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Mailed:
August 8, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Lil Fats, Inc. dba Coast 2 Coast Mixtapes

Serial No. 85404979

Cassandra Spangler for Lil Fats, Inc. dba Coast 2 Coast Mixtapes.

Howard Smiga, Trademark Examining Attorney, Law Office 102 (Mitchell Front, Managing Attorney).

Before Kuhlke, Taylor and Mermelstein, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Applicant, Lil Fats, Inc. d/b/a Coast 2 Coast Mixtapes, filed an application to register on the Principal Register the mark COAST 2 COAST in standard characters for services ultimately identified as “Arranging and conducting nightclub entertainment events in the nature of ‘music industry mixer’ networking events; Arranging and conducting nightclub entertainment events in the nature of live competitions by rap, hip-hop, and urban artists and DJs; Providing a website for

entertainment purposes where users can view and submit songs, videos and photos featuring musical bands and artists,” in International Class 41.¹

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant’s mark, when used with its identified services, is likely to cause confusion, mistake or deception with the following registered marks:

COAST2COAST in standard characters for “entertainment services, namely, a continuing variety show featuring live audiences broadcast over television, satellite, internet, audio and video media” in International Class 41, Registration No. 3812275, issued on June 29, 2010 on the Supplemental Register to Melvin J. Laney; and

COAST TO COAST BLUES BAND in standard characters, BLUES BAND disclaimed, for “entertainment, namely, live performances by a musical band” in International Class 41, Registration No. 3613653, issued on April 28, 2009 on the Principal Register to Glenn Herskowitz.

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out 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 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

¹ Application Serial No. 85404979, filed on August 23, 2011, based on allegations of first use on May 1, 2004 and first use in commerce on May 1, 2009, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

We turn first to a consideration of the services, channels of trade and class of purchasers. We must make our determinations under these factors based on the services as they are recited in the registrations and application. *See In re Elbaum*, 211 USPQ 639 (TTAB 1981). We base our evaluation on the goods as they are identified in the registrations and application. *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). It is settled that it is not necessary that the respective services be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. That is, the issue is not whether consumers would confuse the services themselves, but rather whether they would be confused as to the source of the services. *See In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

The examining attorney argues that “the [identified] services of the parties could well be presumed to be from the same source inasmuch as the services of the parties relate to music entertainment and live musical performances” and applicant’s evidence “that the services of the parties are targeted to a limited and distinct genre within the music industry is irrelevant.”²

² E.A. Br. pp. 12-13.

Applicant counters that “the fact that goods or services are offered in the same general industry ... is not dispositive in an analysis of their similarity and nature.”³

The examining attorney bases his argument on the general statement that the services all encompass musical entertainment. However, while the services are all generally in the field of music or could encompass music, the services are quite different. Applicant is not a band providing live performances which is the sole service in Registration No. 3613153. Moreover, there is nothing in the record to connect the services of providing networking events, live competitions or a website for viewing and submitting videos and photos featuring various bands and artists, to being a band providing live musical performances.⁴

Applicant is also not a variety show which is defined as “entertainment consisting of a series of short unrelated performances or acts, such as comedy turns, songs, dances, sketches, etc.”⁵ While, as identified, registrant’s “variety shows” could encompass all types of musical and dance entertainment, it does not clearly encompass a live competition or networking event. Arguably, perhaps, a variety show could include a short act that consists of a nightclub live competition, but we

³ App. Br. p. 5.

⁴ While a band, like every other business entity, may have a website to post its own clips, we do not consider this to create a *per se* relationship to the service of providing a website in the field of music for viewing and posting various artists.

⁵ Collins English Dictionary (10th ed. 2009) retrieved from www.dictionary.com. The Board may take judicial notice of dictionary definitions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006). *See also University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

are concerned with likelihood of confusion not “mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal.” *Electronic Design & Sales, Inc. et al v. Electronic Data Systems Corporation*, 954 F.2d 713, 21 USPQ2d 1388, 1392 (Fed. Cir. 1992). Without evidence or further explanation as to how applicant’s specific services are related to the registrants’ band or broadcast variety show, the record fails to establish that the services are sufficiently related.

The examining attorney is correct that applicant’s contention that the services of applicant and the registrants are targeted to distinct genres (hip hop and rap v. blues and Alaskan culture)⁶ within the music industry is misplaced inasmuch as there are no such limitations in the registrations or as to two of applicant’s services.⁷ As is well-established we must make our determination on the services as identified and the identifications of services in the registrations and in the application for the networking events and the website are not limited to any particular genre of music. *See In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986). However, as discussed above, the nature of the services themselves is

⁶ Applicant submitted printouts of web pages purporting to be connected to the respective registrants. With regard to Reg. No. 3615653, the web page indicates that COAST TO COAST BLUES BAND is a tribute band to John Lee Hooker the renowned blues artist. With regard to Reg. No. 3812275, the web page indicates that COAST2COAST is used in connection with a locally broadcast television show in Alaska that features Alaskan politics and culture and a Bob Hope impersonation. Resp. to Office Action (June 5, 2012) Exhs. B-D.

⁷ Only the “live competitions” in applicant’s identification are modified by the genre of music; the other services are separated by semi colons.

sufficiently distinct to avoid likely confusion in these circumstances when the marks are weak as discussed below.

