

IN THE MATTER OF AN OPPOSITION by Rogers Broadcasting
Limited to application No. 546,071 for the trade-mark LITE
ROCK...LESS TALK filed by Chum Limited

On July 12, 1985, the applicant, Chum Limited, filed an application to register the trade-mark LITE ROCK...LESS TALK based upon use of the trade-mark in Canada since at least as early as December 29, 1984 in association with "entertainment services in the nature of the production, performance and presentation of radio programmes". The applicant disclaimed the right to the exclusive use of the words LITE and ROCK apart from its trade-mark.

The opponent, Rogers Broadcasting Limited, filed a statement of opposition on July 8, 1988 in which it alleged that the applicant's trade-mark is not registrable and not distinctive as applied to the services covered in the present application "in that the applied-for mark whether depicted, written or sounded, is clearly descriptive or deceptively misdescriptive in the English language of the character or quality of the services in association with which it is alleged to have been used". The opponent further submitted that while the applicant has disclaimed the words LITE and ROCK, the remaining elements LESS and TALK are similarly descriptive of the applied-for services, such that the trade-mark considered in its entirety is clearly descriptive of the applicant's services.

The applicant served and filed a counter statement in which it denied the allegations set forth in the statement of opposition.

The opponent filed as its evidence the affidavit of Eric Sanderson while the applicant submitted the affidavit of William Bodnarchuk.

The applicant alone submitted a written argument and made submissions at an oral hearing.

The opponent's second ground of opposition based on the alleged non-distinctiveness of the applicant's trade-mark is founded on the allegation that the applicant's trade-mark is either clearly descriptive or deceptively misdescriptive of the character or quality of the applicant's services. Accordingly, the determination as to whether the applicant's trade-mark is registrable in view of the provisions of Section 12(1)(b) of the Trade-marks Act will effectively decide both grounds of opposition.

The issue as to whether the applicant's trade-mark LITE ROCK...LESS TALK is clearly descriptive of the applicant's services must be considered from the point of view of the average user of those services, that is, the average radio listener. Further, in determining whether a trade-mark

is clearly descriptive of the character or quality of the services associated with it, the trade-mark must not be dissected into its component elements and carefully analyzed, but rather must be considered in its entirety as a matter of immediate impression (see Wool Bureau of Canada Ltd. v. Registrar of Trade Marks, 40 C.P.R. (2d) 25, at pgs. 27-28 and Atlantic Promotions Inc. v. Registrar of Trade Marks, 2 C.P.R. (3d) 183, at pg. 186).

The relevant date for considering a ground of opposition based on Section 12(1)(b) of the Act is as of the date of decision (see Lubrication Engineers, Inc. v. The Canadian Council of Professional Engineers, 41 C.P.R. (3d) 243 (F.C.A.)). While the legal burden is on the applicant to establish the registrability of its trade-mark, there is an initial evidential burden on the opponent to adduce sufficient evidence which, if believed, would support the truth of its allegations that the applicant's trade-mark is clearly descriptive or deceptively misdescriptive of the character or quality of the applicant's services. It is therefore necessary to consider the Sanderson affidavit in order to determine whether the opponent has met the evidential burden upon it.

In paragraph 1 of his affidavit, Mr. Sanderson, General Manager of CFTR and Senior Vice-President of the opponent, sets forth his background in the radio broadcast industry. According to the affiant, he has held a number of positions including Assistant Programme Director, Programme Director and Vice-President Programming with various radio stations located in Canada and the United States since April of 1972. However, Mr. Sanderson has not provided any details as to the functions which he has performed in any of the positions which he has held. Where an affiant is being put forward as an expert based on his knowledge or skill acquired from experience, it is incumbent on the affiant to provide details of that experience in order that his qualifications as an alleged expert can be properly assessed. In the present case, I am not prepared to infer from Mr. Sanderson's various job titles alone that he is an expert in the radio broadcasting industry. I have therefore concluded that Mr. Sanderson has failed to qualify himself as an expert in the radio broadcasting industry.

In paragraph 2 of his affidavit, Mr. Sanderson expresses his opinion that "light rock" and "lite rock" are a specific format of music programming used by many radio stations which emphasizes a particular type of music, that being "light rock" as opposed to, for example, "hard rock". In paragraph 3, Mr. Sanderson describes the contents of two exhibits annexed to his affidavit in support of his contention that the words LITE ROCK are descriptive of a particular format of radio programming. While the applicant objected to these exhibits as being hearsay evidence, their admissibility is not relevant to the outcome of this opposition as the applicant has effectively

conceded that the words LITE and ROCK are descriptive of its services by disclaiming them apart from its trade-mark. Further, in his affidavit, Mr. Bodnarchuk, the applicant's affiant, states that the words LITE and ROCK are descriptive.

