

This Opinion is not a  
Precedent of the TTAB

Mailed: August 25, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
—

*In re Flying Mojo, LLC*  
—

Serial No. 86009264  
—

Luke Brean of BreanLaw, LLC,  
for Flying Mojo, LLC.

Linda M. Estrada, Trademark Examining Attorney, Law Office 104,  
Chris Doninger, Managing Attorney.

—  
Before Bucher, Cataldo and Adlin,  
Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Flying Mojo, LLC (hereinafter “Applicant”) seeks registration on the Principal Register of the mark **PURPLE HAZE** (*in standard character format*) for “electronic sound pickup for guitars and basses” in International Class 9.<sup>1</sup>

The Trademark Examining Attorney has taken the position that Applicant’s mark, when used on or in connection with Applicant’s goods so resembles the

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<sup>1</sup> Application Serial No. 86009264 was filed on July 12, 2013, based upon Applicant’s claim of first use anywhere at least as early as January 1, 2013, and use in commerce since at least as early as June 1, 2013.

registered mark **HAZE** for “sound amplifiers,” also in International Class 9, that it is likely to cause confusion, to cause mistake or to deceive.

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

### *Likelihood of Confusion Analysis*

Our determination under Section 2(d) is based upon an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *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 Company, 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 relationship 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) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). We discuss each of the *du Pont* factors concerning which Applicant or the Trademark Examining Attorney submitted argument or evidence.

#### ***A. Similarity of the Marks***

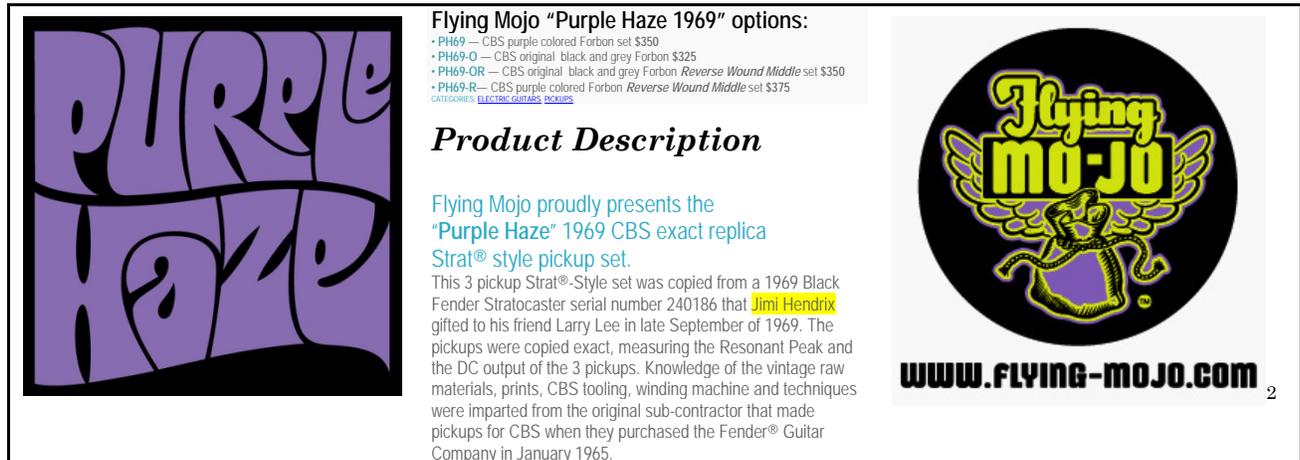
We turn first to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of “the marks in their entireties as to appearance, sound, connotation, and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). “The proper test is not a side-by-side

comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted).

Applicant argues that although the marks share the common term “Haze,” that alone is not enough to support a finding of likelihood of confusion. Applicant takes the position that the Trademark Examining Attorney has violated the “anti-dissection rule” by focusing on this shared feature of these respective marks while ignoring differences between the marks as a whole. Applicant also points out that these marks have entirely different “phonetic profiles.”

