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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	77144094
Applicant	Halftime Live LLC
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Submission	Appeal Brief
Attachments	ATLANTA-#2467019-v1-TTAB_Brief_--_Drumline_Live.pdf (5 pages)(45554 bytes) Exhibit 1 (DRUMLINE LIVE).pdf (3 pages)(9943 bytes)
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Date	09/26/2008

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

IN RE APPLICATION OF:

Applicant:	Halftime Live, LLC
Serial No.:	77/144094
Mark:	DRUMLINE LIVE
Filed:	March 29, 2007
Law Office:	103
Examiners:	Rebecca Gan / Mark Sparacino

APPLICANT'S APPEAL BRIEF

Applicant Halftime Live, LLC (“Applicant”) hereby submits this brief in support of its Appeal to the Trademark Trial and Appeal Board from the final decision of the Examining Attorney refusing registration of the above-referenced mark.

I. Introduction.

The Examiner has refused registration of the mark DRUMLINE LIVE for “Entertainment services in the nature of live musical performances” on the grounds that the mark is merely descriptive.¹ Applicant respectfully requests that the Board reverse the Examiner’s decision.

II. The DRUMLINE LIVE Mark Is Eligible for Registration on the Principal Register.

A. Applicant’s Performances.

Applicant plans to use its mark in connection with a relatively large and very diverse group touring group of vocalists, dancers, musicians, and other entertainers, who will be known collectively as DRUMLINE LIVE. Their respective talents will be used to create a variety of live musical/Broadway-type performances, all of which will include comedic, romantic, and

¹ Applicant has disclaimed the term “LIVE” apart from the DRUMLINE LIVE mark as a whole.

dramatic elements. These live entertainment services will include singing, dancing, physical comedy, dialogue and other elements.

B. The Examiner Failed to Consider the True Nature of Applicant's Services.

The Examiner's refusal is apparently based principally on the notion that Applicant's performances will consist exclusively of a line of drummers or percussionists performing live on stage. For example, in the Initial Refusal, Examiner stated:

Here, the proposed mark "DRUMLINE LIVE" merely indicates what Applicant's musical performance services comprise (*e.g.*, a drumline which performs live)

A similar sentiment was repeated in the Final Refusal as follows:

However, applicant's services are only identified as "live musical performances," which include only "drumlines" performed "live." Therefore [sic], the mark DRUMLINE LIVE exactly names the purpose or use of the *identified* services.

Thus, it is clear that the Examiner's analysis is based on the assumption that Applicant's performance consists "only" of "a drumline which performs live." Furthermore, in the Final Refusal, it appears that Examiner may have even concluded that the term "Drumline" was "exactly name[d]" in the identification of services. The term "Drumline" does not appear anywhere in the identification of services.

Applicant is not applying to register its mark for use in association with a line of percussionists or services the Examiner considers to constitute a "drumline." A mark is not considered descriptive when it describes goods that are *not* the subject of the application in question. *See* TMEP § 1209 ("Matter which 'merely describes' the goods or services *on or in connection with which* it is used is not registrable.") (emphasis added).²

² In the Final Refusal, the Examiner states that "even if applicant's identified services specified more than just drumlines performed live, the mark DRUMLINE LIVE still merely describes a feature of the services." The identified services did not specify "drumlines" at all. However, even if the inclusion of percussion instruments in its performances amounted to the

The Examiner's narrow and incorrect perception that Applicant's services are limited to "only 'drumlines' performed 'live'" is reflected in the evidence attached to the refusals. These consist in substantial part of college and university web pages devoted to the percussion sections of marching bands. These college and university "drumlines" are not at all equivalent to Applicant's performances. While Applicant's performances are musical in nature, and will frequently include percussion instruments, there will be entire performances that do not include percussion instruments at all. Moreover, the varied theatrical elements associated with Applicant's performances are wholly absent from the "drumlines" cited by the Examiner. Thus, the evidence cited by the Examiner does not support a finding that DRUMLINE LIVE is merely descriptive.

C. Applicant's Mark is Suggestive, Not Descriptive

Suggestive marks are those that, when applied to the goods or services at issue, require imagination, thought or perception to reach a conclusion as to the nature of those goods or services. Alternatively, marks that have been denied registration on descriptiveness grounds require no imagination or thought to identify the goods or services being offered. *See, e.g., In re Quik-Print Copy Shops, Inc.*, 616 F.2d 523 (C.C.P.A. 1980) (QUIK-PRINT descriptive for a copy shop because it immediately brings to mind the quick quality of applicant's printing service); *Eugene Biro Corp. v. Empire Diamond Corp.*, 40 U.S.P.Q.2d 1527, 1530 (S.D.N.Y. 1996) (DIAL-A-DIAMOND SYSTEM descriptive because it exactly describes nature of service with which the mark is used).

use of a "drumline," which it would not, this supposed "drumline" would certainly not constitute a "significant function, attribute or property" of Applicant's services. TMEP § 1209.01(b) ("it is enough [for a mark to be deemed descriptive] if the term describes one significant function, attribute or property" of the services); *see In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1173, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004) ("A mark may be merely descriptive even if it does not describe the 'full scope and extent' of the applicant's goods or services").

It cannot be said that it requires no thought or imagination to make the mental connection between the term “Drumline” and the nature of Applicant’ services. A person encountering the mark might have some idea of the meaning of the term “drum,” but this word has meanings other than just a musical instrument.³ Thus, some thought, imagination, or perception is needed to arrive at the conclusion that the DRUMLINE LIVE is associated with live musical performances. *See, e.g., Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 59 F.3d 902, 911 (9th Cir. 1995) (noting that when mental leap between mark and product attribute is not almost instantaneous, suggestiveness is strongly indicated).

D. No Descriptiveness Refusal Issued for a Nearly-Identical Prior Application.

Prior to the filing of Applicant’s application for DRUMLINE LIVE, the USPTO issue a Notice of Allowance for the mark DRUM LINE LIVE (Serial No. 76563002). This nearly-identical mark was to be used in connection with “Entertainment services, namely, organizing and staging musical band concerts.” Evidence of this prior application is attached hereto.

A Notice of Allowance issued for the DRUM LINE LIVE application in 2006. This application was subsequently abandoned for failure to file a Statement of Use. Despite the nearly-identical nature of the DRUM LINE LIVE and DRUMLINE LIVE marks, and the services associated with the marks, the USPTO did not issue a refusal for the DRUM LINE LIVE mark on descriptiveness grounds. The same result should obtain here.

The Examiner stated that it did not consider this prior application, but nevertheless indicated that, even if it had, it was not bound by the decisions of other examiners, and that each

³ The Merriam-Webster online dictionary, available at www.merriam-webster.com/dictionary, includes the following as alternate meanings for the word “drum”: “(1) any of the cylindrical blocks that form the shaft of a column (2): a round wall or structure that supports a dome b: a cylindrical machine or mechanical device or part c: a cylindrical container ; specifically : a large usually metal container for liquids <a 55-gallon drum> d: a disk-shaped magazine for an automatic weapon.”

application stands on its own merits. While Applicant understands this general principle, as well as the practical impossibility of maintaining complete consistency and uniformity in examination decisions, Applicant respectfully requests that, given the marked similarities of the marks and the services with which they are associated, the Board consider this prior application in rendering its decision.

D. Conclusion

The mark DRUMLINE LIVE is suggestive of the services offered by Applicant Accordingly, and consistent with the action taken with respect to a nearly-identical prior application, Applicant respectfully requests that the Board reverse the decision of the Examiner.

Respectfully submitted this 26th day of September 2008.

ARNALL GOLDEN GREGORY LLP

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This page was generated by the TARR system on 2008-09-26 21:21:02 ET

Serial Number: 76563002 [Assignment Information](#) [Trademark Document Retrieval](#)

Registration Number: (NOT AVAILABLE)

Mark

DRUM LINE LIVE

(words only): DRUM LINE LIVE

Standard Character claim: Yes

Current Status: Abandoned: No Statement of Use filed after Notice of Allowance was issued.

Date of Status: 2007-01-11

Filing Date: 2003-11-10

Transformed into a National Application: No

Registration Date: (DATE NOT AVAILABLE)

Register: Principal

Law Office Assigned: LAW OFFICE 115

If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov

Current Location: 700 -Intent To Use Section

Date In Location: 2006-01-10

LAST APPLICANT(S)/OWNER(S) OF RECORD

1. Just In Time Music, Inc.

Address:

Just In Time Music, Inc.
1417 1/2 4th Avenue North
Birmingham, AL 35203
United States

Legal Entity Type: Corporation

State or Country of Incorporation: Alabama

Phone Number: 205/324-0609

Fax Number: 205/324-0850

GOODS AND/OR SERVICES

International Class: 041

Class Status: Active

Entertainment services, namely, organizing and staging musical band concerts

Basis: 1(b)

First Use Date: (DATE NOT AVAILABLE)

First Use in Commerce Date: (DATE NOT AVAILABLE)

ADDITIONAL INFORMATION

Disclaimer: "LIVE"

MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

NOTE: To view any document referenced below, click on the link to "Trademark Document Retrieval" shown near the top of this page.

2007-03-29 - Abandonment Notice Mailed - No Use Statement Filed

2007-03-29 - Abandonment - No use statement filed

2006-07-10 - Extension 1 granted

2006-07-10 - Extension 1 filed

2006-07-10 - TEAS Extension Received

2006-01-10 - Notice of allowance - mailed

2005-10-18 - Published for opposition

2005-09-28 - Notice of publication

2005-07-21 - Law Office Publication Review Completed

2005-07-21 - Assigned To LIE

2005-07-20 - Assigned To LIE

2005-01-19 - FAX RECEIVED

2005-06-17 - Assigned To LIE

2005-06-13 - Approved for Pub - Principal Register (Initial exam)

2005-06-13 - EXAMINERS AMENDMENT E-MAILED

2005-06-13 - Examiners Amendment -Written

2005-06-11 - Teas/Email Correspondence Entered

2005-05-17 - Communication received from applicant

2005-05-17 - TEAS Response to Office Action Received

2005-05-11 - Final refusal e-mailed

2005-05-11 - Final Refusal Written

2005-04-02 - Amendment From Applicant Entered

2004-09-15 - Communication received from applicant

2004-09-15 - FAX RECEIVED

2004-08-11 - NON-FINAL ACTION E-MAILED

2004-06-14 - Communication received from applicant

2004-06-14 - PAPER RECEIVED

2004-06-06 - Non-final action e-mailed

2004-06-06 - Assigned To Examiner

2003-12-22 - New Application Entered In Tram

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