

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. _____

PUBLIC BROADCASTING OF COLORADO,
INCORPORATED, d/b/a COLORADO PUBLIC RADIO,

Plaintiff,

v.

TWIN CITIES PUBLIC TELEVISION, INC.

Defendant.

COMPLAINT WITH JURY DEMAND

Plaintiff Public Broadcasting of Colorado, Incorporated d/b/a Colorado Public Radio (hereinafter “CPR” or “Plaintiff”), by its attorneys, hereby brings this action against Defendant Twin Cities Public Television, Inc. (hereinafter “TPT” or “Defendant”), and allege as follows:

NATURE OF THE ACTION

1. This is an action for injunctive relief and damages based on trademark infringement and unfair competition under the federal Lanham Act, 15 U.S.C. § 1051, *et seq.*, and Colorado common law.

2. CPR has spent more than four decades building its reputation as a trusted source for public broadcasting, including news, information and musical programming. CPR broadcasts its programming through its radio networks and throughout the world over the internet. CPR uses its OPEN AIR mark in connection with broadcasting content and focuses on new and recent music from the past 15 years, interviews, live performances, and topical news and educational

content. CPR uses its “OPEN AIR” mark in connection with programming that appeals to younger customers and those supportive of public broadcasting programming.

3. TPT is a broadcaster and/or producer of public television that – until recently – had not used any “OPEN AIR” mark. When TPT launched its use of the “OPEN AIR” mark in connection with its broadcasting initiative targeting younger viewers, it did so with a name that intentionally copied CPR’s protected marks, in an attempt to trade on CPR’s goodwill and reputation as a leader of broadcasting content delivered on air and on-line. CPR brings this action to stop TPT’s trademark infringement and unfair competition and to repair the damage that has been done to CPR’s valuable intellectual property rights.

THE PARTIES

4. Plaintiff Public Broadcasting of Colorado, Incorporated d/b/a Colorado Public Radio is a non-profit corporation duly organized and existing under the laws of the State of Colorado, having its principal place of business at 7409 South Alton Court, Centennial, Colorado 80112. Colorado Public Radio is a registered trade name for Public Broadcasting of Colorado, Incorporated.

5. On information and belief, Defendant Twin Cities Public Television, Inc. is a non-profit corporation organized and existing under the laws of the State of Minnesota, having a principal place of business at 172 East Fourth Street, Saint Paul, Minnesota 55101.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction under the federal Lanham Act, 15 U.S.C. § 1121, and under 28 U.S.C. §§ 1331, 1332(a) and 1338(a). This Court has supplemental

jurisdiction over Plaintiff CPR's related common law claims under 28 U.S.C. §§ 1338(b) and 1367.

7. This Court has personal jurisdiction over Defendant TPT because, on information and belief, TPT has a presence in Colorado by virtue of its internet channel and other on-line activities, its internet broadcasts and infringing use of CPR's mark aimed at Colorado, its solicitation and acceptance of donations from Colorado, and the confusion and harm to individuals in Colorado caused by TPT's infringement and unfair competition. By virtue of its intentional trademark infringement, TPT has committed an intentional action that was expressly aimed at Colorado and the residents of Colorado with knowledge that the brunt of the injury would be felt in Colorado such that CPR's injuries arise out of TPT's infringing activities. As such, TPT has committed tortious acts in Colorado and has otherwise established contacts within Colorado that make the exercise of personal jurisdiction proper.

8. Venue is proper in this Judicial District pursuant to 28 U.S.C. § 1391(b).

GENERAL ALLEGATIONS

CPR And Its Marks

9. Since its founding in 1970, CPR has become the source for public broadcasting via radio and the internet in Colorado and beyond. CPR has used a variety of legally-protected trademarks, service marks, and design elements/copyrights for many years in connection with the advertisement and broadcasting of its programming, including but not limited to those detailed in this Complaint.