The cited mark is the word **HAZE** in standard character format. The Trademark Examining Attorney contends that Applicant has simply taken the entirety of Registrant’s mark and added the modifier “purple” to this registered mark to form its mark, **PURPLE HAZE**. “When one incorporates the entire arbitrary mark of another into a composite mark, inclusion in the composite mark of a significant, nonsuggestive element will not necessarily preclude a likelihood of confusion.” *See Wella Corp. v. Cal. Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (finding “CALIFORNIA CONCEPT and surfer design” confusingly similar to CONCEPT). Applicant cites other 1970s cases arguing that likelihood of confusion does not automatically result when a junior user’s mark contains in part the whole of another mark. We find that despite the addition of the word “purple” to Registrant’s mark, the similarities outweigh the dissimilarities as to appearance and sound.

The term “Purple Haze” calls to mind the famous Jimi Hendrix song of the same name. In fact, on its home page, Applicant makes a reference to pickups from a Stratocaster once owned by Jimi Hendrix, and the purple-on-black design of its “Purple Haze” mark is reminiscent of psychedelic posters of the 1960s and ‘70s:



The screenshot shows a webpage for Flying Mojo. On the left is a purple and black graphic with the words 'PURPLE HAZE' in a stylized, bubbly font. To the right, under the heading 'Flying Mojo "Purple Haze 1969" options:', there is a list of three pickup sets: PH69 (purple colored Forbon set \$350), PH69-O (black and grey Forbon \$325), and PH69-OR (black and grey Forbon Reverse Wound Middle set \$350). Below this is a 'Product Description' section that states the pickup set is a 1969 CBS exact replica of a Stratocaster pickup set owned by Jimi Hendrix. On the right side of the screenshot is a circular logo with 'Flying MO-JO' in yellow and black, featuring a guitar and a winged figure. Below the logo is the website URL 'WWW.FLYING-MOJO.COM'.

The Trademark Examining Attorney also points to a dictionary definition of “Haze” as follows:

**haze** *n.*

1. a. Atmospheric moisture, dust, smoke, and vapor that diminishes visibility.  
b. A partially opaque covering: *Let the polish dry to a haze before buffing it.*
2. A vague or confused state of mind.

When used in connection with Registrant’s and Applicant’s goods, the word “haze” appears to be a somewhat unusual and arbitrary choice. Perhaps as the dictionary entry suggests, in a setting such as a nightclub, the word “Haze” may create a mental image for some consumers of vapor, smoke or even a confused state of mind. Similarly, in its request for reconsideration, Applicant argues that its own “mark brings to mind a purple, psychedelic vapor or a mental state of blurriness

<sup>2</sup> Applicant’s response of April 27, 2014, at 9-12 of 69.

<sup>3</sup> <https://www.ahdictionary.com/word/search.html?q=haze&submit.x=0&submit.y=0>  
*AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE*, (5<sup>th</sup> ed. 2015).

and confusion.” The Trademark Examining Attorney points out that both the dictionary definition and Applicant’s proffered connotation of its own mark convey commercial impressions relating to “vapor.”

We agree with Applicant’s suggestion that potential consumers may well recognize the association of “Purple Haze” with Jimi Hendrix, psychedelic rock and the counterculture of the 1960s. In comparing the possible meanings of these two marks, to the extent there is overlap between a confused state of mind (“haze”) and the prevalence of a drug culture in the 60s frequently associated with a truly legendary piece of music (“Purple Haze”), we find that these marks could well create similar connotations.

Given that the average purchaser normally retains a general, rather than a specific impression of trademarks, the question is whether the marks are sufficiently similar in their entirety that confusion as to the source of the goods offered under the respective marks is likely to result. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). We are convinced that when this closeness in connotation is added to the similarities in appearance and sound, these respective marks create similar overall commercial impressions, and this critical *du Pont* factor favors a finding of likelihood of confusion.

### ***B. Relationship of the Goods***

We next turn our attention to an evaluation of the relationship between the goods in the cited registration and the goods identified in the application. *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d

1261, 62 USPQ2d 1001 (Fed. Cir. 2002). It is settled that it is not necessary that the respective goods 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 customers would confuse the goods themselves, but rather whether they would be confused as to the source of the goods. *See In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984). The goods need only be sufficiently related that customers would be likely to assume, upon encountering the goods under similar marks, that the goods originate from, are sponsored or authorized by, or are otherwise connected to the same source. *See In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

As noted above, Registrant's goods are sound amplifiers while Applicant's goods are electronic sound pickups for guitars and basses – both in International Class 9. In support of its argument that confusion is unlikely, Applicant relies upon letters from eight individuals in the retail music store industry, all of whom indicate that sound amplifiers and sound pickups are different products, which would not be confused by their consumers. Of course, the issue is not whether even the most unsophisticated of newbie guitar-playing customers would confuse small guitar pickups with larger amplifiers. We must determine instead whether potential consumers, upon encountering guitar pickups and amplifiers being sold under similar marks, might erroneously assume that the goods originate from the same source.

