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# UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 79118868

MARK: WANDERLUST



**CORRESPONDENT ADDRESS:**

JEFFREY P THENNISCH

INGRASSIA FISHER & LORENZ

1050 WILSHIRE DRIVE SUITE 230

TROY, MI 48084

**GENERAL TRADEMARK INFORMATION:**

<http://www.uspto.gov/trademarks/index.jsp>

**TTAB INFORMATION:**

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

APPLICANT: SF MODE

**CORRESPONDENT'S REFERENCE/DOCKET NO:**

N/A

**CORRESPONDENT E-MAIL ADDRESS:**

docketing@ifllaw.com

## EXAMINING ATTORNEY'S APPEAL BRIEF

INTERNATIONAL REGISTRATION NO. 1131630

I. STATEMENT OF THE CASE

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Applicant has appealed the examining attorney's final refusal to register the mark WANDERLUST (standard character drawing) for:

"Pre-Recorded Disks, Tapes, And Compact Disks Featuring Music, Musical Performances, And Fitness, Wellness, And Recreational Content; Audio Devices, Namely, MP3 Players; Audiovisual Devices, Namely, CD Players And DVD Players; Sound, Video, And Data Recordings In The Form Of Disks Featuring Music, Musical Performances, Entertainment Performances, Comedy Performances, Documentaries, Films, Fitness And Wellness Programs, Civic, Socially Beneficial, And Recreational Programs; Apparatus For Recording Sounds; Blank Magnetic Recording Media, Namely, Sound Recording Disks And Optical Disks, And Audio-Video Compact Disks" in Class 009;

"Entertainment Services In The Nature of Live Musical Concerts, Live Musical Performances, Plays, Comedy Routines, Fitness, Wellness, Entertainment, Civic, Social, And Recreational Performances; Discotheque Services; Night Club Services; Providing Online Non-Downloadable Electronic Publications In The Nature Of Reviews In The Field Of Music, Cultural Exhibitions, Current Affairs, Political Topics, Fitness, Wellness, Social, Civic, And Recreational Activities; Providing Amusement Arcade Services; Game Services Provided On-Line From A Computer Network; Publication Of Books Or Periodicals; Leisure Services, Namely, Organization Of Cultural Exhibitions, Musical Performances, Providing Karaoke Services; Music-Halls; Organization Of Balls; Organization Of Sports Competitions For Entertainment; Organization Of Shows, Namely, Fashion Shows, Fitness Shows, Wellness Shows; Party Planning; Theater Productions; Operation Of Movie Theaters; Operation Of Concert Halls, Night Clubs; Organization Of Art Work Exhibitions For Cultural Purposes; Cinematographic Film Projection; Organization Of Concerts; Organization Of Conferences In The Field Of Music, Cultural Exhibitions, Current Affairs, Political Topics, Fitness, Wellness, Social, Civic, And Recreational Activities" in Class 041;

"Providing Food And Drink; Food And Drink Catering; Providing Temporary Housing Accommodation, Bar Services" in Class 043.

Registration was refused under Trademark Act Section 2(d), 15 U.S.C. 1052(d) because the mark so resembled the marks in U.S. Registration Nos. 3880423, 3880519, 4092974 for the mark "WANDERLUST" (all registrations in standard character drawing), as to be likely to cause confusion or mistake, or to deceive within the meaning of Section 2(d) of the Trademark Act in relation to the following goods and services:

“Arranging and conducting nightclub entertainment events; Concert booking; Conducting entertainment exhibitions in the nature of live music festivals; Entertainment, namely, live music concerts” in Class 041; (Registration Number 3880423)

“Audio and video recordings featuring entertainment in the nature of music, lectures on fitness, exercise, yoga and music, interviews on fitness, exercise, yoga and music, or fitness, exercise and yoga instruction, all of which relate to a festival featuring these activities” in Class 009; (Registration Number 3880519)