The Sanderson affidavit does not purport to relate any facts relating to the alleged descriptiveness of the applicant's trade-mark LITE ROCK...LESS TALK when considered in its entirety and only in paragraph 5 of his affidavit does Mr. Sanderson comment on the alleged descriptiveness of the words LESS TALK:

"5. "Less talk" is an important feature to certain music listeners who wish to hear less of the radio announcer and more music. These listeners will tune into those radio stations that provide "less talk" and more music, tuning out at the same time those that do not. The words "less talk" are more than suggestive of a particular end result to be obtained should the listener tune in to a particular radio station that describes itself as having "less talk"; rather radio listeners when hearing the words "less talk" will assume that there will in fact be "less talk" and the words therefore describe a durable quality of the radio station's services, describing the character or quality of the programming of that station. I verily believe that many radio stations, in addition to the RBL and the CHUM groups of radio stations, use the words "less talk" to describe their programming services."

The opinions of an affiant are admissible as evidence in an opposition where the subject matter of the opinion calls for knowledge or special skill and the affiant is an expert in relation to the subject matter. On the other hand, if the subject matter does not involve a degree of specialized knowledge sufficient to require the evidence of an expert, such evidence is inadmissible. In the present case, such matters as radio programming and its impact on listening audiences might well be considered the subject matter of expert opinion evidence. However, I do not consider that the perception of the average radio listener as to whether he or she would consider the applicant's mark to be clearly descriptive of the character or quality of radio broadcasting services involves a degree of specialized knowledge sufficient to justify the reception of expert opinion evidence on the point.

Even if I am incorrect in concluding that the meaning of the applicant's trade-mark to the average radio listener is not proper subject matter for expert opinion evidence, as noted above, I do not consider that Mr. Sanderson has qualified himself as an expert in the radio broadcasting industry, nor has the affiant provided the factual bases and/or assumptions, if any, upon which the opinions set forth in this paragraph are based. At most, the affiant states that he believes that the words LESS TALK are used or recognized in radio broadcasting to describe a type of "broadcasting service". In any event, and even had Mr. Sanderson qualified himself as an expert in radio programming, such qualifications might only have permitted him to give an opinion as to the significance of such expressions LITE ROCK or LESS TALK within the radio broadcasting industry. Indeed, in the absence of a properly conducted survey in support of the opinion, I seriously doubt that the opinion

of any affiant as to how the average radio listener would perceive a particular trade-mark could, even if admissible (see Jordan & Ste-Michelle Cellars Ltd. et al v. T. G. Bright & Co. Ltd., 71 C.P.R. (2d) 138), be accorded much weight in an opposition proceeding. As a result, I am not prepared to accept Mr. Sanderson's opinions set forth in paragraph 5 of his affidavit.

In view of the above, I have concluded that the opponent has not met the evidential burden upon it in respect of its allegations that the trade-mark LITE ROCK...LESS TALK, when considered in its entirety, is clearly descriptive of the character or quality of the applicant's services. Further, no evidence has been adduced by the opponent relating to the trade-mark LITE ROCK...LESS TALK being either deceptive or misdescriptive of the applicant's services. I have therefore rejected the opponent's grounds of opposition.

Apart from the above, I do not consider that the average radio listener would perceive the trade-mark LITE ROCK...LESS TALK as being clearly descriptive, of services relating to the production and performance of radio programs. The words LESS TALK might lead some radio listeners to believe that the applicant's radio broadcasts include less commentary or fewer interviews while other listeners might think that the expression LESS TALK means that the broadcasts include fewer commercials. As a result, the average listener might conclude that the applicant's LITE ROCK...LESS TALK radio program services include more "light rock" music than other radio stations as a result of there being less commentary, fewer interviews or not as many commercials. In any event, the average listener would have to go through a two-step process in order to reach such a conclusion. As a result, the trade-mark LITE ROCK...LESS TALK is, at most, highly suggestive, as opposed to being clearly descriptive of the applicant's services.

I therefore reject the opponent's opposition pursuant to Section 38(8) of the Trade-marks Act.

DATED AT HULL, QUEBEC THIS 29th DAY OF JANUARY 1993.

G.W.Partington,
Chairman,
Trade Marks Opposition Board.