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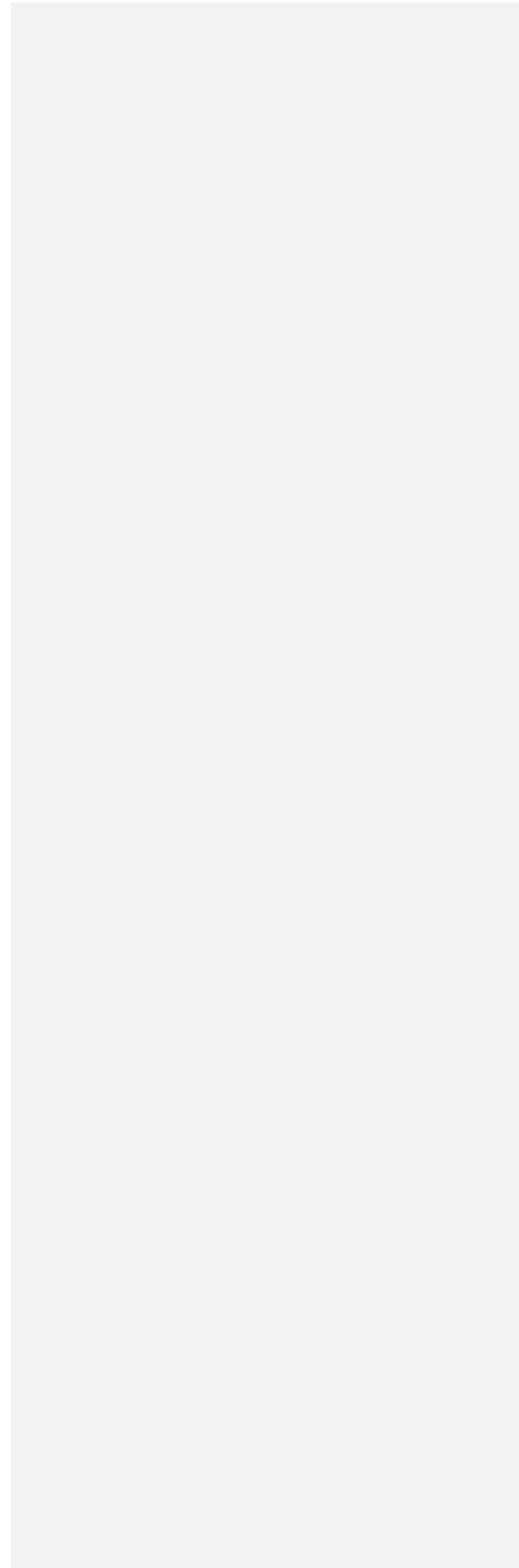
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Subject: U.S. TRADEMARK APPLICATION NO. 86471501 - HAYDEN PRODUCTIONS - N/A - EXAMINER BRIEF

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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 86471501

MARK: HAYDEN PRODUCTIONS



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GENERAL TRADEMARK INFORMATION:

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

TTAB INFORMATION:

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

APPLICANT: Hayden Productions, LLC

CORRESPONDENT'S REFERENCE/DOCKET NO:

N/A

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EXAMINING ATTORNEY'S APPEAL BRIEF

INTRODUCTION

Applicant has appealed the trademark examining attorney's final refusal to register the mark HAYDEN PRODUCTIONS (Application Serial No. 86471501), for, as amended "Entertainment services in the nature of arranging social entertainment events; Entertainment services in the nature of hosting social entertainment events; Entertainment services in the nature of live visual and audio performances

by World Class Performing Artists, Corporate Professionals, LED, Circus performers, Living Decor, Hologram, Projection and 3D mapping along with models, dancers, magicians, Dj's, staging, and fire performers; Entertainment services in the nature of organizing social entertainment events”.

Registration is refused because applicant’s mark is likely to be confused with the mark HAYDENFILMS.COM with a design (Registration No. 3515473) for “Entertainment services, namely, organizing and conducting online and live film festivals and exhibitions; Providing on-line information regarding films, and providing information on film industry events in the nature of film festivals, and exhibiting non-downloadable films via a global computer network; Planning and conducting live award shows for the purpose of providing recognition by the way of live awards to demonstrate excellence in the field of films; Planning and conducting film screening events in the nature of planning and conducting film festivals that screen contemporary movies, documentaries and short films; Planning and conducting cultural events, exhibitions, conferences and panel discussions in the fields of art, literature, music, and cinema”.