“Production of streaming video and website development in the fields of yoga, music, and entertainment; providing an on-line computer database in the fields of music, yoga and entertainment; educational services, providing instruction, studios, conferences, workshops, professional trainings and retreats in the fields of yoga, meditation, spiritual attunement, exercise and aerobic fitness, diet and nutrition, stress management and relaxation, outdoor recreation, holistic health care, preventative health care, alternative health care, therapeutic massage and alternative healing; electronic publishing services, namely, publishing of online works of others featuring user-created text, audio, video, and graphics; providing on-line journals and web logs featuring user-created content in the fields of music, yoga, and entertainment” in Class 041; (Registration Number 4092974)

“Computer services, namely, providing a database and facilities for interactive discussion groups featuring information in the fields of music, yoga and entertainment via a global computer network; computer services in the nature of customized web pages featuring user-defined information, personal profiles and information; providing temporary use of non-downloadable software applications for classifieds, virtual community, social networking, photo sharing, and transmission of photographic images” in Class 042; (Registration Number 4092974)

“Online social networking services” in Class 045; (Registration Number 4092974)

## **II. FACTS**

On October 18, 2012, applicant applied to register the mark WANDERLUST for “Disks, tapes, compact disks, audio devices, audiovisual devices, sound, video and data recordings in the form of disks, films for recording sounds, magnetic recording media, sound recording disks or optical disks, compact disks (audio-video); Entertainment; discotheque services; club services (entertainment); providing online electronic publications, not downloadable; providing amusement arcade services; game services provided on-line from a computer network; publication of books or periodicals; leisure services; providing karaoke services; music-halls; organization of balls; organization of competitions (entertainment); organization of shows; party planning; theater productions; operation of movie theaters; operation of concert halls, night clubs; organization of exhibitions for cultural purposes (for art work exhibitions); cinematographic film projection; organization of concerts, of conferences; Providing food and drink (accommodation); food and drink catering; temporary accommodation, bar services.”

On December 18, 2012, the examining attorney refused registration of the mark under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), cited a prior pending application, and required clarification regarding the Identification of Goods and Services.

On June 18, 2013, applicant submitted a response to the first Office Action arguing against the refusal to register and providing an acceptable amendment to the Goods and Services.

On June 25, 2013, the examining attorney issued a suspension notice pending Registration of the cited application and continuing the refusal to register under Section 2(d) of the Trademark Act.

On July 10, 2014, the examining attorney issued a final Office Action withdrawing citation of the prior filed application due to its abandonment, but maintaining the refusal under Section 2(d) of the Trademark Act.

On January 9, 2015, applicant filed a Request for Reconsideration of Final Action and a Notice of Appeal. Due to an incorrect upload of a non-related matter, a Petition to the Director ensued on February 18, 2015, to redact and expunge the Request for Reconsideration. A subsequent Request for Reconsideration was filed on February 20, 2015.

On February 10, 2015 and following on March 10, 2015, the examining attorney issued denials of applicant's Request for Reconsideration.

On May 26, 2015, applicant filed a Brief in support of registration of application serial number 79118868.

On May 28, 2015, the file was remanded to the examining attorney.

### III. ARGUMENT

The sole issue for consideration in this appeal is whether applicant's intended mark, WANDERLUST (standard character drawing) when used in connection with applicant's goods and services in International Classes 009, 041, and 043 so resembles the marks in U.S. Registration Nos. 3880423, 3880519, and 4092974, for the mark WANDERLUST (standard character drawing), for goods and services in International Classes 009, 041, 042, and 045, as to be likely to cause confusion or mistake, or to deceive within the meaning of Section 2(d) of the Trademark Act.

