Mailed: December 16, 2009

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Calvin Broadus
v.
Kristyn Kelley Allen dba Passive Devices[1]

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Opposition No. 91176834

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Michael Chiappetta of Fross Zelnick Lehrman & Zissu, P.C. for Calvin Broadus.

Kristyn Kelley Allen dba Passive Devices, pro se.[2]

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Before Holtzman, Cataldo and Ritchie, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

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[1] Applicant was originally identified in the application as a California partnership composed of Kristyn Kelley Heath and her father, Allen Heath. The application was subsequently amended to identify applicant as an individual doing business as a sole proprietorship under the name Passive Devices. During the course of this proceeding, however, applicant began referring to her business name as Passive Devices, LLC, and Allen Heath provided testimony for applicant as chief operations officer and vice president of business development for "Passive Devices, LLC." As there are no documents reflecting a change of applicant's business name or the nature of applicant's entity, the opposition will proceed in the name of the original applicant. However, for ease of reference, opposer has referred to applicant by the pronoun "it" rather than "she" and we will do so as well.

[2] Applicant was represented through trial by Jon L. Dumon, Esq. On March 3, 2009, prior to the time for filing briefs on the case, Allen Heath filed a document indicating that applicant intended to represent itself in this matter.

Kristyn Kelley Allen dba Passive Devices (applicant) has filed an application to register the mark SNOOPTUNES in standard characters for "wireless transceivers for distributing audio, visual, and textual computer files over computer networks including music, books, plays, pamphlets, brochures, newsletters, journals, magazines on the subjects of sporting and cultural activities and a wide variety of topics of general interests" in Class 9.[3]

Calvin Broadus (opposer) filed a notice of opposition on the ground of priority and likelihood of confusion. Opposer alleges that applicant's mark SNOOPTUNES, when applied to applicant's goods, so resembles opposer's previously used and registered marks SNOOP DOGGY DOGG and SNOOP DOGG, as well as his previously used mark SNOOP and SNOOP-formative marks in connection with entertainment-related goods and services as to be likely to cause confusion. Opposer has pleaded ownership of Registration No. 2278013 for the typed mark SNOOP DOGGY DOGG for a "series of musical sound recordings" in Class 9; and Registration No. 2697128 for the mark SNOOP DOGG for "musical sound and video recordings" in Class 9, "t-shirts and caps" in Class 25 and "entertainment services in the nature of live musical performances and music-based entertainment" in Class 41.

[3] Application Serial No. 78803956, filed January 31, 2006, based on an allegation of first use and first use in commerce on January 17, 2006.

Applicant, in its answer, has denied the salient allegations of the notice of opposition.[4]

The record includes the pleadings and the file of the involved application. In addition, opposer submitted the testimony, with exhibits, of Constance Schwartz, opposer's manager; and notices of reliance on evidence including status and title copies of opposer's pleaded registrations, TARR printouts of third-party registrations, dictionary definitions of "tune," and applicant's responses to opposer's interrogatories. Opposer also submitted, by stipulation of the parties, the declaration and supplemental declaration of Mario Ortiz, with exhibits, including Lexis/Nexis articles and Internet printouts from applicant's website and third-party websites,[5] and the prosecution histories for various oppositions filed by opposer against third-party applicants.

Applicant submitted the testimony, with exhibits, of Allen Heath, chief operations officer and vice president of business development for "Passive Devices, LLC"; a notice of reliance on materials including dictionary definitions of "snoop" and "tune," and opposer's responses to applicant's interrogatories and his

[4] The answer also includes arguments on the merits of opposer's claim. To the extent such arguments have not been raised in applicant's brief or otherwise supported by appropriate evidence, they are considered waived. We hasten to add, however, that even if we had considered these arguments, they would not change the outcome of this case.

[5] This evidence, as well as the Internet evidence submitted as part of applicant's record, is considered only for what it shows on its face and not for the truth of any facts stated therein except to the extent

written responses to applicant's document requests. Also, by stipulation of the parties, applicant submitted the declarations and supplemental declarations, with exhibits, of Allen Heath and Jon L. Dumon in support of Internet evidence.

Both parties have filed briefs.

