

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Soundscape, Inc.*

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Serial No. 76620682

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Amber N. Davis and Kevin W. Wimberly of Beusse Wolter Sanks & Maire, PLLC for  
Soundscape, Inc.

Janice L. McMorrow, Trademark Examining Attorney, Law Office 115 (Daniel  
Brody, Managing Attorney).

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Before Wellington, Wolfson, and Masiello, Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

Soundscape, Inc. (“Applicant”) filed an application for registration on the Principal  
Register of the mark SOUNDSCAPE in standard characters for the following goods:

Equipment for sound processing, reproduction, transmission, and storage, namely, digital and analog audio signal playback and recording devices and associated storage media, namely, CD and DVD optical discs and DAT tapes; sound recording and reproduction machines and accessories and parts therefore, namely, audio transformers, digital sound processors, and CD and DVD optical discs and DAT tapes; wired and wireless microphones; computer software for use in sound processing, mixing, reproduction, and transmission; loudspeakers; microphone mixers; amplifiers; signal

processors; audio pickups; integrated systems for use in sound recording composed of microphones, recorders, sound processors, and storage media such as CD and DVD; headphones, earphones; personal stereos; car stereos; stereo tuners; and radios, in International Class 9.<sup>1</sup>

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as used in connection with Applicant's goods, so resembles the registered mark SOUNDSCAPE as to be likely to cause confusion, or to cause mistake, or to deceive.

The cited mark is registered in typed form<sup>2</sup> for:

Services Involving the Installation, Repair and Maintenance of High Fidelity Equipment, Components and Supplies, in International Class 37; and

Retail Store Services Specializing in High Fidelity Equipment, Components and Supplies, in International Class 42.<sup>3</sup>

The Examining Attorney also refused registration because Applicant had not satisfied a requirement to submit an acceptably definite identification of goods. When the refusals were made final, Applicant appealed to this Board. The case is fully briefed.

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<sup>1</sup> Application Serial No. 76620682 was filed on November 15, 2004 under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), but was later amended to base the application on Applicant's *bona fide* intent to use the mark in commerce, under Section 1(b), 15 U.S.C. § 1051(b).

<sup>2</sup> Prior to November 2, 2003, "standard character" drawings were known as "typed" drawings. A typed mark is the legal equivalent of a standard character mark. TMEP § 807.03(i) (April 2017).

<sup>3</sup> Reg. No. 1226934 issued on February 8, 1983; Section 15 affidavit acknowledged; renewed.

1. Refusal under Section 2(d).

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion as set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). In this case, Applicant and the Examining Attorney have also submitted evidence and arguments regarding trade channels, relevant customers, the market interface of Applicant and Registrant, long-term coexistence without confusion, and Applicant's ownership of a prior registration of the same mark.

(a) The marks.

We first consider the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). The marks are identical. Therefore, this *du Pont* factor weighs in favor of a finding of likelihood of confusion.

(b) The goods and services.

We next consider the similarity or dissimilarity of the goods and services at issue, as identified in the application and the cited registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-62 (Fed. Cir. 2014); *Octocom Sys. Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16

USPQ2d 1783, 1787 (Fed. Cir. 1990). Goods or services need not be identical or competitive in order to support a finding of likelihood of confusion. “Likelihood of confusion can be found if the respective products [or services] are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (internal quotation marks omitted). We bear in mind that where identical marks are involved, as is the case here, the degree of relatedness between the goods and services that is required to support a finding of likelihood of confusion declines. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688-89 (Fed. Cir. 1993).

Applicant’s goods include various types of equipment for processing and reproduction of sound, including “loudspeakers, ... amplifiers, ... headphones, earphones; personal stereos; car stereos; stereo tuners; and radios.”<sup>4</sup> Registrant’s services include operating retail stores specializing in high fidelity equipment. The Examining Attorney has submitted evidence that shows persuasively that “high fidelity” equipment is, in essence, sound reproduction equipment like loudspeakers,