ISSUE

The sole issue herein is whether applicant’s mark HAYDEN PRODUCTIONS, used in connection with the identified services, presents a likelihood of confusion with the registered mark HAYDENFILMS.COM with a design (Registration No. 3515473) under Trademark Act Section 2(d).

PROCEDURAL HISTORY

Applicant applied to register the mark HAYDEN PRODUCTIONS under Section 1(a) of the Trademark Act for use in commerce in connection with “Entertainment services in the nature of arranging social entertainment events; Entertainment services in the nature of hosting social entertainment events; Entertainment services in the nature of live visual and audio performances by World Class Performing Artists, Corporate Professionals, LED, Circus performers, Living Decor, Hologram,

Projection and 3D mapping along with models, dancers, magicians, Dj's, plexiglass staging, and fire performers; Entertainment services in the nature of organizing social entertainment events".

In Office action dated March 26, 2015, Applicant's mark was refused under Section 2(d) of the Trademark Act due to a likelihood of confusion with the following registered marks: HAYDEN 5 MEDIA (Registration No. 4001251) for "Entertainment and media services, namely, creating, developing, producing, and editing motion pictures, film and video productions, television programs, digital videos for the Internet, music videos, multi-media productions, sound recordings, digital video downloads and streaming videos, DVDs, photographic images, website designs, scripts, books, and written materials; distributing motion pictures, film and video productions, and television programs; operation of movie and television studios; operation of cameras, lighting, equipment for production purposes; operation of post-production facilities" and HAYDENFILMS.COM with a design (Registration No. 3515473) for "Entertainment services, namely, organizing and conducting online and live film festivals and exhibitions; Providing on-line information regarding films, and providing information on film industry events in the nature of film festivals, and exhibiting non-downloadable films via a global computer network; Planning and conducting live award shows for the purpose of providing recognition by the way of live awards to demonstrate excellence in the field of films; Planning and conducting film screening events in the nature of planning and conducting film festivals that screen contemporary movies, documentaries and short films; Planning and conducting cultural events, exhibitions, conferences and panel discussions in the fields of art, literature, music, and cinema".

In response dated August 4, 2015, applicant argued against the Section 2(d) refusals. Based on applicant's response, the Section 2(d) refusal based on Registration No. 4001251 was withdrawn.

Accordingly, in Office action dated August 26, 2015, the Section 2(d) refusal was made final with respect to HAYDENFILMS.COM with a design (Registration No. 3515473).

Thereafter, the Examining Attorney issued a new non-final Office action dated September 28, 2015 requiring an amendment to the Identification of Services pursuant to acceptance of a Letter of Protest received in connection with the application. Applicant filed a Response dated October 15, 2015 which satisfied the requirements set forth in the Letter of Protest. Finally, the Examining Attorney maintained the Final Section 2(d) refusal in Office action dated November 6, 2015. Applicant has now appealed the examining attorney's final refusal by maintaining that the Section 2(d) refusal should be withdrawn. The Examining Attorney disagrees and requests that the refusal be affirmed.

LEGAL STANDARD

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely a potential consumer would be confused, mistaken, or deceived as to the source of the goods and/or services of the applicant and registrant. See 15 U.S.C. §1052(d). A determination of likelihood of confusion under Section 2(d) is made on a case-by case basis and the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973) aid in this determination. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1349, 98 USPQ2d 1253, 1256 (Fed. Cir. 2011) (citing *On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1085, 56 USPQ2d 1471, 1474 (Fed. Cir. 2000)). Not all the *du Pont* factors, however, are necessarily relevant or of equal weight, and any one of the factors may control in a given case, depending upon the evidence of record. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d at 1355, 98 USPQ2d at 1260; *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); see *In re E. I. du Pont de Nemours & Co.*, 476 F.2d at 1361-62, 177 USPQ at 567.

In this case, the following factors are the most relevant: similarity of the marks, similarity and nature of the goods and/or services, and similarity of the trade channels of the goods and/or services.

See *In re Viterra Inc.*, 671 F.3d 1358, 1361-62, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1595-96 (TTAB 1999); TMEP §§1207.01 *et seq.*

ARGUMENTS

APPLICANT'S MARK PRESENTS A LIKELIHOOD OF CONFUSION WITH THE REGISTERED MARK BECAUSE BOTH MARKS CONVEY A SIMILAR COMMERCIAL IMPRESSION AND ARE USED IN CONNECTION WITH ENCOMPASSING AND RELATED SERVICES

Applicant's and Registrant's Marks are Similar in Sound, Appearance and Commercial Impression

The applicant's mark is HAYDEN PRODUCTIONS in standard characters. The registrant's mark is HAYDENFILMS.COM with a design (Registration No. 3515473).

Marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F. 3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)); TMEP §1207.01(b)-(b)(v). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007)); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988)); TMEP §1207.01(b).

When comparing marks, the test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods and/or services offered under the respective marks is likely to result. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 1053, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016) (quoting *Coach Servs., Inc. v. Truimph Learning LLC*, 668 F.3d 1356, 1368, 101 USPQ2d 1713,

1721 (Fed. Cir. 2012)); TMEP §1207.01(b). The proper focus is on the recollection of the average purchaser, who retains a general rather than specific impression of trademarks. *In re Bay State Brewing Co.*, 117 USPQ2d at 1960 (citing *Spoons Rests., Inc. v. Morrison, Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd per curiam*, 972 F.2d 1353 (Fed. Cir. 1992)); *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1353 (TTAB 2015) (citing *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1430 (TTAB 2013)); TMEP §1207.01(b).

In this case, the marks share the dominant, first term, "HAYDEN". Although marks are compared in their entireties, one feature of a mark may be more significant or dominant in creating a commercial impression. See *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985); TMEP §1207.01(b)(viii), (c)(ii). Greater weight is often given to this dominant feature when determining whether marks are confusingly similar. See *In re Nat'l Data Corp.*, 753 F.2d at 1058, 224 USPQ at 751.

The additional term "PRODUCTIONS", which has been disclaimed in the applied-for mark does not obviate a finding of likelihood of confusion because although marks are compared in their entireties, one feature of a mark may be more significant or dominant in creating a commercial impression. See *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985); TMEP §1207.01(b)(viii), (c)(ii). Matter that is descriptive of or generic for a party's goods and/or services is typically less significant or less dominant in relation to other wording in a mark. See *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1824-25 (TTAB 2015) (citing *In re Chatam Int'l Inc.*, 380 F.3d 1340, 1342-43, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004)). Furthermore, disclaimed matter that is descriptive of or generic for a party's goods and/or services is typically less significant or less dominant when comparing marks. See *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Nat'l Data Corp.*, 753 F.2d at 1060, 224 USPQ at 752; TMEP §1207.01(b)(viii), (c)(ii).

The evidence of record shows that the word “FILMS” in the registered mark is merely descriptive of or generic for registrant’s services pertaining to *films*, as evidenced by the registrant’s identification of services.¹ Furthermore, the non-source-identifying generic top-level domain (gTLD) “.com” merely indicates an Internet address for use by commercial, for-profit organizations. *See, e.g., In re 1800Mattress.com IP LLC*, 586 F.3d 1359, 1364, 92 USPQ2d 1682, 1685 (Fed. Cir. 2009); *In re Hotels.com, L.P.*, 573 F.3d 1300, 1301, 1304, 91 USPQ2d 1532, 1533, 1535 (Fed. Cir. 2009); *In re Oppedahl & Larsen LLP*, 373 F.3d 1171, 1175-77, 71 USPQ2d 1370, 1373-74 (Fed. Cir. 2004); *see also* TMEP §§1209.03(m), 1215.01.

Thus, the words “PRODUCTIONS” and “FILMS.COM” are less significant in terms of affecting the marks’ commercial impressions, and render the term “HAYDEN” the more dominant element of the marks.

Finally, the design element in the registered mark does not so differentiate the marks herein as to overcome a likelihood of confusion because although marks must be compared in their entireties, the word portion generally may be the dominant and most significant feature of a mark because consumers will request the goods and/or services using the wording. *See In re Viterra Inc.*, 671 F.3d 1358, 1362, 1366, 101 USPQ2d 1905, 1908, 1911 (Fed. Cir. 2012); *In re Davia*, 110 USPQ2d 1810, 1813 (TTAB 2014). For this reason, greater weight is often given to the word portion of marks when determining whether marks are confusingly similar. *Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1431 (TTAB 2013) (citing *In re Dakin’s Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999)); TMEP §1207.01(c)(ii).