In explaining the different functions of the respective goods, Applicant itself argues that pickups are essentially the equivalent of a microphone for the sounds

coming from the strings of a musical instrument, while the amplifier is, by contrast, a critical component for producing the ultimate sound through a loudspeaker.<sup>4</sup>

Rather than creating legal distance, this complementary function is indeed a basis for finding these goods to be related. Without a pickup, the amp will not be able to amplify the sound of an instrument, and vice versa. That is, in view of their complementary nature, the goods are likely to be purchased together and used in conjunction with each other. *See, e.g., In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984) (**MARTIN'S** for bread is confusingly similar to **MARTIN'S** for cheese, in part because the goods are complementary and often used and consumed together); *In re Sela Prods., LLC*, 107 USPQ2d 1580 (TTAB 2013) (finding that in the course of purchasing a television, audio or home theater system, purchasers would encounter both surge protectors (marketed specifically for television, audio and home theater equipment) and wall mounts and brackets (used in connection with same)); *In re Cook Medical Technologies LLC*, 105 USPQ2d 1377, 1380 (TTAB 2012) (medical guiding sheaths used in conjunction with catheters are closely related, complementary goods). In this case, Applicant's evidence supports a finding that an amplifier and guitar pickup work together in order to provide amplification for an electric guitar or bass.

Applicant also argues that its position is supported by the fact that Registrant does not sell electronic pickups. However, that alleged fact is not especially relevant to our inquiry either. Applicant points to no authority for its apparent position that

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<sup>4</sup> See Applicant's response of April 27, 2014, at 14 of 78, and Wikipedia pages on Pickups and Amplifiers, at 26-66 of 78.

Registrant must offer identical goods in order to support a finding of likelihood of confusion as to related goods.

Rather, the Trademark Examining Attorney, in support of her contention that the goods at issue are commercially related, has made of record examples of webpages from third-party vendors – both retailers and manufacturers – offering types of goods that are similar in nature to those of both Applicant and Registrant under the same service mark and/or trademark, including the following, *inter alia*:<sup>5</sup>

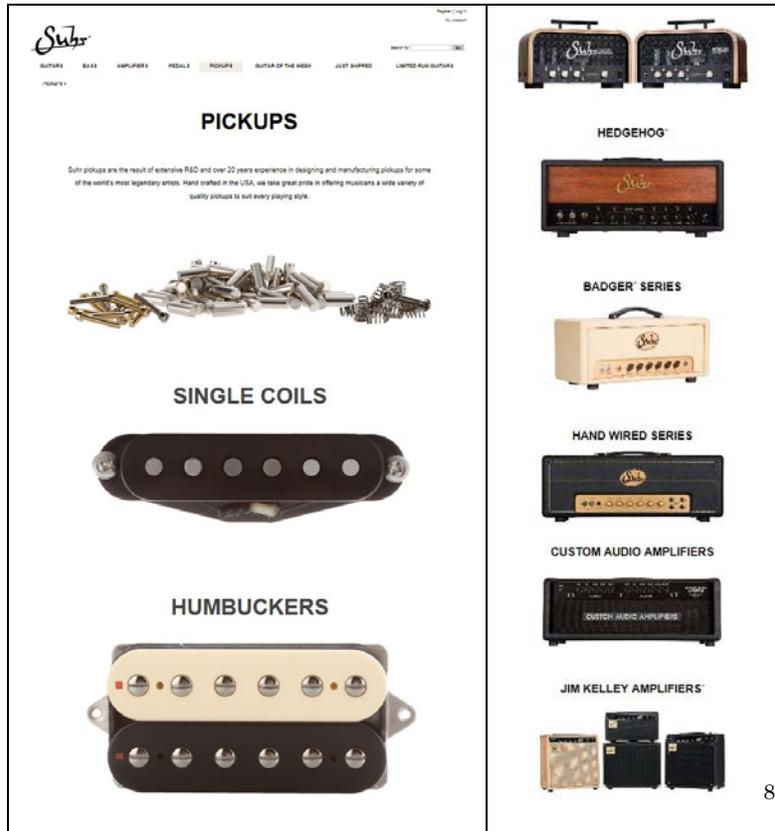


<sup>5</sup> Office actions of October 28, 2013, May 30, 2014, and January 11, 2015.