10. Since September 2011, a time prior to Defendant's acts of trademark infringement and unfair competition complained of herein, CPR has used the mark "OPEN AIR" in the United

States in connection with radio and on-line programming, which focuses on new and recent music, interviews, live performances, topical news and educational content. CPR uses its “OPEN AIR” mark on air at 1340 AM throughout the Denver, Colorado metro area and also on-line at <http://www.openaircpr.org> where its content is displayed and streamed throughout the world. CPR also uses its “OPEN AIR” mark in the United States in connection with its YouTube Channel (<http://www.youtube.com/user/OpenAirCPR>) and in social media, including on Facebook, Twitter, and Google+. CPR uses its “OPEN AIR” mark in connection with programming that appeals to younger customers and those supportive of public broadcasting programming.

11. CPR is the owner of U.S. Registration No. 3,001,604, for the service mark “OPEN AIR” (the “OPEN AIR Mark”) in connection with radio programming; distribution of radio programs for others; entertainment in the nature of on-going radio programs in the field of music, commentary and interviews; and entertainment services, namely providing radio programming and information in the field of music, commentary and interviews via a global computer network. A copy of a printout from the U.S. Patent and Trademark Office (“USPTO”) detailing the registration of the OPEN AIR Mark in the United States is attached hereto as **Exhibit A**.

12. The registration is valid, subsisting, in full force and effect and has become incontestable pursuant to 15 U.S.C. § 1065.

13. The registration of the mark constitutes *prima facie* evidence of its validity and conclusive evidence of CPR’s exclusive right to use of the OPEN AIR Mark in connection with the information identified therein.

14. The registration of the mark also provides sufficient notice to TPT of CPR's ownership and exclusive rights in the OPEN AIR Mark.

15. The OPEN AIR Mark at issue in this case has been continuously used and has never been abandoned.

16. On information and belief, with the exception of one authorized and licensed use of the OPEN AIR Mark for archived radio programs, no other broadcasting entity but Defendant delivers similar programming using a mark identical or confusingly similar to CPR's OPEN AIR Mark.

17. Since 2011 CPR has spent substantial time, money, and other resources in developing, advertising, and otherwise promoting the OPEN AIR Mark. As a result of its use and promotion of the OPEN AIR Mark, CPR has developed strong common law rights in its mark, and has built up and owns valuable goodwill that is symbolized by its OPEN AIR Mark.

TPT And Its Infringing And Unfair Conduct

18. Upon information and belief, TPT has been broadcasting television programming since 1955. TPT has traditionally broadcast television programs, including Public Broadcast Service ("PBS") programming and other public educational, cultural, and children's programs. TPT traditionally delivered its programs through its family of television channels and subchannels. TPT's public television broadcasting has historically been not at all similar to CPR's radio broadcasting and on-line streaming.

19. In or about May 2013, TPT for the first time launched an on air and on-line broadcasting initiative, called "Open Air Initiative," using the "OPEN AIR" mark (the "Infringing OPEN AIR Mark") aimed at young adults. While TPT was in the process of

launching its use of the Infringing OPEN AIR Mark, CPR contacted TPT on or about May 24, 2013, provided TPT with actual notice of CPR's OPEN AIR Mark, expressed CPR's concern that TPT's use of the Infringing OPEN AIR Mark in connection with the same or substantially similar broadcasting activities would inevitably cause confusion among the public, and requested that TPT cease any use of its Infringing OPEN AIR Mark.

20. TPT, however, refused CPR's request and, since that time, has used the Infringing OPEN AIR Mark to promote and advertise its online broadcast of music, video, and other content. TPT, for example, has used the Infringing OPEN AIR Mark to promote its "Live from the Artists Den" music series, to broadcast Austin City Limits TV online, to broadcast music videos of artists including Mumford & Sons, The National, and Norah Jones. *See, e.g., Exhibit B.*

21. TPT currently maintains a website accessible through the domain name "openair.tpt.org" (the "Open Air Website") The Open Air Website describes that "Open Air is public media with a twist. This new initiative from Twin Cities Public Television (tpt) involves a series of smart and playful events, content, and online engagements that take TV outside the box—and into the digital era." The Open Air Website displays a wide variety of content including, among other things, video, events, news, press, and highlights. The website largely displays and prominently features the Infringing OPEN AIR Mark and the domain name wholly incorporates the Infringing OPEN AIR Mark. Additional screen shots from the Open Air Website are attached hereto as **Exhibit C**.