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<sup>4</sup> In focusing our analysis upon these goods of Applicant we note that we need not find similarity as to each and every product listed in the application and registration. For purposes of our analysis, it is sufficient that relatedness be established for any item encompassed by the identification of goods in a particular class in the application. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

stereo music systems, headphones, car stereos, and amplifiers.<sup>5</sup> Thus, the cited registration identifies retail stores of the type that would sell sound equipment of the type identified in Applicant's application. Likelihood of confusion may arise where confusingly similar marks are used on goods, on the one hand, and in connection with sales of such goods, on the other. *See In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988) ("trademarks for goods find their principal use in connection with selling the goods"); *see also In re Wet Seal, Inc. v. FD Management, Inc.*, 82 USPQ2d 1629, 1640 (TTAB 2006). The record shows that makers of sound equipment may offer their goods at retail directly to the public; or that their goods may be offered in the retail stores of others. The record contains evidence of at least one retailer of sound equipment that offers its own brand of equipment alongside the goods of others.<sup>6</sup> Under such circumstances, the use of identical marks on goods and on the retail service offering the goods may confuse consumers as to whether, in any given case, the mark indicates the source of the goods or the source of the retail service. As discussed *infra*, there are no limitations on the trade channels for the respective goods and services; therefore, we must anticipate the possibility that Applicant's goods will be sold in retail stores like Registrant's.

Applicant argues that its goods are "for professional and commercial applications" only.<sup>7</sup> However, this restriction does not appear in the application's identification of

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<sup>5</sup> Office Action of November 7, 2016 at 6-16.

<sup>6</sup> *Id.* at 15-16.

<sup>7</sup> Applicant's brief at 7, 4 TTABVUE 8.

goods, and we must interpret the identification as encompassing all goods of the type described. *Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973); *Octocom v. Houston Computers*, 16 USPQ2d at 1787. To do otherwise “would be improper because the [goods] recited in the application determine the scope of the post-grant benefit of registration.” *Stone Lion Capital v. Lion Capital*, 110 USPQ2d at 1162. Therefore, Applicant’s goods would include all types of loudspeakers, amplifiers, headphones, earphones, and personal stereos that are offered to ordinary consumers in retail stores specializing in high fidelity equipment, components and supplies.

For the reasons stated, we find that the *du Pont* factor of the similarity or dissimilarity of the goods and services at issue favors a finding of likelihood of confusion.

(c) Trade channels; customers.

Applicant argues that both Applicant and Registrant market their respective goods and services “through different trade channels to knowledgeable purchasers, thereby limiting the possibility of confusion among consumers.”<sup>8</sup> Applicant argues that “Registrant’s services are offered to a local market only through its single, physical store,” which is located in Baltimore.<sup>9</sup> We cannot read this limitation into the cited registration, which is evidence of Registrant’s exclusive right to use its

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<sup>8</sup> Applicant’s brief at 9, 4 TTABVUE 10.

<sup>9</sup> *Id.*; see also Second declaration of Martin Collins ¶ 6, Applicant’s response of April 11, 2006 at 9 (“Park Radio has a single physical retail showroom located in Baltimore, Maryland, and conducts all of its sales through that retail location. ... Park Radio does not sell any products bearing the SOUNDSCAPE mark, nor does it sell products to the commercial professional market.”)

mark in nationwide commerce. Trademark Act Section 7(b) and (c), 15 U.S.C. § 1057(b) and (c). Applicant also argues that “Applicant conducts its business almost exclusively through telephone, catalog and internet marketing channels”<sup>10</sup> and that, unlike Registrant, “Applicant does not operate a retail showroom or brick and mortar location ...”<sup>11</sup> However, there is no limitation in the application that would restrict Applicant from offering its goods through a showroom, or placing its goods with equipment retailers like Registrant. Applicant notes that it does not sell goods under any brand other than SOUNDSCAPE, while Registrant sells a “number of brands” in its stores, “none of which bear the SOUNDSCAPE brand.”<sup>12</sup> Even if this is true, there is no reason why consumers, seeing Applicant’s goods in normal retail trade channels, would know that Applicant offers only a single brand (nor is it clear why such knowledge would reduce the likelihood of confusion). Moreover, nothing in the application limits Applicant’s goods to channels in which only a single brand is offered.

Finally, Applicant contends that its own purchasers are sophisticated,<sup>13</sup> and that in Registrant’s stores customers typically “make in-person purchasing decisions with the assistance and sophistication of the sales people ...”<sup>14</sup> As we have noted

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<sup>10</sup> Applicant’s brief at 9, 4 TTABVUE 10; Second Collins declaration ¶ 4, Applicant’s response of April 11, 2006 at 8.

<sup>11</sup> Applicant’s brief at 7-8, 4 TTABVUE 8-9.