Considering the channels of trade and classes of purchasers, the examining attorney argues that we must presume overlapping trade channels in the absence of limitations. However, the proper analysis is that we presume the respective services will travel in and be offered to the ordinary channels of trade and classes of consumers for the services identified in the application and the cited registrations. There is no evidence to show what the ordinary channel of trade is for these types of services or how they overlap. While they all presumably use the Internet to advertise or provide their services, this alone is not sufficient to find that the trade channels overlap in a manner that creates a likelihood of confusion.

With regard to the conditions of sale, applicant argues that consumers of music are discriminating purchasers who exercise care to insure the goods or services feature the music they seek.⁸ Applicant also argues that its services are targeted toward artists and professionals within the music industry. However, applicant's customers, at least of the web services, would include the general music consumer and the standard of care, for our analysis is that of the least sophisticated purchaser. *Alfacell Corp. v. Anticancer, Inc.*, 71 USPQ2d 1301, 1306 (TTAB 2004). Nonetheless, we agree that music consumers would exercise some degree of care and we find this factor to be neutral.

⁸ App. Br. p. 8.

We next consider the marks and compare them “in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) *quoting du Pont*, 177 USPQ at 567.

We begin by noting that the phrase COAST TO COAST and its phonetic equivalent COAST 2 COAST are, at a minimum, highly suggestive of all of the services.⁹ “Coast to coast” is defined as “extending, going, or operating from one coast of the U.S. to the other: a coast-to-coast television network.”¹⁰ Thus, the marks all suggest the territorial scope of the services. We first consider the mark in Reg. No. 3613653 COAST TO COAST BLUES BAND. Given the suggestive nature of the phrase and the differences in the services we find that the addition of BLUES BAND and the visual distinction presented by replacement of the “TO” with “2” to be sufficient to distinguish the marks.

With regard the mark in Reg. No. 3812275 COAST2COAST, this mark is nearly identical to applicant’s COAST 2 COAST mark and the additional spaces in applicant’s mark do not distinguish the marks. *Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020 (TTAB 2009) (spaces respondent used between words of mark did not distinguish it from petitioner’s mark); *In re 1st USA Realty Prof’ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007) (similarity in sound alone may be sufficient to find marks confusingly similar); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535

⁹ Reg. No. 3812275 is registered on the Supplemental Register which indicates that COAST2COAST is merely descriptive for the identified broadcast services.

¹⁰ Random House Dictionary (2013) retrieved from www.dictionary.com.

(TTAB 1988). Thus, as to Registration No. 3812275 we find applicant's and registrant's marks to be similar.

Applicant argues that the marks in the registrations are not famous.¹¹ There is nothing in the record to support a finding of fame, and therefore, this factor is neutral.

Applicant also argues under the *du Pont* factor concerning the number and nature of similar marks in use on similar services, that confusion is not likely in view of the two coexisting cited prior registrations. However, registrations have little weight in determining the strength of a mark because they 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 (CCPA 1973); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009). Moreover, prior decisions by examining attorneys are not binding on the Board. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). However, as noted above the mark is conceptually weak in that it is highly suggestive.

Applicant's argument that there have been no known instances of actual confusion is not persuasive. The contemporaneous use of applicant's and registrants' marks for a period of approximately three years without actual confusion is entitled to little weight. *See Majestic Distilling Co., Inc.*, 65 USPQ2d at

¹¹ We note that applicant's statements regarding possible nonuse of the registered marks. However, any possible abandonment of the mark in a cited registration is not relevant in the context of an ex parte appeal and arguments on that point constitute an impermissible collateral attack on the cited registration. *Dixie Rests.*, 41 USPQ2d at 1534-35.

1205 (“uncorroborated statements of no known instances of actual confusion are of little evidentiary value”). *See also In re Bisset-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of applicant’s corporate president’s unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). The lack of evidence of actual confusion carries little weight, *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965), especially in an *ex parte* context. In any event, there is no evidence of record to indicate wide use of the registered marks and applicant argues that there is not such wide use of the registered marks. Thus, it appears there have not been meaningful opportunities for instances of actual confusion to have occurred in the marketplace. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000); and *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). Accordingly, the *du Pont* factor of the length of time during and conditions under which there has been contemporaneous use without evidence of actual confusion is considered neutral.

Finally, under the catch-all thirteenth *du Pont* factor, applicant argues that it “has increasingly become the victim of third parties attempting to capitalize on this fame and goodwill by passing off their music-industry products as Applicant’s ... [and] believes it is highly relevant in order for the TTAB to understand Applicant’s need for registered trademark protection, as well as the benefit to

consumers which will be served in granting such registration.”¹² Further, applicant asserts that “confusion between Applicant’s Mark and unauthorized third-party users poses a greater risk to consumers, which can be eradicated by approval of Applicant’s Mark for publication, than any risk of confusion between Applicant’s Mark and either cited prior mark which, for all of the reasons set forth herein, Applicant submits is de minimis.”¹³

While we appreciate applicant’s concerns we must make our determination based on the prior registrations.

In conclusion, because the services are different and the common element in the marks is conceptually weak, confusion is not likely between applicant’s mark COAST 2 COAST and the marks COAST TO COAST BLUES BAND and COAST2COAST in the cited registrations.

Decision: The refusal to register is reversed.

¹² App. Br. p. 13.

¹³ Id.