#### A. CONFUSION IS LIKELY BETWEEN APPLICANT'S MARK "WANDERLUST" (STANDARD CHARACTER DRAWING) AND REGISTRANT'S MARK "WANDERLUST" (STANDARD CHARACTER DRAWING)

The Court in *In re E. I. Dupont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), listed the principal factors to be considered in determining whether there is a likelihood of confusion under Section 2(d). Any one of the listed *DuPont* factors may be dominant in any given case, depending upon the evidence of record. In this case, the following factors are most relevant: similarity of the goods, similarity of the marks, and similarity of the channels of trade. Any doubt as to the issue of likelihood of confusion must be resolved in favor of the Registrant and against the Applicant who has a legal duty to select a mark which is totally dissimilar to trademarks already being used. *In re Hyper Shoppes* (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988). The Examining Attorney has determined that the Applicant's mark is identical to the Registrant's mark and its goods and services travel in the same channels of trade as the Registrant's goods and services, therefore creating a likelihood of confusion between the marks.

1. The Marks are Identical

Applicant seeks to register the mark WANDERLUST in standard character drawing format while registrant owns the marks WANDERLUST in standard character drawing format.

In a likelihood of confusion determination, the marks in their entireties are compared for similarities in appearance, sound, connotation, and commercial impression. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973); TMEP §1207.01(b)-(b)(v).

Applicant's and registrant's marks are each comprised of the same single term "WANDERLUST". Thus, both marks are not only similar, but in fact identical in appearance, sound, connotation, and commercial impression because they are both comprised of the same term and both presented in standard character format. Thus, the marks are identical in terms of appearance and sound. In addition, the connotation and commercial impression of the marks do not differ when considered in connection with applicant's goods and services and registrant's respective goods and services.

Therefore, the marks are confusingly similar.

2. The Goods and Services are Similar and Consumers would believe that they Originate from the Same Source

As noted, the second prong in analyzing likelihood of confusion is to compare the goods to determine if they are related. The goods of the parties need not be identical or directly competitive to find a likelihood of confusion. They need only be related in some manner, or the conditions surrounding their marketing be such, that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come from a common source. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984); *Guardian Products Co., Inc. v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

In accordance with the practice established in *In re August Storck KG*, 218 USPQ 823 (TTAB 1983), in addition to examining the similarities of the marks to determine likelihood of confusion, similarities between the goods associated with the marks must be considered. Where the marks of the respective parties are identical or virtually identical, the relationship between the relevant goods need not be as close to support a finding of likelihood of confusion. *See In re Shell Oil Co.*, 992 F.2d 1204, 1207, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202 (TTAB 2009); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1636 (TTAB 2009); TMEP §1207.01(a). Moreover, the

greater degree of similarity between the applied-for mark and the registered mark, the lesser the degree of similarity between the goods and/or services of the respective parties that is required to support a finding of likelihood of confusion. *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202 (TTAB 2009); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1636 (TTAB 2009). Where, as in this case, the applicant's mark is identical to the registrant's marks, there need only be a viable relationship between the goods to find that there is a likelihood of confusion. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) ("even when the goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source"); *In re Concordia International Forwarding Corp.*, 222 USPQ at 356.

The examining attorney must determine whether there is a likelihood of confusion on the basis of the goods and services identified in the application and registration. With respect to applicant's and registrant's goods and/or services, the question of likelihood of confusion is determined based on the description of the goods and/or services stated in the application and registration at issue, not on extrinsic evidence of actual use. See *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1323, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys. Inc. v. Hous. Computers Servs. Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)).

In this case, the identifications set forth in the application and registrations have no restrictions as to nature, type, channels of trade, or classes of purchasers. Therefore, it is presumed that these goods and/or services "travel in the same channels of trade to the same class of purchasers." *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)). Registrant's recitation of services in Classes 041, 042, and 045 are notably broad. Despite applicant's highlight of registrant's music festivals listed in Class 041, these services do not restrict the overall recitation, but are merely placed as one service in a list of other entertainment services. Further, the language in registrant's Class 009 goods referring to the audio and video recordings relating to a festival featuring music, fitness, exercise, and wellness does not obviate the likely confusion inherent in consumers encountering applicant's identical mark appearing on audio and video recordings featuring music, fitness, exercise and wellness. The clarification of the type of goods does not render the goods dissimilar, nor does it limit their trade channels.