<sup>12</sup> *Id.* at 10, 4 TTABVUE 11.

<sup>13</sup> Second Collins declaration ¶ 4, Applicant’s response of April 11, 2006 at 8 (“most of Soundscape, Inc.’s customers are commercial enterprises, with little to no business coming from consumer end-users.”).

<sup>14</sup> Applicant’s brief at 10, 4 TTABVUE 11.

above, Applicant's goods, as identified, are not limited to professional-grade equipment, and many of Applicant's goods are ordinary consumer items. Therefore, customer sophistication cannot be presumed. Further, the contention that retail store sales personnel necessarily provide sophisticated guidance to customers is not supported by evidence.

Registrant's service is, by its terms, a trade channel for Applicant's goods; and customers wishing to purchase sound equipment are also the customers who would visit a retail store offering sound equipment. The *du Pont* factors of trade channels and customers favor a finding of likelihood of confusion.

(d) Market interface of Applicant and Registrant.

Applicant contends that Registrant and Applicant have long been aware of each other, that they have entered an oral coexistence agreement, and have coexisted for many years without confusion. Applicant's president stated:

Park Radio and Soundscape, Inc. have, for many years, had an oral agreement consenting to each other's use of the SOUNDSCAPE mark. Soundscape, Inc.'s recently filed application for SOUNDSCAPE (Serial No. 78/570431) is consistent with this agreement.<sup>15</sup>

A consent agreement may carry substantial weight in the Board's analysis of likelihood of confusion; and there is no reason why a consent may not be entered orally. However, the terms and underlying rationale of the consent must persuade the Board that, in fact, confusion is not likely. Where there is inadequate information upon which to reach such a determination, the mere existence of a

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<sup>15</sup> Second Collins declaration ¶ 8, Response of April 11, 2006 at 9. (Serial No. 78/570431 is associated with a third-party application for a mark other than SOUNDSCAPE.)



consent will not suffice. *See Du Pont*, 177 USPQ at 568. (“In considering agreements, a naked ‘consent’ may carry little weight. Absent more, the consenter may continue or expand his use. The consent may be based on ignorance or misconception of the law.”) The Federal Circuit, interpreting *Du Pont*, stated:

[T]he *DuPont* case does not make it a “given” that experienced businessmen, in all cases, make an agreement countenancing each other's concurrent use of the same or similar marks only in recognition of no likelihood of confusion of the public. One must look at all of the surrounding circumstances, as in *DuPont*, to determine if the consent reflects the reality of no likelihood of confusion in the marketplace ...

As *DuPont* holds, a consent is simply evidence which enters into the likelihood of confusion determination and may or may not tip the scales in favor of registrability, depending upon the entirety of the evidence ...

*In re Mastic Inc.*, 829 F.2d 1114, 4 USPQ2d 1292, 1294 (Fed. Cir. 1987); *see also In re Bay State Brewing Co.*, 117 USPQ2d 1958 (TTAB 2016).

In this case, Mr. Collins’ description of the asserted oral consent agreement (quoted above) provides no information upon which we may make a determination as to the likelihood of confusion. Applicant has not submitted any corroboration from the other party to the agreement as to the agreement’s terms or even its existence. We therefore give little weight to the asserted oral consent agreement.

Similarly, Applicant’s *ex parte* assertion that, despite long-term use of its mark, it is not aware of any actual confusion<sup>16</sup> is unsupported by any evidence of the manner

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<sup>16</sup> Second Collins declaration ¶ 9, Applicant’s response of April 11, 2006 at 9 (“Soundscape, Inc. ... has never heard any complaints from Park Radio. Also, I am not aware of a single instance of actual confusion resulting from Soundscape, Inc.’s use of the SOUNDSCAPE mark in connection with any of the goods claimed in the recently filed application.”)

and extent of use of the marks of Applicant and Registrant, and by any corroboration from Registrant regarding the lack of confusion. Such an argument is entitled to little probative value. *See In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003).

(e) Applicant's prior registration.

