

IN THE MATTER OF AN OPPOSITION
by CHUM Limited to application
No. 626,530 for the trade-mark
TODAY'S MUSIC filed by Today's
Music Inc.

On March 2, 1989, the applicant, Today's Music Inc., filed an application to register the trade-mark TODAY'S MUSIC based on use in Canada since January, 1986 with the following services:

design, installation and service of back-ground music, public address and intercom systems for others, wired music services, and the supply of background music services to businesses and individuals.

The application was amended to include a disclaimer to the word MUSIC and was subsequently advertised for opposition purposes on November 29, 1989.

The opponent, CHUM Limited, filed a statement of opposition on March 30, 1990, a copy of which was forwarded to the applicant on April 12, 1990. The grounds of opposition include, among others, that the applied for trade-mark is not registrable pursuant to Section 12(1)(b) of the Act because it is either clearly descriptive or deceptively misdescriptive of the character or quality of the applied for services. In support of this ground, the opponent alleged that "today's music" is an expression commonly used in the English language and in the radio broadcasting, radio communications, music services and entertainment industry to describe currently popular music.

The applicant filed and served a counter statement. As its evidence, the opponent filed the affidavit of Wallace E. West. The applicant did not file evidence. Only the opponent filed a written argument and an oral hearing was conducted at which only the opponent was represented.

The material time for considering the circumstances respecting the issue arising pursuant to Section 12(1)(b) of the Act is the date of my decision: see the decision in Lubrication Engineers, Inc. v. The Canadian Council of Professional Engineers (1992), 41 C.P.R.(3d) 243 (F.C.A.). The issue is to be determined from the point of view of an everyday user of the services. Furthermore, the trade-mark in question must not be carefully analyzed and dissected into its component parts but rather must be considered in its entirety and as a matter of first impression: see Wool Bureau of Canada Ltd. v. Registrar of Trade Marks (1978), 40 C.P.R.(2d) 25 at 27-28 and Atlantic Promotions Inc. v. Registrar of Trade Marks (1984), 2 C.P.R.(3d) 183 at 186.

In his affidavit, Mr. West identifies himself as Vice President and General Manager of CHUM Satellite Business Music Network, a division of the opponent CHUM Limited. He has held that position since 1975 and has been employed by the opponent since 1964. He states that he is familiar with all aspects of the opponent's business, including the radio broadcasting business, but his specialty is the music systems business. He states that this is the same business as that described by the applicant's statement of services and further states that CHUM Satellite Business Music Network and the applicant are competitors.

Mr. West states that, in his opinion, the phrase "today's music" is a generic term commonly used in the radio broadcasting, radio communication, music services and

entertainment industries. However, I am not convinced that Mr. West has clearly established his credentials as an expert in the field such that his opinion would be admissible. Furthermore, even if it was, I am not convinced that it would have any bearing on a determination of how the everyday user would react to those words when used in association with the applicant's services: see the opposition decision in Rogers Broadcasting Ltd. v. Chum Limited (1993), 48 C.P.R. (3d) 108 at 112.

Notwithstanding Mr. West's failure to qualify himself as an expert, he does provide admissible evidence relative to the issue arising pursuant to Section 12(1) (b) of the Act. For example, Exhibit B to his affidavit is a sample of the applicant's advertising in which its trade-mark is used as part of the phrase "Today's Music For Today's People." That phrase is followed by a description of the types of music provided by the applicant's systems including "easy listening instrumental", "top 100's", "soft rock" and "contemporary." The applicant's own advertising therefore seems to use the phrase "today's music" to describe contemporary or currently popular music.

Mr. West also provides samples of his company's advertisements for the same services as performed by the applicant (see Exhibit C to his affidavit). His company's ads prominently use the phrase "today's music" presumably to indicate to the customer the type of music available. Exhibit D to the West affidavit is an advertisement by another competitor in the field in which the phrase "Today's Music By Today's Artists" is used. Mr. West also states that the phrase "today's music" is used in an industry magazine read by those in the radio and broadcast business.

Also of note is Mr. West's statement that the opponent uses the phrase "today's music" during its radio broadcasts to refer to popular or contemporary music. Since the opponent operates more than eighteen radio stations, the use of the phrase can be assumed to be more than minimal. Mr. West further notes that he has heard the phrase "today's music" used on other radio stations to refer to popular or contemporary music.

Having reviewed the West affidavit, I find that the applicant has satisfied the evidential burden on it to show that the trade-mark TODAY'S MUSIC is clearly descriptive or deceptively misdescriptive of the character or quality of the applicant's services. Although the opponent's evidence is not overwhelming, it does tend to support the proposition that the everyday user of the applicant's music services would react to the applicant's mark as clearly describing those services as providing popular or contemporary music. Although I am not entirely convinced as to the accuracy of Mr. West's observations about the use of the phrase "today's music" by the opponent and others, his statements in this regard are uncontradicted and the applicant chose not to cross-examine Mr. West on them. In fact, the applicant has taken no active step in this opposition since filing its counter statement.

The opponent has satisfied its evidential burden. The legal burden is on the applicant to show that its mark does not offend the provisions of Section 12(1) (b) of the Act. The opponent's evidence leaves me in a state of doubt respecting this issue and I must therefore resolve that doubt against the applicant. The ground of non-registrability is therefore successful and the remaining grounds need not be considered.

In view of the above, I refuse the applicant's application.

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

David J. Martin,
Member,
Trade Marks Opposition Board.