Here the registrant's goods and services are music concerts, music festivals and nightclub events (3880423), audio and video recordings featuring music, and fitness and wellness information (3880519), and streaming video, websites, online instruction, electronic publishing, electronic databases, non-downloadable software, and social networking all featuring music, and fitness and wellness information (4092974). The applicant's goods and services are audio and video recordings featuring music, fitness and wellness information, music concerts and other entertainment events,

nightclub events, and organization of conferences in the fields of music and fitness and wellness, and provision of food and drink.

In this case, the identifications set forth in the application and registrations contain identical goods and services and have no restrictions as to nature, type, channels of trade, or classes of purchasers. Therefore, it is presumed that these goods and/or services travel in all normal channels of trade, and are available to the same class of purchasers. *See Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 1053, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012). Accordingly, the goods and/or services of applicant and the registrant are considered related for purposes of the likelihood of confusion analysis.

With regard to applicant's Class 043 provision of food and drink services, the Denial of Request for Reconsideration dated March 10, 2015, contained attached Internet evidence consisting of screenshots of websites from a variety of music and entertainment festivals. This evidence established that the same entity commonly provides music festivals and concerts with provision of food and drink services, and markets the goods and services under the same mark. Therefore, all of applicant's goods and services and registrant's goods and services are considered related for likelihood of confusion purposes. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009).

Evidence obtained from the Internet may be used to support a determination under Section 2(d) that goods and/or services are related. *See, e.g., In re G.B.I. Tile & Stone, Inc.*, 92 USPQ2d 1366, 1371 (TTAB 2009); *In re Paper Doll Promotions, Inc.*, 84 USPQ2d 1660, 1668 (TTAB 2007). The Internet has become integral to daily life in the United States, with Census Bureau data showing approximately three-quarters of American households used the Internet in 2013 to engage in personal communications, to obtain news, information, and entertainment, and to do banking and shopping. *See In re Nieves & Nieves LLC*, 113 USPQ2d 1639, 1642 (TTAB 2015) (taking judicial notice of the following two official government publications: (1) Thom File & Camille Ryan, U.S. Census Bureau, Am. Cmty. Survey Reports ACS-28, *Computer & Internet Use in the United States: 2013* (2014), available at <http://www.census.gov/content/dam/Census/library/publications/2014/acs/acs-28.pdf>, and (2) The Nat'l Telecomms. & Info. Admin. & Econ. & Statistics Admin., *Exploring the Digital Nation: America's Emerging Online Experience* (2013), available at [http://www.ntia.doc.gov/files/ntia/publications/exploring\\_the\\_digital\\_nation\\_-\\_americas\\_emerging\\_online\\_experience.pdf](http://www.ntia.doc.gov/files/ntia/publications/exploring_the_digital_nation_-_americas_emerging_online_experience.pdf)). Thus, the widespread use of the Internet in the United States suggests that Internet evidence may be probative of public perception in trademark examination.

## B. THE MARK IS NOT WEAK OR DILUTED

In its Appeal Brief, applicant argues that the mark WANDERLUST is a weak mark that has been “adopted, registered, and used by many third parties for a variety of goods and services.” (See Applicant’s Appeal Brief at page 9).

Applicant’s argument is misplaced. Applicant has submitted printouts of third-party registrations for marks containing the wording WANDERLUST to support the argument that this wording is weak, diluted, or so widely used that it should not be afforded a broad scope of protection. The weakness or dilution of a particular mark is generally determined in the context of the number and nature of similar marks *in use in the marketplace* in connection with *similar* goods and/or services. See *Nat’l Cable Television Ass’n, Inc. v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 1579-80, 19 USPQ2d 1424, 1430 (Fed. Cir. 1991); *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973). Applicant has provided no marketplace evidence of actual use of the mark in connection with similar goods or services.

