

Adnan Syed Won a New Trial (Again), But the Serial Podcast Lost its Own Appeal

April 26, 2018 – The TMCA
by Fara Sunderji



If you were a devoted listener of season one of *Serial*, you probably already know that last month the Maryland Court of Special Appeals decided that Adnan Syed deserves a new trial. What you may not know is that three days before, the Trademark Trial and Appeal Board quietly issued a precedential opinion holding that Sarah Koenig, Dana Chivvis, Ira Glass and team at Serial Podcast, LLC have no trademark rights in the term “serial” because it is a generic term free for all to use for ongoing audio programs.

Related People

- Fara Sunderji

Related Capabilities

- Trademark, Copyright + Advertising
- Intellectual Property Litigation

According to TTAB precedent, generic terms are common descriptive names of a class of goods or services and are not registrable because they are incapable of indicating source. In other words, generic terms are the “antithesis of trademarks, and can never attain trademark status.” So how does the Trademark Office determine that a term is generic? They ask if members of the relevant public, the general public in this case, understand the term to refer to the genus of goods or services in question, ongoing audio programs in this case rather than a particular, single source of the goods or services. If the evidence shows the former, the term is generic. On the other hand, if everyone in your office thinks Serial is Serial the podcast and not a “serial,” the term might not be generic, depending on whether this understanding truly reflects single source significance, not just the popularity of one particular program. But the evidentiary record in this case didn’t include any consumer survey or even an unscientific office poll for that matter.

The Examining Attorney, who had already found the term generic prior to the *ex parte* appeal, relied on current dictionary definitions and a long list of online articles using the

term “serial” as both a noun and an adjective to generically denote episodic broadcasts or podcasts. It should be noted that a number of the articles were references to older radio program dating as far back at the 1930s. On the other hand, the podcast team relied on over 12,000 recent media stories referring to its podcast as Serial; a daily download audience as high as 1.4 million in the first season and 1.7 million in the second; and high profile parodies on *Saturday Night Live* and *Sesame Street*. In their defense, the podcasters also attacked the Examining Attorney’s evidence as “antiquated” and “archaic,” which should not be relied upon to determine the public’s current understanding of a term.

From the title of this post, you should already know that the TTAB sided with the Examining Attorney. The Board found that because current dictionaries contain a definition for “serial,” the understanding of the term is not confined to a bygone era. Moreover, it found that the podcast’s evidence only amounted to *de facto* secondary meaning of a generic term, which essentially means nothing more than that the public recognizes Serial as the most well-known ongoing series currently being offered. In leveling a last blow to the podcast team, the TTAB referenced a Federal Circuit opinion from 2006:

While it is always distressing to contemplate a situation in which money has been invested in a promotion in the mistaken belief that trademark rights of value are being created, merchants act at their peril in attempting, by advertising, to convert common descriptive names, which belong to the public, to their own exclusive use. Even though they succeed in the creation of de facto secondary meaning, due to lack of competition or other happenstance, the law respecting registration will not give it any effect.

So what do you think? Does the term “serial” belong to the public or the public radio team of *This American Life* at WBEZ in Chicago? If the podcasters had submitted a consumer survey, would the case have turned out differently? Maybe this Serial will follow in the footsteps of Adnan and go up on appeal once more.