Applicant has shown that it owns U.S. Reg. No. 2072948 for the mark SOUNDSCAPE in typed form for "outdoor loudspeakers," issued in 1997.<sup>17</sup> Applicant compares the present case to *In re Strategic Partners, Inc.*, 102 USPQ2d 1397 (TTAB 2012), arguing:

... Applicant owns a prior registration for the exact same mark Applicant is applying for ... The identification of goods in Applicant's [application]<sup>18</sup> and Applicant's Registration are identical in relevant part, namely, Applicant's Registration is for "outdoor loudspeakers" in Class 009 and Applicant's [application] is for equipment for sound processing, reproduction, transmission, and storage, which is all related to the goods in the prior registration in that the loudspeakers reproduce and transmit the music. Applicant's [application] represents a logical expansion of Applicant's existing registration, used in the continuing development of a family of products all bearing the SOUNDSCAPE mark. Finally, Applicant's Registration has co-existed on the USPTO database for a total of twenty (20) years with Registrant's Mark.<sup>19</sup>

The case now before us presents facts that are substantially different from those of *In re Strategic Partners*. In that case, the applicant's applied-for mark was

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<sup>17</sup> See Applicant's response of April 11, 2007 at 13; *see also* Second Collins declaration ¶ 3, *id.*

<sup>18</sup> In the quoted passage, Applicant uses the expression "Applicant's Mark" as an apparent reference to its application. We have paraphrased this expression as "Applicant's [application]" to clarify the sense of the argument.

<sup>19</sup> Applicant's brief at 12, 4 TTABVUE 13.

substantially similar to its existing registered mark and both were for essentially *identical goods*. Here, Applicant's registered mark is identical to the mark in the present application, but Applicant now seeks to register its mark for a range of goods that is substantially broader than the "outdoor loudspeakers" identified in the prior registration. Indeed, many of Applicant's arguments that we have rejected in the context of the present application (*e.g.*, that the goods are for professional or commercial use, would be sold to sophisticated purchasers or would travel through limited trade channels) might have been valid in the context of "outdoor loudspeakers," but they are clearly not valid with respect to many of the goods now at issue, such as headphones, earphones, personal stereos, and radios. In terms of the scope of protection sought, we see little similarity between the application now before us and Applicant's prior registration. The attempt to analogize this case to *In re Strategic Partners* is inapposite.

(f) Conclusion.

We have considered all of the arguments and evidence of record, including those not specifically discussed herein, and all relevant *du Pont* factors. The marks at issue are identical and Applicant's goods are commercially related to Registrant's services. Overall, we find that Applicant's mark, as used on Applicant's goods, so resembles the cited registered mark as to be likely to cause confusion or to cause mistake or to deceive.

2. Refusal on grounds of indefinite identification of goods.

In issuing a final refusal to register Applicant's mark, the Examining Attorney made final her requirement that Applicant's identification of goods be made more definite. Applicant did not address this requirement in its brief and, in its reply brief, conceded that its failure to amend the identification of goods was inadvertent and agreed to amend the identification of goods.<sup>20</sup> Applicant has effectively conceded that its current identification of goods is indefinite. *See In re Harley*, 119 USPQ2d 1755, 1758 (TTAB 2016) (Applicants' failure to address refusals is a basis for affirming the examining attorney's refusal on all grounds); *see also* TBMP § 1203.02(g) (June 2017) ("If an applicant, in its appeal brief, does not assert an argument made during prosecution, it may be deemed waived by the Board.").

"It is within the discretion of the PTO to require that one's goods be identified with particularity." *In re Omega SA*, 494 F.3d 1362, 83 USPQ2d 1541, 1544 (Fed. Cir. 2007) (quoting *In re Water Gremlin Co.*, 635 F.2d 841, 208 USPQ 89, 91 (CCPA 1980)). An applicant's failure to comply with a requirement that the identification of goods be made acceptably definite is a ground for refusing registration. *Id.*; *see also In re Faucher Industries Inc.*, 107 USPQ2d 1355 (TTAB 2013). Applicant's offer to amend its identification of goods now is unavailing. The Board cannot reopen the application at this time for the purpose of entering such an amendment. 37 C.F.R. § 2.142(g) ("An application which has been considered and decided on appeal will not be reopened except for the entry of a disclaimer ... or upon order of the

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<sup>20</sup> Applicant's reply brief at 5, 7 TTABVUE 6.

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Director....”). Accordingly, we affirm the Examining Attorney’s refusal of registration on the ground that the identification of goods is indefinite.

***Decision:*** The refusal under Section 2(d) is affirmed. The refusal on the ground of Applicant’s failure to appropriately amend the identification of goods is affirmed.