Applicant has provided eight (8) screenshots from the Trademark Electronic Search System (TESS) of filings containing the word WANDERLUST. Of these eight screenshots, four (4) were abandoned pre-approval for publication (85473752, 85834013, 85726625, 85596003), one is a cancelled registration (3526235), two (2) are filed applications without approval for publication (85679384, 85634581), and one (1) is a registration for POETIC WANDERLUST for pillows (4295609). Applicant further provided a redundant list of applications and registrations in its Request for Reconsideration including those provided previously and listed above, with the addition of another filed application without approval (86437557), an additional application abandoned pre-approval (86446965), another cancelled registration (3511635), and two further registrations for unrelated goods and services, namely, boots and shoes (1961144) and advertising and marketing (3825752). In sum, applicant’s evidence of weakness and dilution consist of Registration Number 1961144 for the mark WANDERLUST for shoes and boots; Registration Number 3825752 for the mark WANDERLUST for brand imagery consulting services, advertising, and marketing consulting services; and Registration Number 4295609 for the mark POETIC WANDERLUST for accent pillows.

Evidence of weakness or dilution consisting solely of third-party registrations, such as those submitted by applicant in this case, is generally entitled to little weight in determining the strength of a mark, because such registrations do not establish that the registered marks identified

therein are in *actual use* in the marketplace or that consumers are accustomed to seeing them. See *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (C.C.P.A. 1973); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009); *Richardson-Vicks Inc. v. Franklin Mint Corp.*, 216 USPQ 989, 992 (TTAB 1982). Furthermore, the goods and services listed in the third-party registrations submitted by applicant are different from those at issue and thus do not show that the relevant wording is commonly used in connection with the goods and services at issue.

To support applicant's arguments, applicant submitted evidence of cancelled or expired third-party registrations, in addition to filed application which had neither registered nor published in the Official Gazette. However, a cancelled or expired registration is "only evidence that the registration issued and does not afford an applicant any legal presumptions under [Section] 7(b)," including the presumption that the registration is valid, owned by the registrant, and the registrant has the exclusive right to use the mark in commerce in connection with the goods and/or services specified in the certificate. *In re Pedersen*, 109 USPQ2d 1185, 1197 (TTAB 2013) (citing *Anderson, Clayton & Co. v. Krier*, 478 F.2d 1246, 1248, 178 USPQ 46, 47 (C.C.P.A. 1973) (statutory benefits of registration disappear when the registration is cancelled); *In re Brown-Forman Corp.*, 81 USPQ2d 1284, 1286 n.3 (TTAB 2006); *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1047 n.2 (TTAB 2002)); see TBMP §704.03(b)(1)(A); TMEP §1207.01(d)(iv). Nor does a cancelled or expired registration provide constructive notice under Section 22, in which registration serves as constructive notice to the public of a registrant's ownership of a mark. See *Action Temp. Servs. Inc. v. Labor Force Inc.*, 870 F.2d 1563, 1566, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) ("[A] canceled registration does not provide constructive notice of anything.").

Thus, these third-party registrations have little, if any, probative value with respect to the registrability of applicant's mark.

C. CONSUMERS OF APPLICANT'S GOODS AND SERVICES AND REGISTRANT'S GOODS AND SERVICES ARE NOT SOPHISTICATED PURCHASERS

Applicant also argues that the purchasers of applicant's goods and services are somehow sophisticated, and that this negates a finding of a likelihood of confusion between the applicant's mark and the registered marks.

It is accepted that there may be less likelihood of confusion where goods are expensive and purchased after careful consideration by experts in a particular field. However, the goods identified in the decisions in this area have typically been limited to highly advanced, custom-designed technology offered by a small number of manufacturers world-wide, accompanied by on-site training for specialists accustomed to the use of such goods. See *In re Digirad Corp.*, 45 USPQ2d 1841 (TTAB 1998); *Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc.*, 718 F.2d 120, 220 USPQ 786 (1 Cir. 1983); *Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388 (Fed. Cir. 1992). Applicant highlights that music festivals are “highly-regulated and requires permits, licenses, etc.” as evidence that consumers of the goods and services of applicant and registrant fall into the “highly sophisticated” category, thereby, negating a likelihood of confusion.