STANDING AND PRIORITY

Opposer has established that he is the owner of the following valid and subsisting registrations:

> Registration No. 2278013 for the typed mark SNOOP DOGGY DOGG for "series of musical sound recordings" in Class 9;[6] and
>
> Registration No. 2697128 for the typed mark SNOOP DOGG for "series of musical sound and video recordings" in Class 9; "T-shirts and caps" in Class 25; and "entertainment services in the nature of live musical performances and music-based entertainment" in Class 41.[7]

Thus, opposer's standing has been established, and his priority with respect to the registered marks for the goods and services identified in those registrations is not in issue. King Candy Co., Inc. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

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that a witness with personal knowledge has testified as to the truth of such facts. See TBMP §704.08 (2d ed. rev. 2004).

[6] Issued September 14, 1999; renewed. The registration states that "Calvin Broadus is a living individual DBA 'SNOOP DOGGY DOGG' whose consent is of record."

[7] Issued March 18, 2003. The registration states, "The wording 'SNOOP DOGG' is a performing name that identifies a living individual whose consent is of record." We take judicial notice of the current status of this registration and specifically that a Section 8 affidavit has been accepted; and that a Section 15 affidavit was acknowledged as to all goods except "caps." See TBMP §704.03(b)(1)(A) (2d ed. rev. 2004).

In addition, opposer has established through the testimony of Ms. Schwartz and the supporting documentation, common law rights in the marks and names SNOOP DOGG, SNOOP DOGGY DOGG and SNOOP prior to any date on which applicant is entitled to rely.[8] As the record shows, and there is no dispute, opposer has used the marks SNOOP DOGGY DOGG since at least 1993 and SNOOP DOGG since at least 1998 in connection with the performance and recording of music, and that at least the mark SNOOP DOGG has been in continuous use since that time.[9] The record also shows that opposer has acquired proprietary rights in the nickname Snoop for music entertainment based upon extensive public or media usage of that shorthand name to refer to opposer since at least 2003. See generally Schwartz Test., Exh. 7; and Ortiz Decl., Exh. B. Nearly every one of the dozens of articles of record about Snoop Dogg also includes a reference to him by the shorthand name Snoop. The following examples are representative:

[8] The January 31, 2006 filing date of the application is the earliest date on which applicant is entitled to rely for purposes of priority as to common law rights. Although applicant asserted January 17, 2006 as the date of first use of the mark, applicant admitted that commercial use of the mark did not actually begin until October 2006. Heath Test., pp. 13, 63. When asked during cross-examination whether applicant had used the mark publicly in any way in January 2006, Mr. Heath responded, "No, we hadn't." However, the question of non-use of the mark as of the filing date of the application is not an issue in this case.

[9] Opposer states in his brief that with the release of his third album (in 1998) opposer "dropped the term 'Doggy' from his name and mark, and became known simply as SNOOP DOGG, the name and mark that [have] appeared on all of his recordings and other goods and services over the last 10 years." Brief, p. 5; Schwartz Test., p. 16.

HEADLINE: Snoop nation: He raps. He acts. He speaks in riddles. Now this Dogg is taking over televizzle.
BODY:
NEW LINE CINEMA
... But Snoop, who recently appeared in Dallas on a bill with the Red Hot Chili Peppers, is about more than music and TV -- the dude's long fingers have stretched into fashion, movies, radio, advertising and even language -- to the point where, Entertainment Weekly reports, a British judge has ruled that Snoop's 'shizzle my nizzle' is neither offensive nor English."
MUSIC
Snoop has recorded, produced and appeared on so many albums that we've lost count. ...
Star-Telegram (Fort Worth, Texas) from DFW.com (June 19, 2003); Ortiz Decl., Exh. B.

Iacocca teams with Snoop Dogg
Chrysler spokeswoman Suraya DaSante told the *New York Times*, "Snoop is a hip-hop icon, a lot of people know him and recognize him, so it's a fun complement to Lee."
money.cnn.com (August 5, 2005); Schwartz Test., Exh. 13, p. 306.

Snoop has proven he can spread himself thin and still win. But like comic book superheroes, super rapper Snoop has a sidekick to help him out.... ...
All of Worthington's business decisions reflect the Big Dogg's style. Case in point is the Snoop Dogg Board Co., which Worthington came up with after hearing Snoop tracks played repeatedly at last year's X Games.
The Boston Herald (November 8, 2005); Schwartz Test., Exh. 7; Ortiz Decl., Exh. B.

The Family Dogg
Mix home life and thug life, add big beats. Result: the best Snoop disc in years. ... Snoop has shown a lot more flexibility onscreen than on his records, where he tends to stay in his comfort zone....
Rolling Stone (March 2008); Schwartz Test., Exh. 7.