22. The Open Air Website also prominently includes a tab for "Support" that resolves to a website hosted at the domain name "tpt.org" (the "TPT Website") that solicits and accepts

donations and contributions. The TPT Website utilizes PayPal, a global e-commerce business that allows payments to be made through the Internet, for one (1) time payments as well as fields where individuals can fill in personal and credit card information to make reoccurring contributions. On information and belief, TPT solicits and accepts donations and contributions from persons residing in all fifty (50) states. In particular, the “State” field provides a drop-down list listing all fifty (50) states, including Colorado. Screen shots from the TPT Website are attached hereto as **Exhibit D**.

23. TPT lauds itself for aiming its Open Air programming at a young adult audience and those supportive of public broadcasting programming. *See Exhibit E*, power point slides presented by Andi McDaniel of TPT at the 2013 PBS Annual Meeting.

24. TPT also uses its Infringing OPEN AIR Mark on internet based social media sites that are globally accessible. TPT’s Open Air Initiative has an OPEN AIR Facebook page and a Twitter account where people can follow the twitter handle “tptopenair.” Both social media sites prominently display the Infringing OPEN AIR Mark. Screen shots from these social media sites are attached hereto as **Exhibit F**.

25. Upon information and belief, the selection and adoption of an identical OPEN AIR mark represents a deliberate attempt by TPT to trade on CPR’s reputation and goodwill as the forerunner in focusing its broadcasting on a younger demographic and those supportive of public broadcasting programming by creating confusion in the marketplace as to the source of CPR’s and TPT’s respective broadcast initiatives. Confusion among the public with respect to CPR’s programming and those broadcast or used in connection with the Infringing OPEN AIR Mark is extremely likely, as these directly competitive programs are offered in the same on-line

media. The likelihood of confusion is heightened because few public television broadcasters focus on a younger demographic. *See Exhibit G* (“What has been the biggest surprise to you related to Open Air? I’d have to say it’s that so few other stations are venturing into this space.”).

26. TPT’s activities, including those described above, are likely to create a false impression and deceive donors, the public, and the trade into believing that there is a connection or association between the Infringing OPEN AIR Mark and CPR.

27. On information and belief, as a result of TPT’s Infringing OPEN AIR Mark, CPR has lost and will continue to lose listeners, donors, supporters and customers who are accustomed to looking for CPR’s OPEN AIR Mark will now be mistakenly directed to TPT’s programming and on-line activities.

28. TPT has no license, authority, or other permission from CPR to use the OPEN AIR Marks.

29. TPT has been engaging in the above-described infringing activities negligently and/or knowingly and intentionally, with reckless disregard or willful blindness to CPR’s rights, or with bad faith, for the purpose of trading on the goodwill and reputation of the OPEN AIR Mark and CPR’s on air and on-line broadcasting.

30. CPR has demanded that TPT cease all further use of the Infringing OPEN AIR Mark, but TPT has failed and refused to do so.

31. Upon information and belief, TPT intends to continue to advertise, promote, and use the Infringing OPEN AIR Mark.

32. TPT's conduct is therefore causing immediate and irreparable injury to CPR and will continue to damage CPR and the public unless enjoined by this Court.

FIRST CLAIM FOR RELIEF
Federal Trademark Infringement
15 U.S.C. § 1114

33. CPR repeats and incorporates by reference all previous allegations in paragraphs 1 - 32 as if fully set forth herein.