Applicant further relies upon the decision in *Weiss Associates, Inc. v. HRL Associates, Inc.*, 14 USPQ2d 1840 (Fed. Cir. 1990) in arguing that consumers of registrant’s goods and services will utilize careful consideration. Applicant states in its Appeal Brief, “In exercising this type of careful consideration, “the reasonably prudent person standard is elevated to the standard of the ‘discriminating purchaser.’” (See Applicant’s Appeal Brief page 23). This reliance is misguided as the Court stated in its opinion affirming a likelihood of confusion between two software systems companies, “In making purchasing decisions regarding “expensive” goods, the reasonably prudent person standard is elevated to the standard of the “discriminating purchaser.”” (Id at page 1842, citing 2 J. McCarthy, *Trademarks and Unfair Competition* §23:28 at 130 (2d. ed. 1984). Applicant has provided no evidence that the goods and services of the parties are particularly high priced as to warrant a sophisticated purchaser analysis.

Applicant explains that consumers that attend the “discrete festival event” will use careful consideration to research when the event will take place, as evidence of an obviated likelihood of confusion between the goods and services of the parties (See Applicant’s Appeal Brief page 23). Furthermore, applicant goes on to state that the situation is akin to “other well-known events or festivals” where consumers would “exercise this type of discriminating consumer process to ensure that they purchased tickets to attend their desired show or event.” (See Applicant’s Appeal Brief page 24).

This argument is without merit for two principal reasons. First, as discussed previously, the recitation of goods and services in Registration Numbers 3880423 and 4092974 are not limited in any way. The listing of music festivals in the Class 041 Identification of Services in Registration Number 3880423 is merely an item in a list of other entertainment services (Arranging and conducting nightclub entertainment events; Concert booking; Conducting entertainment exhibitions in the nature of live music festivals; Entertainment, namely, live music concerts). The recitation of goods in Class 009 in Registration Number 3880519 references that the audio and video recordings “relate to a festival

featuring these activities” does not obviate the refusal in that applicant’s goods and services are sufficiently related to these goods a likelihood of confusion.

Second, the confusion of the parties refers to the source of the goods and services, not the goods and services themselves. The issue is not likelihood of confusion between particular goods, but likelihood of confusion as to the source or sponsorship of those goods. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1316, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003); *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); TMEP §1207.01. While attendees of concerts and music festivals would certainly know the tickets they were purchasing, the source of the entertainment services, audio/visual products, and hospitality services is the cause of the confusion. For example, an individual who may attend registrant’s music festival may attend applicant’s music concerts, musical performances, or a venue with applicant’s catering, believing they were of the same source. In addition, a consumer of applicant’s musical audio and visual items may confuse them as originating from the source of the music festival they may (or may not) have attended.

As a consequence, given the identical marks of applicant and registrant, and the similar nature of the goods and services identified by both parties, consumers are likely to believe that the parties’ goods and services originate from a common source.

#### **IV. CONCLUSION**

For the foregoing reasons, the examining attorney submits that the refusal to register applicant’s mark WANDERLUST as used in connection with goods and services in Classes 009, 041, and 043 on the basis that it is confusingly similar to registrant’s marks WANDERLUST for goods and services in Classes 009, 041, 042, and 045 should be affirmed.

Respectfully submitted,

/Kelly Trusilo/

Trademark Examining Attorney

Law Office 107

(571) 272-8976

[kelly.trusilo@uspto.gov](mailto:kelly.trusilo@uspto.gov)

J. Leslie Bishop

Managing Attorney

Law Office 107