It is clear based on the nature of these references to Snoop and the general tenor of the articles that Snoop is a well recognized nickname for SNOOP DOGG, and that the public upon

hearing the name Snoop would immediately associate the nickname Snoop with opposer and his music.

Applicant argues that opposer presented no evidence of use of the "Snoop mark" in commerce.[10] Brief, p. 3. However, as stated by the Federal Circuit in National Cable Television Association Inc. v. American Cinema Editors Inc., 937 F.2d 1572, 19 USPQ2d 1424, 1428 (Fed. Cir. 1991):

> ...even without use directly by the claimant of the rights, the courts and the Board generally have recognized that abbreviations and nicknames of trademarks or names used *only* by the public give rise to protectable rights in the owners of the trade name or mark which the public *modified*. [footnote omitted.] Such public use by others inures to the claimant's benefit and, where this occurs, public use can reasonably be deemed use "by" that party in the sense of a use on its behalf.

See also Martahus v. Video Duplication Services Inc., 3 F3d 417, 27 USPQ2d 1846, 1853 n.9 (Fed. Cir. 1993) ("the public's adoption of 'VDS' to refer to Stock's company is enough to establish trade name and service mark use."); and American Stock Exch., Inc. v. American Express Co., 207 USPQ 356, 364 (TTAB 1980) (protectable property right in "AMEX").

[10] Applicant also argues, based on an article from the website citypaper.com, that the mark "Snoop" was first used in the entertainment industry by Felicia Pearson who plays the character "Snoop" on the HBO television show "The Wire." In that article, Ms. Pearson states that the nickname was given to her "long before the world ever heard of the rapper Snoop Doggy Dogg." Suppl. Heath Decl., Exh. G. This evidence is hearsay and of no probative value. In any event, the question of whether a third party has rights in the name prior to opposer is irrelevant.

Furthermore, applicant admitted that opposer is commonly known by the nickname Snoop. Heath Test., p. 80. There is no question that when used in the context of music, consumers understand the name Snoop to be a reference to SNOOP DOGG.

LIKELIHOOD OF CONFUSION

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, however, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods and/or services. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

For purposes of our analysis we will focus primarily on the mark and names SNOOP DOGG and Snoop inasmuch as the evidence of record for the most part relates to the use of these two names.

Fame of opposer's mark and name

We turn first to the factor regarding the fame of SNOOP DOGG mark and Snoop name because the fame of a mark "plays a dominant role in cases featuring a famous or strong mark." Kenner Parker Toys *v.* Rose Art Industries, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992). Our primary reviewing Court has made it clear that "[a] strong mark...casts a long shadow which competitors must avoid," and "[t]here is no excuse for even approaching the

well-known trademark of a competitor." Id., at 1456. See also Recot Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000).

The record clearly demonstrates that SNOOP DOGG is a strong and famous mark. We also find that the fame of this mark extends to the name Snoop, a long-used and well recognized shorthand name for SNOOP DOGG, and which in the context of music entertainment is essentially synonymous with SNOOP DOGG.

Opposer is a performing and recording artist in the rap and hip hop genre. He has performed under the name SNOOP DOGG professionally for over 10 years, and during that time, as we noted, he has been known as and frequently referred to by the public and the media simply as "Snoop." Opposer began using the name SNOOP DOGGY DOGG professionally in 1992 in collaboration with the rap artist Dr. Dre on the soundtrack for the movie *Deep Cover*. Opposer released his first solo album, *Doggystyle*, in 1993 and it featured SNOOP DOGGY DOGG on the front of the album cover. The album was certified quintuple-platinum in the United States, with sales exceeding 5.4 million copies,[11] and it was the first rap album to debut at number 1 on the Billboard charts. Id., p. 13, Exh. 7. Opposer's second album, *Tha Doggfather*, was released under the mark SNOOP DOGGY DOGG in 1996. This album

[11] A "platinum" album, as designated by the Recording Industry Association of America (RIAA), refers to the sale of over one million copies of the recording. Thus, "quintuple platinum" status means that over 5 million copies of the album were sold. A "gold" album is one that sells 500,000 copies. Schwartz Test., pp. 12-14.

reached nearly double platinum status with sales of 1.9 million copies. Opposer's third album, *Da Game Is To Be Sold Not To Be Told*, was the first to be recorded under the name and mark SNOOP DOGG. The album was released in 1998 and exceeded double platinum status at 2.8 million records. From 1993 to 2008, opposer released a total of nine albums, the last six of which were under the SNOOP DOGG mark. All but two of the nine albums earned platinum status or higher with total sales of approximately 18 million records.