The Marks Convey a Similar Commercial Impression that Production and Film/Cultural Entertainment Event Services Are Being Provided Under the Name HAYDEN

¹ Office action, November 6, 2015 at 60

The examining attorney disagrees with applicant's contention that the marks convey distinct commercial impressions. Even when considering the marks in their entirety, they convey a similar commercial impression in the context of the encompassing and related services therein. Applicant argues that its proposed mark HAYDEN PRODUCTIONS forms the impression of a "general production company under the name of HAYDEN without specific reference to what is being produced", while the registrant's mark, HAYDENFILMS.COM creates a different commercial impression "...of a film company under the name of HAYDEN specifically identifying the type of goods or services used in connection with the trademark...".² This is unpersuasive because the use of HAYDEN PRODUCTIONS for production entertainment event services with HAYDENFILMS.COM for film/cultural event services presents a likelihood of confusion *as to the source of the services* because both marks contain the name HAYDEN followed by descriptive and/or non-source identifying language in connection with encompassing and related production and film/cultural event entertainment services. Thus, the marks convey a similar commercial impression, namely, that production event and film event services are being provided under the name HAYDEN. Marks must be compared in their entireties and should not be dissected; however, a trademark examining attorney may weigh the individual components of a mark to determine its overall commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1322, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) ("[Regarding the issue of confusion,] there is nothing improper in stating that . . . more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.") (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985)).

Applicant's further argument that the pictorial element in the registered mark further distinguishes the marks herein is unpersuasive.³ As previously discussed, the word portion is often

² Applicant's Appeal Brief at 9

³ *Id.*

considered the dominant feature and is accorded greater weight in determining whether marks are confusingly similar, even where the word portion has been disclaimed. *In re Viterra Inc.*, 671 F.3d at 1366, 101 USPQ2d at 1911 (Fed. Cir. 2012) (citing *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1570-71, 218 USPQ2d 390, 395 (Fed. Cir. 1983)).

Finally, applicant's contention that the common element of the two marks is "weak", namely, generic, descriptive or highly suggestive of the services is inapplicable herein. Applicant argues and sets forth case law regarding marks that share some type of descriptive wording and were thus were found not likely to cause confusion. The Court of Appeals for the Federal Circuit and the Trademark Trial and Appeal Board have recognized that merely descriptive and weak designations may be entitled to a narrower scope of protection than an entirely arbitrary or coined word. *See Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1338-39, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015); *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772*, 396 F.3d 1369, 1373, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005); *Giersch v. Scripps Networks, Inc.*, 90 USPQ2d 1020, 1026 (TTAB 2009) ; *In re Box Solutions Corp.*, 79 USPQ2d 1953, 1957-58 (TTAB 2006); *In re Cent. Soya Co.*, 220 USPQ 914, 916 (TTAB 1984).

However, in this case, the marks do not have overlapping "weak" descriptive wording. Rather, the marks share the term HAYDEN, which has the look and feel of a surname, as corroborated by the applicant.⁴ There is no evidence to suggest that this word is in any way generic, descriptive or even highly suggestive of the services herein. Nonetheless, assuming applicant's argument were relevant here, it would be unpersuasive because even a weak mark is entitled to protection against the registration of a similar mark for closely related goods or services. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 1401 182 USPQ 108, 109 (C.C.P.A. 1974).

⁴ Applicant's Appeal Brief at 12

Accordingly, with the dominant feature of both marks being the first term HAYDEN, followed by the descriptive wording "PRODUCTION" and "FILMS.COM" for production and film/cultural event entertainment services, it follows that the marks convey a similar commercial impression. Particularly, the marks convey that production event and film/cultural event entertainment services are both being provided under the name HAYDEN. Therefore, when considered as a whole, the marks are confusingly similar.

The Services are Related for Likelihood of Confusion Purposes

The Section 2(d) refusal should be affirmed because the parties' services are legally related. The services of the applicant encompass those of the registrant, and the identifications set forth in the application and registrations denote the same types of service, namely, entertainment services in the nature of event organization. In fact, applicant specifically concedes that its services are related to those of the registrant.⁵

The applicant's services, as amended, are identified as "Entertainment services in the nature of arranging social entertainment events; Entertainment services in the nature of hosting social entertainment events; Entertainment services in the nature of live visual and audio performances by World Class Performing Artists, Corporate Professionals, LED, Circus performers, Living Decor, Hologram, Projection and 3D mapping along with models, dancers, magicians, Dj's, staging, and fire performers; Entertainment services in the nature of organizing social entertainment events" The registrant's services are identified as "Entertainment services, namely, organizing and conducting online and live film festivals and exhibitions; Providing on-line information regarding films, and providing information on film industry events in the nature of film festivals, and exhibiting non-downloadable films via a global computer network; Planning and conducting live award shows for the purpose of providing recognition

⁵ Response to Office Action, August 4, 2015 at 7

by the way of live awards to demonstrate excellence in the field of films; Planning and conducting film screening events in the nature of planning and conducting film festivals that screen contemporary movies, documentaries and short films; Planning and conducting cultural events, exhibitions, conferences and panel discussions in the fields of art, literature, music, and cinema.”

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)).

Absent restrictions in an application and/or registration, the identified goods and/or services are “presumed to 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)). Additionally, unrestricted and broad identifications are presumed to encompass all goods and/or services of the type described. *See In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (citing *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992).

In this case, the relevant portion of the identification set forth in the application has no restrictions as to nature, type, channels of trade, or classes of purchasers. Therefore, it is presumed that these services travel in all normal channels of trade, and are available to the same class of purchasers. Further, the application uses broad wording to describe the relevant services and this wording is presumed to encompass all services of the type described, including those in the registrant’s more narrow identification. In particular, applicant’s “Entertainment services in the nature of arranging social entertainment events; Entertainment services in the nature of hosting social entertainment events;

entertainment services in the nature of organizing social entertainment events” are so broad as to encompass the registrant’s more narrowly specific entertainment services in the nature of planning and organizing events related to film/culture. Thus, both applicant and registrant provide the same type of entertainment services, that is, the arrangement and organization of entertainment events, with the applicant providing more narrowly described film and cultural-related event organization. Therefore, the applicant’s services encompass those of the registrant’s.

Furthermore, the evidence of record consists of websites from various film and entertainment service providers that offer applicant’s entertainment services in the nature of arranging, hosting or organizing entertainment events, along with the organization of film-related and cultural events.⁶ For example, the evidence demonstrates that businesses such as Harkins and National Geographic provide social entertainment events in the nature of birthday parties or all access tours, along with film festivals and screenings. This evidence establishes that the same entity commonly provides the relevant services and markets the services under the same mark:

- Alamo Drafthouse:
 - Entertainment Events: http://drafhouse.com/series/venue-rental-just-for-fun/northern_virginia
 - Film Events: http://drafhouse.com/series/venue-rental-film-events/northern_virginia
- Blue Lotus Insights:
 - Entertainment and Film Events: <http://bluelotusinsights.com/event-services/#tab2>
- Harkins:
 - Film Festivals: <http://www.harkinstheatres.com/filmFestival.aspx>
 - Entertainment Events: <http://www.harkinstheatres.com/privateEvents.aspx>
- National Geographic:
 - Film Festival: <http://events.nationalgeographic.com/films/2015/01/26/banff-2015-1/>

⁶ Office Action, November 6, 2015 at 2-13, 21-38, 40-59

- Special Events: http://events.nationalgeographic.com/special-events/?source=events_specialevents
- Paramount Studios:
 - Film Events: <http://www.paramountstudios.com/special-events-main.html>
 - Entertainment Events: <http://www.paramountstudios.com/special-events/award-shows.html>
- The Film Festival Group
 - Special Events and Film events: <http://www.filmfestivalgroup.com/pages/special.html>
- 1540 Productions
 - Film Events: <http://1540productions.com/movie-premieres-los-angeles/>
 - Entertainment Events: <http://1540productions.com/entertainment-events-los-angeles/>
- Elan Event Studio:
 - Film Events: <http://www.elaneventstudio.com/about.php>
 - Entertainment Events: <http://www.elaneventstudio.com/social.php>

Therefore, applicant's and registrant's 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). Thus, the widespread use of the Internet in the United

States suggests that Internet evidence may be probative of public perception in trademark examination.