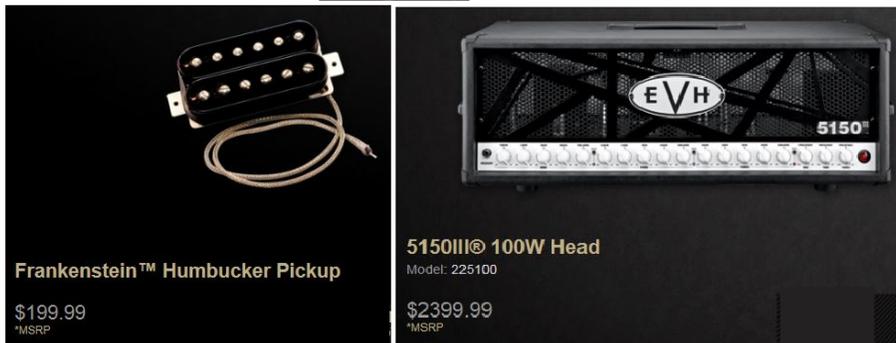
<sup>6</sup> <http://www.carvinguitars.com/guitarparts/guitarpickups.php>, Office Action of October 28, 2013, at 29-30 of 34.



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<sup>7</sup> <http://axepalace.com/>, Final Office Action of January 11, 2015, at 74-85 of 87.

<sup>8</sup> <http://www.suhr.com/>, Final Office Action of January 11, 2015, at 39-47 of 87.

<sup>9</sup> <http://www.evhgear.com/>, Final Office Action of January 11, 2015, at 20-25 of 87.

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<sup>10</sup> <http://www.uptonbass.com/>, Office Action of October 28, 2013, at 17-19 of 34.

<sup>11</sup> <http://www.fishman.com/products/filter>, Office Action of October 28, 2013, at 20-28 of 34; and Office Action of May 30, 2014, at 9-16 of 79.