Over the years, opposer has also collaborated with other artists of various music genres including Dr. Dre, Willie Nelson, Mariah Carey and the Pussycat Dolls. Schwartz Test., p. 55. More than 744 songs written by or featuring SNOOP DOGG are available for download on mp3 players at the amazon.com website; and 150 songs are available at the iTunes Store. Schwartz Test., p. 25, Exh. 6. In addition to recorded music, Snoop Dogg performs between 50 and 150 concerts per year. Schwartz Test., pp. 32-34, Exh. 2.

Opposer has expended approximately $3 million a year specifically on the advertising and promotion of his recordings. Id., p. 29. The recordings have been promoted through national television and radio advertising and all forms of print advertising as well as mobile and roadside billboards and online advertising, all prominently featuring the SNOOP DOGG mark.

Close to $1 billion has been spent in advertising and promoting the SNOOP DOGG brand and image over the past 16 years. Id.

Although the mark and name SNOOP DOGG is primarily associated with opposer's persona as a rap and hip hop artist, he clearly has broad appeal, and the evidence shows considerable mainstream exposure. Billed under the name Snoop Dogg, opposer has played significant character roles in at least two major films including *Training Day* (2001) and *Starsky and Hutch* (2004); and he has appeared in more than 100 television programs since 1993. He has made multiple guest appearances on a number of national talk shows, including four appearances on *Saturday Night Live*, 14 appearances on *The Tonight Show with Jay Leno* and five appearances on *Late Night With Conan O'Brien*. In addition, opposer produces and stars in his own TV show, *Snoop Dogg's Father Hood*, a highly rated program on the E! Entertainment network now in its second season.

Opposer's SNOOP DOGG mark and persona have been associated with a diverse range of products and services. His endorsements include Chrysler automobiles (appearing in a commercial with Lee Iacocca and giving his own version of Iacocca's pitch line "If you can find a better car, buy it," Snoop Dogg says, "If the ride is more fly, then you must buy.") (Schwartz Test., p. 48, Exh. 13); cell phones for T-Mobile and Nokia, XM Satellite Radio (marketing campaign featuring Snoop Dogg along with Ellen DeGeneres, Derek Jeter, David Bowie and Martina McBride to

showcase the diversity of programming) (Id., p. 47, Exh. 12); and Orbitz chewing gum (where fans can go to the Orbit Gum website and sign up and get a message from Snoop Dogg) (Id., p. 50, Exh 15). Opposer has also licensed his name and likeness for a clothing line, "Rich N Infamous by Snoop Dogg." In addition, in 2004, opposer established the Snoop Youth Football League sponsored by AMP'D Mobile, a broadband wireless service. This is a community sports program for inner-city youth which each year culminates in the "Snoop Bowl," a widely publicized event (in such publications as *Rolling Stone* and *USA Today*) which is held on the day of the Super Bowl in the city where the Super Bowl is being played. Id., Exh. 7.

Opposer has received substantial media attention over the years for his music and other ventures. He has been the subject of numerous cover stories, articles and interviews in national print publications such as, *Rolling Stone*, *Billboard, Maxim, Vibe and Entertainment Weekly*, as well as online publications such as usatoday.com and money.cnn.com. Opposer's search in the Lexis/Nexis news database during the past 5 years for articles mentioning "Snoop Dogg" at least 5 times retrieved more than 2000 results. Ortiz Decl., Exh. A. Applicant's own evidence shows that a search on the Google search engine for "Snoop Dogg" returned 22.2 million results. Heath Decl. ¶2, Exh. A.

Opposer's endorsement value and "crossover" appeal have been widely recognized by the media. For example, an article in *The Boston Herald* (July 18, 2008) states, "Don't look now, but Snoop Dogg has become pop culture's cross-over king" (Ortiz Decl., Exh B); an article from billboard.com (May 20, 2006) states that Snoop Dogg has been transformed "from gang member to Madison Avenue darling"; a cover story in *Billboard* print magazine (March 2008) referred to Snoop Dogg as a "lovable mainstream brand" (Schwartz Test., Exh. 7); and a cover story in *Rolling Stone* (December 14, 2006) entitled "At Home With America's Most Lovable Pimp" states "Snoop Dogg has survived gangsta rap, charmed Hollywood and won over soccer moms - he's a hip-hop family man who's evolved from the consummate thug to the ultimate mack." Heath Decl., Exh. D.

