

**THIS OPINION IS NOT A
PRECEDENT OF
THE T.T.A.B.**

Mailed: May 24, 2012

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re MUS, Inc.

Serial No. 77865028

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Intellectual Property Law LLC for MUS, Inc.

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(Mary I. Sparrow, Managing Attorney).

Before Seeherman, Cataldo and Mermelstein,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, MUS, Inc., filed an application to register the mark GREEN DOOR in standard characters on the Principal Register for the following services, as amended: "Adult entertainment services, namely, an adult-themed social club for engaging in adult-themed erotic activities, excluding restaurant and bar services" in International Class 41.¹

¹ Application Serial No. 77865028 was filed on November 4, 2009 based upon applicant's assertion of August 1, 1998 as a date of first use of the mark anywhere and in commerce in connection with the services.

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, as used in connection with its services, so resembles the mark THE GREEN DOOR, previously registered on the Principal Register in standard characters for "restaurant and bar services," in International Class 43,² as to be likely to cause confusion, mistake or deception.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs on the issue on appeal.

Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). 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, 27 (CCPA

² Registration No. 3513748 issued on October 7, 2008.

1976). See also *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997).

The Marks

We first consider the similarity of the marks. To state the obvious, applicant's GREEN DOOR mark is essentially identical to registrant's mark, THE GREEN DOOR. The mere absence of the definite article THE from applicant's mark does not serve to distinguish it from registrant's mark. It is settled that definite articles such as THE generally possess little, if any, source-indicating significance. See *In re Thor Tech, Inc.* 90 USPQ2d 1634, 1635 (TTAB 2009); and *In re Narwood Productions, Inc.*, 223 USPQ 1034 (TTAB 1984) (noting the insignificance of the word "the" in comparison of THE MUSIC MAKERS and MUSICMAKERS). See also *In re Universal Package Corporation*, 222 USPQ 344, 345 (TTAB 1984); *Conde Nast Publications Inc. v. Redbook Publishing Company*, 217 USPQ 356, 357 (TTAB 1983); and *United States National Bank of Oregon v. Midwest Savings and Loan Association*, 194 USPQ 232, 236 (TTAB 1977).

As a result, besides applicant's GREEN DOOR mark being nearly identical to registrant's THE GREEN DOOR mark in appearance and sound, we find that the marks are identical in meaning or connotation and that, as a whole, the marks

convey identical commercial impressions. The fact that the marks are essentially identical results in this factor strongly supporting the examining attorney's position. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993). See also *Ancor, Inc. v. Ancor Industries, Inc.*, 210 USPQ 70, 78 (TTAB 1981). This *du Pont* factor weighs in favor of a finding of likelihood of confusion.

The Services

We next turn to the similarity or dissimilarity between applicant's recited services and the services identified in the cited registration. We note that "it is not necessary that the goods or services be identical or even competitive in nature in order to support a finding of likelihood of confusion, it being sufficient that the goods or services are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under circumstances that would give rise, because of the marks employed thereon, to the mistaken belief that they originate from or are in some way associated with the same producer." *In re Home Builders Assn. of Greenville*, 18 USPQ2d 1313, 1317 (TTAB 1990).

When we address the question of whether services are related, we must compare the services as they are described

in the application and registration. *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed"). See also *Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods"); and *Dixie Restaurants*, 41 USPQ2d at 1534 (punctuation in original), quoting *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1816 (Fed. Cir. 1987) ("Likelihood of confusion must be determined based on an analysis of the mark as applied to the ... services recited in applicant's application vis-à-vis the ... services recited in [a] ... registration, rather than what the evidence shows the ... services to be").

The services identified in the subject application are "Adult entertainment services, namely, an adult-themed social club for engaging in adult-themed erotic activities,

excluding restaurant and bar services." We find this recitation of services to be sufficiently self-explanatory that we do not need to consider extrinsic evidence in order to understand the nature of the services. *Cf. In re Trackmobile, Inc.*, 15 USPQ2d 1152 (TTAB 1990). We note nonetheless that evidence made of record by applicant and the examining attorney corroborates that applicant provides a sex club or "swingers" club in which couples and individuals may engage in sexual activity or observe others so engaged.³ These services do not appear to be related to registrant's "restaurant and bar services." That is to say, on the face of the respective recitations, it is clear that applicant's services are different from those of registrant. We therefore look to the evidence of record to determine whether these services are related.

In support of the refusal to register, the examining attorney has made of record approximately 20 third-party registrations reciting "restaurant and bar services" along with other goods and/or services. However, only one also recites adult-oriented services that arguably may be

³ See exhibits to the examining attorney's February 9, 2010 Office action and applicant's brief. While exhibits submitted for the first time with an applicant's brief normally would be untimely, the examining attorney discussed these materials in her brief and did not otherwise object thereto. Accordingly, they are deemed to have been stipulated into the record. See TBMP § 1207.03 (3d ed. 2011).

related to those in the involved application: Registration No. 2852441 for services including "Adult entertainment in the nature of live nude, semi-nude, erotic, lap and table dancing; adult cabarets; night clubs; show clubs" as well as "restaurant and bar services."

The remaining registrations generally recite night club services in addition to "restaurant and bar services." However, applicant does not provide night club services. We hereby take judicial notice of the following definition of night club: "an establishment for evening entertainment, generally open until the early morning, that serves liquor and usually food and offers patrons music, comedy acts, a floor show, or dancing; nightspot."⁴ The examining attorney made of record several pages from the internet website of a single entity identifying itself as a bar and night club⁵ that provides night club services in accordance with the above definition and, on Saturday nights, also provides private rooms for "swingers." We find the services provided by this single entity do not establish that applicant's adult social club may be

⁴ Random House Dictionary (2012). The Board may take judicial notice of dictionary definitions. See *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1791 n.3 (TTAB 2002). See also *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

⁵ Sugarhousedenver.com.

considered a night club such that the third-party registrations reciting night club services may be considered probative of the similarity or dissimilarity of the services at issue herein.

Nor do we find the examining attorney's evidence from applicant's internet web site which indicate that its adult social club includes a bar and serves alcoholic drinks persuasive of her position that applicant's services are related to registrant's services. To be clear on this point, the language in applicant's amended recitation of services "excluding restaurant and bar services" is not sufficient to render applicant's services unrelated to those of registrant. Nonetheless, based on the respective identifications, we cannot treat the services for which applicant seeks registration as encompassing bar services. As discussed above, our determination of the relatedness of the services is based upon the services as recited in the involved application and cited registration. *Octocom Systems, Inc.*, 16 USPQ2d at 1787; and *Paula Payne Products*, 177 USPQ at 77.

The examining attorney must present evidence that applicant's recited services are related to those in the cited registration. Evidence that applicant's club may in fact include a bar and may provide alcoholic drinks to its

members (and the evidence of record is contradictory on these points) does not establish a similarity between applicant's sex or "swingers" club and registrant's restaurant and bar. In this case, the examining attorney has provided a single third-party registration and pages from a single third-party Internet web site suggesting that a viable relationship exists between adult-themed social clubs for engaging in adult-themed erotic activities, regardless of whether alcoholic beverages are provided there, and "restaurant and bar services." This simply is insufficient to show that consumers would expect that bar services and social club services for engaging in adult-themed erotic activities would emanate from the same source, even if they were offered under the same mark.

We recognize the multifarious connection that exists between alcohol and sexual activity. We further are mindful that habitués of bars may utilize such venues as a prelude to adult-themed erotic activities. However, this tangential connection between bar services and erotic activities is not a basis for finding the offering of bar services and an adult-themed social club to be related.

Accordingly, based upon the record before us this *du Pont* factor weighs against a finding of likelihood of confusion.

Summary

We have considered all of the evidence of record directed toward the refusal to register, including any evidence not specifically discussed herein. We observe that neither applicant nor the examining attorney has presented evidence with regard to any *du Pont* factors other than the similarity or dissimilarity of the services. Despite the near identity of the marks, we find that the paucity of evidence of a relationship between the services outweighs this factor. Any one of the *du Pont* factors may, from case to case, play a dominant role. *Du Pont*, 476 F.2d at 1361, 177 USPQ at 567. See also *Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) (Court found "no reason why, in a particular case, a single DuPont factor may not be dispositive"). In this case, because of the dissimilarity of the services, we find that confusion is not likely.

Decision: The refusal of registration is reversed. Accordingly, the involved application will be forwarded for publication in due course.