34. TPT's unauthorized advertisement, promotion, and display of the Open Air Initiative and Infringing OPEN AIR Mark as aforesaid constitutes use in commerce, or on in connection with TPT's services, is a copy and/or colorable imitation of CPR's OPEN AIR Mark, which is likely to cause confusion, to cause mistake, or to deceive.

35. The foregoing acts of TPT are intended to cause, have caused, and are likely to continue to cause confusion, mistake, and deception among consumers, the public, and the trade as to whether TPT's Infringing OPEN AIR Mark originates from, or is affiliated with, sponsored by, or endorsed by CPR.

36. Upon information and belief, TPT has acted with knowledge of Plaintiff's ownership of the OPEN AIR Mark and with deliberate intention or willful blindness to unfairly benefit from the goodwill symbolized thereby.

37. TPT's acts constitute trademark infringement in violation of Section 32 of the Lanham Act (15 U.S.C. § 1114).

38. Upon information and belief, TPT has made and will continue to generate revenue and/or gains to which it is not in law or equity entitled.

39. Upon information and belief, TPT intends to continue its infringing acts, unless restrained and enjoined by this Court.

40. TPT's acts have damaged and will continue to damage CPR, and CPR has no adequate remedy at law.

41. As a result of TPT's activities, CPR has been damaged in an amount to be ascertained at trial.

SECOND CLAIM FOR RELIEF
Federal Unfair Competition
15 U.S.C. § 1125(a)

42. CPR repeats and incorporates by reference all previous allegations in paragraphs 1 - 41 as if fully set forth herein.

43. TCP's unauthorized promotion, advertising, and display of the OPEN AIR Initiative and the Infringing OPEN AIR Mark, together with TPT's use of other indicia associated with CPR is intended, and is likely to confuse, mislead, or deceive consumers, the public, and the trade as to the origin, source, sponsorship, or affiliation of the Infringing OPEN AIR Mark, and is likely to cause such parties to believe in error that the Infringing OPEN AIR Mark has been authorized, sponsored, approved, endorsed or licensed by CPR, or that TPT is in some way affiliated with CPR.

44. The foregoing acts of TPT constitute a false designation of origin, and false and misleading descriptions and representations of fact, all in violation of Section 43(a) of the Lanham Act (15 U.S.C. § 1125(a)).

45. Upon information and belief, TPT has made and will continue to generate revenue and/or gains to which it is not in law or equity entitled.

46. Upon information and belief, TPT intends to continue its infringing acts, unless restrained and enjoined by this Court.

47. TPT's acts have damaged and will continue to damage CPR, and CPR has no adequate remedy at law.

48. As a result of TPT's activities, CPR has been damaged in an amount to be ascertained at trial.

THIRD CLAIM FOR RELIEF
Common Law Trademark Infringement

49. CPR repeats and incorporates by reference all previous allegations in paragraphs 1 - 48 as if fully set forth herein.

50. The OPEN AIR Mark is distinctive and valid at common law.

51. CPR has used the Open Air Mark in U.S. commerce since at least as early as 2011, including as described above.

52. TPT has advertised, promoted, displayed, and used the Infringing OPEN AIR Mark in U.S. commerce, including the internet, which is accessible in the State of Colorado, since approximately May 2013.

53. TPT's conduct constitutes trademark infringement under Colorado common law.

54. TPT's acts of trademark infringement have caused and will continue to cause damage and irreparable harm to CPR, and are likely to continue unabated, thereby causing further damage and irreparable harm to CPR and to the valuable goodwill symbolized by and associated with its distinctive OPEN AIR Mark, unless enjoined and restrained by the Court.

55. CPR has no adequate remedy at law. If TPT's activities are not enjoined, CPR will continue to suffer irreparable harm and injury to the OPEN AIR Mark, their goodwill, and their reputation.

56. Upon information and belief, TPT's trademark infringement is and was knowing and willful.

57. As a result of TPT's activities CPR has been damaged in an amount to be ascertained at trial.

**FOURTH CLAIM FOR RELIEF
Common Law Unfair Competition**

58. CPR repeats and incorporates by reference all previous allegations in paragraphs 1 - 57 as if fully set forth herein.