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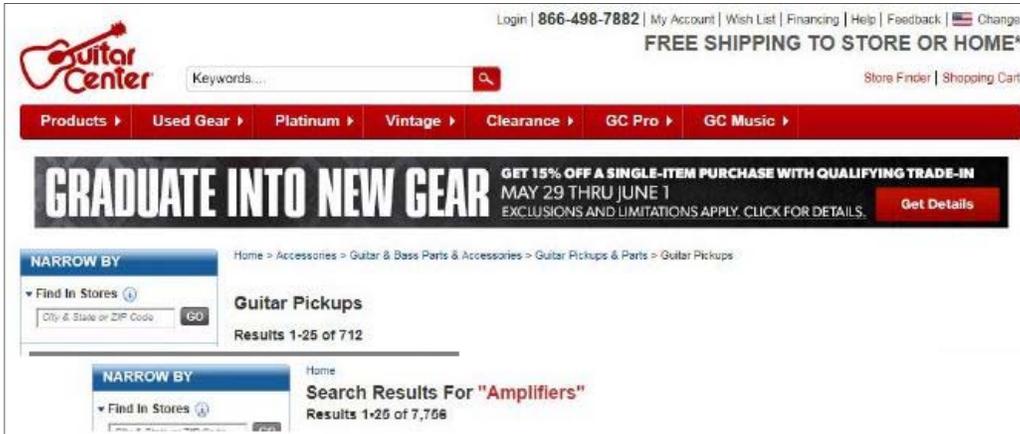
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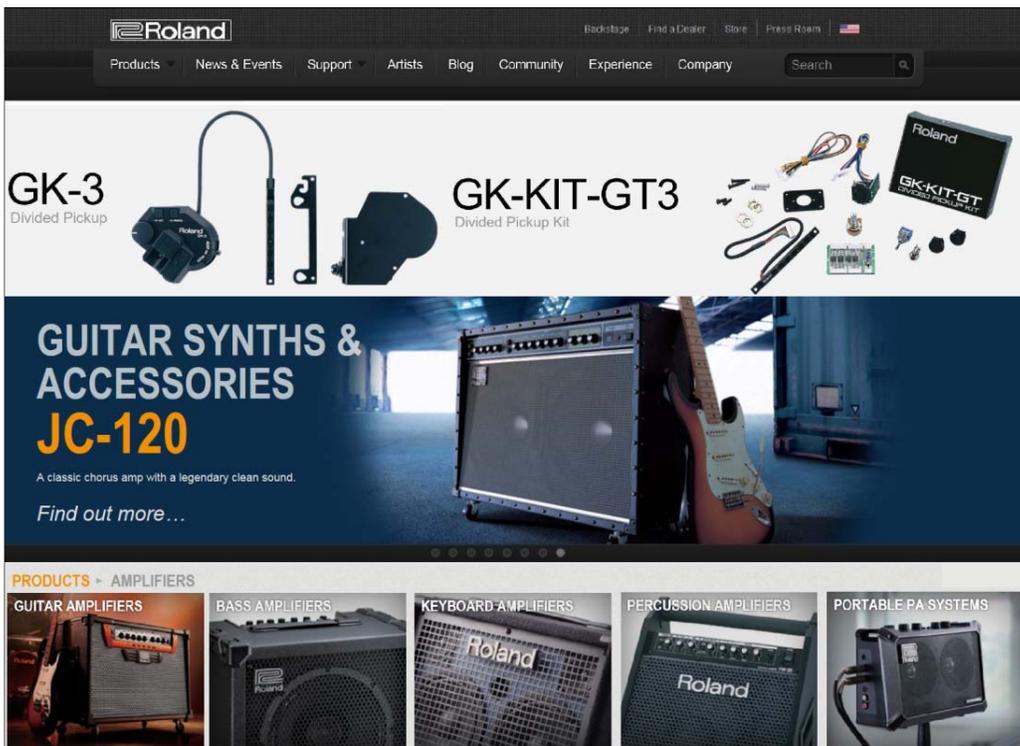
<sup>12</sup> <http://www.deanguitars.com/>, Final Office Action of January 11, 2015, at 63-73 of 87.

<sup>13</sup> <http://www.fender.com/>, Office Action of May 30, 2014, at 24-37 of 79.

<sup>14</sup> <http://www.fralinpickups.com/>, Final Office Action of January 11, 2015, at 14-17 of 87.



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<sup>15</sup> <http://www.guitarcenter.com/>, Office Action of May 30, 2014, at 17-23 of 79, and Final Office Action of January 11, 2015, at 32-38 of 87.

<sup>16</sup> <http://www.rolandus.com/products/category/477> & <http://www.rolandus.com/products/category/447>, Office Action of May 30, 2014, at 41-49 of 79, and Final Office Action of January 11, 2015, at 12-13 of 87.

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- Dean Markley CD60
- Dean Markley CD30
- Dean Markley DM30RC
- Dean Markley DM15R

**Acoustic Amplifiers:**

- Ultrasound AG50
- Ultrasound AG100
- Ultrasound AG250
- Ultrasound AG15M
- Ultrasound AG30M

Pickups

Amplifiers

- Dean Markley CD60
- Dean Markley CD30
- Dean Markley DM60RC
- Dean Markley DM30RC
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In addition to all of these websites, the Trademark Examining Attorney also made of record a number of third-party registrations showing that both Applicant's

<sup>17</sup> <http://www.deanmarkley.com/>, Final Office Action of January 11, 2015, at 26-31 of 87.