It is clear that SNOOP DOGG is a strong and famous mark and name in the music entertainment field, and that in view of the wide exposure of Snoop to the public as a nickname for SNOOP DOGG, that name is famous as well.[12] Indeed, applicant admits that SNOOP DOGG is famous, and that in the context of music Snoop is a recognized nickname for SNOOP DOGG. Heath Test., pp. 80-81.

[12] We also note that since 2001, opposer has instituted a number of proceedings before the Board against entities using what opposer believes to be conflicting marks, all of which were resolved in opposer's favor. This is not evidence of "a pattern of prosecutorial conduct" as applicant claims, but rather of opposer's efforts to protect his marks.

At the same time, however, applicant apparently disputes the strength or fame of the nickname Snoop, arguing that "the exclusive use of SNOOP is contrary to the evidence." Brief, p. 6. Applicant argues that there are four third-party registrations for marks containing "SNOOP" which applicant identifies in its brief as TOWNSNOOP, WATERSNOOP, SNOOP and SUPER SNOOP; and asserts third-party use of marks such as Snoopy, Snoop, Snoopstar and Sound Snooper. Id., pp. 5-6; Heath Test., Exh. 20 (App's Resp. to Interrog. Nos. 5-6). The relevant consideration under this *du Pont* factor is "the number and nature of similar marks in use on similar goods [or services]." See *du Pont*, supra at 567. Copies of these registrations have not been made of record and we have no information as to the goods and/or services for which the marks are registered. Furthermore, third-party registrations are not evidence of use of the marks shown therein, and applicant has not shown that these marks are actually in use. See Olde Tyme Foods Inc. v. Roundy's Inc., 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

In fact, as to the asserted third-party uses, other than the animated "Snoopy" character created by Charles Schultz, which is in an unrelated field, and the character "Snoop" on the HBO television show *The Wire*, for which there is no evidence of the extent of exposure of this name to the public, Mr. Heath stated that he was not aware of any other products or services that are

sold under a mark that includes the term "Snoop." Heath Test., pp. 81-82.

The factor of fame weighs heavily in opposer's favor.

Goods/Channels of trade/Conditions of purchase

In evaluating these *du Pont* factors we keep in mind that the question of likelihood of confusion is determined on the basis of the identification of goods set forth in the application and registration without limitations or restrictions as to the actual nature of the goods, their channels of trade and/or classes of purchasers that are not reflected therein. See J & J Snack Foods Corp. v. McDonald's Corp., 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); and Octocom Systems Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990).

We must also consider that because SNOOP DOGG and the nickname Snoop are strong and famous, they are "more likely than a weak mark to be remembered and more likely to be associated by the purchasing public with a greater breadth of goods or services." Tuxedo Monopoly, Inc. v. General Mills Fun Group, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981).

These factors all weigh in favor of finding a likelihood of confusion.

Similarity or dissimilarity of the goods

Opposer's goods as identified in his Registration No. 2697128 for SNOOP DOGG include musical recordings. Applicant's goods are identified as "wireless transceivers for distributing

audio, visual, and textual computer files over computer networks including music, books, plays, pamphlets, brochures, newsletters, journals, magazines on the subjects of sporting and cultural activities and a wide variety of topics of general interests."

Applicant's product is an electronic device that allows users to share music between portable playing devices such as the Apple iPod, Microsoft Zune and other mp3 players. Applicant states that it named this device "NoeStringAttached," and applicant claims that the mark SNOOPTUNES identifies the proprietary technology inside the NoeStringAttached device. As described by Mr. Heath the device "attaches to a portable music player and allows its users to share their music and other content with each other wirelessly." Heath Test., p. 82, Exh. 20 (App's Resp. to Interrog. No. 2). The most compatible product is the mp3 player, but it could also be used with any audio device that uses an earphone jack such as a CD player or even a cell phone if the appropriate jack is used. Heath Test., pp. 65, 68, 108. Applicant's product packaging explains how the device is used:

> NOE StringAttached
>
> Transmit and Receive music wirelessly between an unlimited number of friends.
>
> No More Sharing Earphones!
>
> Now you can share your music with an unlimited number of friends and they can share their music with you. NoeStringAttached eliminates the need to share earbuds or use earphone splitters....Just plug NoeStringAttached in line between the portable player and your earphones using

> the standard...jack. Select one of the 5 channels to transmit and your friends will be able to receive your transmission on the same channel wirelessly.

Id., p. 22; Exh 5.