59. The OPEN AIR Mark is distinctive and valid at common law.

60. TPT misappropriated CPR's OPEN AIR Mark for its directly competitive services and is unfairly competing with CPR by falsely representing the source or quality of its services.

61. TPT's adoption and use in commerce of its Open Air Initiative and its Infringing OPEN AIR Mark in U.S. commerce, including the internet, which is accessible in the State of Colorado, is likely to cause confusion, deception, and mistake by creating the false and misleading impression that TPT's services are associated or connected with CPR's, or have been sponsored, endorsed, or approved by CPR.

62. TPT's use of the Infringing OPEN AIR Mark has caused, and unless enjoined by this Court, will continue to cause a likelihood of confusion and deception among members of the public and to cause injury to CPR's goodwill and reputation as symbolized by CPR's OPEN AIR Mark, for which CPR has no adequate remedy at law.

63. TPT's actions constitute unfair competition under the common law of the State of Colorado.

64. Upon information and belief, TPT's actions demonstrate an intentional, willful, and bad-faith intent to trade on the goodwill associated with CPR's OPEN AIR Mark.

65. TPT's conduct has caused and is likely to continue causing substantial injury to the public and to CPR, and CPR is entitled to injunctive relief, its actual damages, and TPT's profits under Colorado common law.

JURY DEMAND

66. Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, CPR requests a jury trial for all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Public Broadcasting of Colorado, Incorporated d/b/a Colorado Public Radio prays for a judgment as follows:

A. That TPT and all its agents, officers, employees, representatives, successors, assigns, attorneys, and all other persons acting for, with, by, through, or under authority of TPT, or in concert or participation with TPT, and each of them, be preliminarily and then permanently restrained and enjoined from:

1. Using CPR's OPEN AIR Mark and the domain name "openair.tpt.org";
2. Using any trade dress, trademark, service mark, name, logo, or source designation of any kind that is a copy, reproduction, colorable imitation, or simulation of or is confusingly similar to any trade dress, trademark, service mark, name, or logo of CPR, or is likely to cause confusion,

mistake, deception, or public misunderstanding as to the source of CPR's and TPT's respective services or as to the relationship of CPR and TPT and their respective services;

3. Advertising, marketing, promoting, supplying, distributing, soliciting donations and/or contributions, any services utilizing CPR's intellectual property and/or business values, or engaging in any other conduct constituting unfair competition; and

4. Maintaining any domain name containing "OPEN AIR";

B. That TPT be ordered to deliver up for destruction all products, labels, packages, advertising, promotional material, or other materials in its possession, custody, or control that incorporate or reflect the Open Air Initiative, the Infringing OPEN AIR Mark, or any mark that is confusingly similar to CPR's OPEN AIR Mark;

C. The TPT be ordered to file with this Court and serve on CPR within thirty (30) days after entry of judgment herein, a written report under oath setting forth in detail the manner and form in which TPT has complied with the injunction ordered by the Court;

D. That TPT be compelled to account to CPR for any and all profits derived by TPT from its misappropriation and use of CPR's OPEN AIR Mark, its unfair competition, and its misappropriation of CPR's business value;

E. That CPR be awarded its damages in an amount to be determined at trial, including TPT's profits, that damages be trebled, and that CPR be awarded pre-judgment and post-judgment interest;

F. That TPT be ordered to pay CPR a sum sufficient to cover the cost of reasonable corrective advertising to alleviate any existing confusion resulting from TPT's unauthorized use of CPR's OPEN AIR Mark and any other confusingly similar marks;

G. That TPT be ordered to pay to CPR the cost of this action and CPR's reasonable attorneys' fees as allowed by law; and

H. That CPR be granted such other and further relief as this Court may deem just and proper.

Dated: July 9, 2013.

Respectfully submitted,

BRYAN CAVE HRO

/s/ Erin A. Kelly

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