<sup>18</sup> <http://www.aguilaramp.com/>, Office Action of October 28, 2013, at 16 of 34.

type of goods (e.g., “electronic sound pickup”) and Registrant’s type of goods (e.g, “sound amplifiers) are offered under a single mark by others:<sup>19</sup>

<b>DANELECTRO</b> <sup>20</sup>	<b>EXPRESSION SYSTEM</b> <sup>21</sup>	
<b>TAYLOR GUITARS K4</b> <sup>22</sup>	<b>HARTKE</b> <sup>23</sup>	
	<b>SUHR</b> <sup>25</sup>	<b>EGNATER</b> <sup>26</sup>
	<b>SCHECTER</b> <sup>27</sup>	<b>Bring Tone to Life</b> <sup>28</sup>
	<b>PRS</b> <sup>29</sup>	<b>JAZZ FUSION</b> <sup>30</sup>
<b>HELLRAISER</b> <sup>32</sup>	<b>Harparatus</b> <sup>33</sup>	<b>GEAR ONE</b> <sup>31</sup>
		<b>RIO GRANDE</b> <sup>34</sup>

<sup>19</sup> Office actions of May 30, 2014, and January 11, 2015.

<sup>20</sup> Registration No. 2116570 issued on November 25, 1997; renewed.

<sup>21</sup> Registration No. 2849699 issued on June 1, 2004; renewed. No claim is made to the exclusive right to use the word “System” apart from the mark as shown.

<sup>22</sup> Registration No. 2921736 issued on January 25, 2005; Section 8 affidavit accepted and Section 15 affidavit acknowledged.

<sup>23</sup> Registration No. 3017601 issued on November 22, 2005; Section 8 affidavit accepted and Section 15 affidavit acknowledged.

<sup>24</sup> Registration No. 3340605 issued on November 20, 2007; Section 8 affidavit accepted and Section 15 affidavit acknowledged.

<sup>25</sup> Registration No. 3470385 issued on July 22, 2008; Section 8 affidavit accepted and Section 15 affidavit acknowledged.

<sup>26</sup> Registration No. 3573193 issued on February 10, 2009; Section 8 affidavit accepted and Section 15 affidavit acknowledged.

<sup>27</sup> Registration No. 4222161 issued on October 9, 2012.

<sup>28</sup> Registration No. 4300859 issued on March 12, 2013.

<sup>29</sup> Registration No. 4305318 issued on March 19, 2013.

<sup>30</sup> Registration No. 4329561 issued on the Supplemental Register on April 30, 2013.

<sup>31</sup> Registration No. 4653034 issued on December 9, 2014. No claim is made to the exclusive right to use the word “Gear” apart from the mark as shown.

<sup>32</sup> Registration No. 4452021 issued on December 17, 2013.

<sup>33</sup> Registration No. 4651640 issued on December 9, 2014.

<sup>34</sup> Registration No. 4533415 issued on May 20, 2014.

Although such third-party registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless may have probative value to the extent they are based on use in commerce and serve to suggest that the goods identified therein are of a kind which may emanate from a single source under a single mark., i.e., that the same entity may provide amplifiers and guitar pickups under the same mark. See *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009); and *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

We find that the third-party website evidence is competent to show that some merchants and manufacturers use a single mark to identify both Applicant's and Registrant's types of goods and that the third-party registrations suggest that pickups and amps may emanate from a common source. Accordingly, we must assume that the goods are complementary or otherwise-related products, and we find that Registrant's goods are related to those provided by Applicant for purposes of our determination herein.

This evidence shows that consumers searching for information about pickups and amps will likely see them commonly associated with each other, either by retailer or by brand. Hence, based upon widespread industry practice, customers would be likely to assume, upon encountering these complementary products under such similar marks, that the goods originate from the same source. Specifically, a consumer acquainted with the **HAZE** amplifier who is looking for an electronic sound pickup for a guitar or bass is likely to believe the **PURPLE HAZE** pickup is a brand or product extension from the same source that offers the Marshall **HAZE**

amplifier. This critical *du Pont* factor favors a finding of likelihood of confusion herein.

***C. Channels of trade and conditions of sale***

In many of the websites placed into the record by the Trademark Examining Attorney, the amplifiers are displayed on different pages than are the electronic sound pickup for guitars and basses. Additionally, as pointed out by Applicant, pickups and amps are presumably located in different sections of most brick-and-mortar music stores. However, given what we have seen of industry practice, prospective consumers will be accustomed to seeing an array of guitar parts, accessories and auxiliary components like amplifiers offered in these sites under a single brand, such as **Fender, Roland** or **EVH**.

In its brief, Applicant argues that “[m]usicians are sophisticated consumers to the extent that they understand the tools of their trade.” The record shows that Applicant’s goods retail for more than three-hundred dollars. However, Applicant has not offered evidence about the sophistication of its customers, and its identification of goods is not limited to a particular type of consumer or price point. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014). Hence, we presume that these goods will be sold to ordinary consumers exercising an average level of care. To the extent we were to conclude based solely upon the price points of Applicant’s pickups that the musicians comprising its customer base may be fairly sophisticated, we note that even careful purchasers can be confused as to source when presented with highly similar marks used on related and/or complementary goods. *See In re Research*,

*Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (citing *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) (“Human memories even of discriminating purchasers ... are not infallible.”)).

These *du Pont* factors also support a finding of likelihood of confusion.

***D. Effect of purported consent agreement***

Evidently in response to a request from Applicant, on September 18, 2014, Jonathan Ellery, Managing Director of Marshall Amplification plc, the owner of the cited HAZE registration, sent Applicant a “consent to use letter,” which was then forwarded to the Office on September 23, 2014. This letter reads as follows:

This consent to use serves as formal confirmation that Marshall permits Flying Mojo, LLC, 578 Washington Blvd, Suite 105, Marina Del Rey, California 90292, U.S.A (“Flying Mojo”) incorporating Haze (on a non-exclusive basis under the terms contained herein.) as part of the brand name for Flying Mojo manufactured guitar pickups (“Pickups”).

It is expressly understood and agreed by Flying Mojo that it shall (at its own expense and liability) seek all necessary permissions in respect of any term, name or other brand name to accompany Haze, and that furthermore, any and all Marshall intellectual property, including, but not limited to, any Marshall product and/or any Marshall trade mark (including Haze), shall remain the sole property of Marshall.

Although Applicant argues that this letter constitutes Registrant’s consent to the registration of Applicant’s proposed mark, the Trademark Examining Attorney has rejected this argument. We agree that this is not sufficient to overcome the statutory refusal grounded in likelihood of confusion.

This alleged “consent to use,” by its own terms, does not provide Registrant’s consent to Applicant’s *registration* of its claimed mark. Instead, Registrant consents to Applicant’s non-exclusive inclusion of the word “Haze” into its

composite mark for guitar pickups. In addition, the second paragraph of this “agreement” suggests that Applicant needs to seek additional consent from Registrant for an action such as registration.

We recognize that our primary reviewing court has repeatedly indicated that consent agreements should be given great weight, and that we should not substitute our judgment about likelihood of confusion for the judgment of the real parties in interest. However, this case is an outlier. This “naked consent” fails to set forth the reasons why Registrant believes there is no likelihood of confusion and does not describe any arrangements undertaken by Applicant and Registrant to avoid confusion among members of the relevant public. *See In re Mastic*, 829 F.2d 1114, 4 USPQ2d 1292, 1295-96 (Fed. Cir. 1987); *In re Permagrain Prods., Inc.*, 223 USPQ 147, 149 (TTAB 1984). Without additional factors to support the conclusion that confusion is unlikely, this naked agreement is accorded little weight inasmuch as it does not constitute a proper and credible consent agreement between the parties. *See In re du Pont*, 177 USPQ at 568; *see also In re Four Seasons Hotels Ltd.*, 987 F.2d 1565, 26 USPQ2d 1071 (Fed. Cir. 1993); *In re N.A.D. Inc.*, 754 F.2d 996, 224 USPQ 969 (Fed. Cir. 1985).

Accordingly, this is a neutral *du Pont* factor in our final determination.

#### ***E. Conclusion on Likelihood of Confusion***

When comparing the involved marks in their entireties, we find that they are similar as to sound and appearance, create similar connotations and convey quite similar overall commercial impressions. The goods are complementary products that will be sold through the same channels of trade to the same classes of

purchasers. Despite Applicant's attempt to secure Registrant's consent to Applicant's use of Applicant's claimed mark, we find the naked consent to be insufficient (and on its face, somewhat contradictory) to overcome the statutory bar to registration herein. Hence, after considering all of the applicable *du Pont* factors, we find that Applicant's mark, **PURPLE HAZE** for "electronic sound pickup for guitars and basses" is likely to cause confusion with the cited mark, **HAZE** for "sound amplifiers."

**Decision:** The refusal to register Applicant's **PURPLE HAZE** mark under Section 2(d) of the Lanham Act is hereby affirmed.