Applicant argues that the device can transmit any form of audio content, including books on tape and podcasts, and not just music. Nevertheless, the principal purpose of the device is to transmit (via broadcast) music, and indeed, broadcasting music was applicant's original idea for the product. Id., pp. 11, 65-66, 98-99; Exhs. 5, 7 and 8. Moreover, the identification of goods specifically includes the transmission of music.

As to applicant's argument that the mark identifies the technology inside the NoeStringAttached device, we point out that the identification of goods is broad enough to include the device itself and not just the technology. Furthermore, the device is often referred to by applicant and by the media as SNOOPTUNES. For example, applicant's marketing handout describes "SnoopTunes" as "The first portable music player accessory that turns your IPOD, CD, MP3,...into a wireless transmitter and receiver...." Heath Test., Exh. 8. A screen shot from the website digg.com submitted by applicant states, "SnoopTunes: Zune-like Wireless Sharing on an iPod ... SnoopTunes is a small, bullet-vibrator-like device that was conceived by a 16-year girl. It plugs into your iPod and gives it wireless sharing capabilities, like the Zune." Suppl. Heath Decl., Exh. C. We also note as shown on the specimen submitted with the application, which is identified in

the application as a photograph of the goods, the mark SNOOPTUNES appears on the device itself, as shown below:

It is true that opposer's musical recordings and applicant's electronic device are distinctly different products. However, the question is not whether purchasers can differentiate the goods themselves but rather whether purchasers are likely to be confused as to the source of the goods, or as to affiliation, connection or sponsorship of the goods. See Hilson Research Inc. v. Society for Human Resource Management, 27 USPQ2d 1423, 1429 (TTAB 1993). Thus, it is not necessary that goods be similar or even competitive to support a finding of likelihood of confusion. It is sufficient if the goods are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the marks used thereon, give rise to the mistaken belief that they emanate from or are associated with the same source. See In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993). As stated by the Federal Circuit, "even 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. It is this sense of relatedness that matters in the likelihood of confusion analysis." *Recot*, supra at 1898.

Opposer has associated his SNOOP DOGG mark and identity with a variety of goods and services including consumer electronic products such as cell phones. As we noted, applicant's device can be used with cell phones. Also, opposer's songs are available for download as ringtones for cell phones, and at least one of opposer's songs *Drop It Like It's Hot* was a platinum-selling ringtone. Schwartz Test., p. 64. Further, applicant acknowledges, and the evidence shows, that other celebrities are associated with or endorse mp3 products. Heath Test., pp. 84-85. For example, Apple partnered with the rock group U2 to market the "U2 iPod," a special edition iPod bearing U2's name. Heath Test., pp. 84-85; Ortiz Suppl. Decl., Exh. A. Opposer himself has been in discussions concerning a possible license for Microsoft's Zune mp3 player which would bear his name and likeness and feature his music. Schwartz Test., pp. 61-62. Thus, the goods are related in the sense that consumers who encounter a mark similar to the famous mark and names SNOOP DOGG and Snoop on a device that allows music sharing between mp3 and other music players are likely to believe that opposer is now using or has licensed the use of his mark or name for those goods. See R.J. Reynolds Tobacco Co. v. R. Seelig & Hille, 201

USPQ 856, 860 (TTAB 1978) (considering evidence that opposer marketed a wide variety of goods and considered expansion into beverage area relevant to relatedness).

Channels of trade

Applicant's music sharing device and opposer's musical recordings would be encountered by the same consumers in at least some of the same channels of trade. We presume opposer's recordings are sold through all the normal channels of trade for such goods, and they are in fact available in such retail chains such as Best Buy and Wal-Mart.

Applicant's product is currently sold through its website snooptunes.com, through third-party websites such as bhphotovideo.com and at social networking websites such as myspace.com, and applicant wants to expand into other trade channels. Ideally, applicant would like to advertise where the iPod is advertised, such as *Rolling Stone* magazine, and other music-related publications, and to sell through national retail channels. Heath Test., pp. 70, 100. Considering that applicant's SNOOPTUNES device and mp3 players are complementary products, it is reasonable to assume both types of products would be sold in the same retail stores, such as Best Buy and Wal-Mart, that is, the same retail stores where opposer's recordings are sold. See Venture Out Properties LLC v. Wynn Resorts Holdings LLC, 81 USPQ2d 1887 (TTAB 2007).

Opposer's target consumer for his music is young teenagers to young adults. Schwartz Test., p. 57. Applicant targets the very same market. Opp's. