the respective programs differ in substance and format. Although applicant misses the mark in much of its argument, by referencing decisions in infringement cases and discussing registrant's actual use of its mark as a tagline rather than as the title of its variety show, we agree that, as written, the services are sufficiently distinct to avoid likely confusion.⁴ While the examining attorney is correct that the identifications of services are limited by trade channels or classes of customers and, thus, we must presume overlapping trade channels and customers, the

⁴ We note that the examining attorney has not submitted evidence to support a finding that programs featuring starkly different subject matter are nonetheless sufficiently related to create a likelihood of confusion.

differences in the services are not outweighed by this factor.⁵

Further, in the context of the services, as identified, the differences in the marks are more pronounced. As applicant argues 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?" Reply Br. p. 9.

The examining attorney relies on *Miss Universe L.P. v. Community Marketing Inc.*, 82 USPQ2d 1562 (TTAB 2007), however, in that inter partes case, the record was much more developed and the identification of services were also identical in terms of content and format in that both were for beauty pageants and both involved "preliminary regional contests leading to a televised final pageant featuring celebrity masters of ceremonies, celebrity entertainers and celebrity judges." *Miss Universe*, 82 USPQ2d at 1568.

While it is possible that we could come to a different conclusion based on a different record that could be

⁵ It is possible that the differing subject matter of the programs may, in fact, attract a different audience. However,

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developed in an inter partes case, on this record, we find, that because the services are distinct and there are differences, albeit slight, in the marks, confusion is not likely between applicant's mark and the mark in the cited registration.

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

the limitation of subject matter in this case does not by itself limit the channels of trade or classes of customers.