Applicant's and Registrant's Respective Services Are Not Readily Distinguishable in a Likelihood of Confusion Analysis

Applicant argues that the identified services differ and there is no overlap between the two, where applicant's services "...concern the arrangement of social events" and the registrant's services "...are specifically and narrowly defined in the film industry".⁷ This analysis appears to misunderstand the standard of analysis herein. It is not necessary to have overlap between the identified services in order to find for the refusal herein, because the goods and/or services of the parties need not be identical or even competitive to find a likelihood of confusion. See *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) ("[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods."); TMEP §1207.01(a)(i). The respective goods and/or services need only be "related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); TMEP §1207.01(a)(i).

As evidenced above, the services of the applicant and registrant are related and encompassing, where both parties provide entertainment services in the nature of event planning and organization.

⁷ Applicant's Brief at 14

Applicant's arrangement, hosting and organizing of social entertainment events encompasses the registrant's more specific entertainment event organization for various film and cultural events. Furthermore, the evidence of record demonstrates that businesses provide entertainment event organization services along with film and cultural event organization. Therefore, the services are related for likelihood of confusion purposes.

The Services are Presumed to Operate in all Normal Channels of Trade and Reach all Classes of Purchasers

Applicant's arguments that the services purportedly arise in different trade channels and are marketed differently is not controlling to this analysis.⁸ As previously discussed, the presumption under Trademark Act Section 7(b), 15 U.S.C. §1057(b), is that the registrant is the owner of the mark and that use of the mark extends to all goods and/or services identified in the registration. The presumption also implies that the registrant operates in all normal channels of trade and reaches all classes of purchasers of the identified goods and/or services. *In re Melville Corp.*, 18 USPQ2d 1386, 1389 (TTAB 1991); *McDonald's Corp. v. McKinley*, 13 USPQ2d 1895, 1899 (TTAB 1989); *RE/MAX of Am., Inc. v. Realty Mart, Inc.*, 207 USPQ 960, 964-65 (TTAB 1980); see TMEP §1207.01(a)(iii).

Purchaser Sophistication does not Obviate Source Confusion

Applicant's contention that consumers for the applied-for services are sophisticated enough to be able to distinguish between the marks and the services is unpersuasive. The fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. TMEP §1207.01(d)(vii); see, e.g., *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d. 1317, 1325, 110

⁸ Applicant's Brief at 15

USPQ2d 1157, 1163-64 (Fed. Cir. 2014); *Top Tobacco LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011).

Absence of Actual Confusion is not Probative to the Analysis Herein

Finally, applicant's argument that there is no evidence of record as to actual confusion in the marketplace between the marks herein is not dispositive in the instant analysis. The test under Trademark Act Section 2(d) is whether there is a likelihood of confusion. It is not necessary to show actual confusion to establish a likelihood of confusion. *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (citing *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1571, 218 USPQ 390, 396 (Fed. Cir. 1983)); TMEP §1207.01(d)(ii). The Trademark Trial and Appeal Board stated as follows:

[A]pplicant's assertion that it is unaware of any actual confusion occurring as a result of the contemporaneous use of the marks of applicant and registrant is of little probative value in an ex parte proceeding such as this where we have no evidence pertaining to the nature and extent of the use by applicant and registrant (and thus cannot ascertain whether there has been ample opportunity for confusion to arise, if it were going to); and the registrant has no chance to be heard from (at least in the absence of a consent agreement, which applicant has not submitted in this case).

In re Kangaroos U.S.A., 223 USPQ 1025, 1026-27 (TTAB 1984).

CONCLUSION

The foregoing demonstrates that applicant's mark, HAYDEN PRODUCTIONS in standard characters is likely to cause confusion with the registered mark HAYDENFILMS.COM with a design. Both marks convey a similar commercial impression, that is, of production and film services being provided

under the name HAYDEN. Furthermore, both applicant's and registrant's marks are used in connection with encompassing and related entertainment event services, specifically, the arrangement, hosting and organizing of social entertainment, film and/or cultural events. Therefore, the examining attorney requests that the refusal to register under Trademark Act Section 2(d), 15 U.S.C. §1052(d), be affirmed.

Respectfully submitted,

Commented [KSD1]:

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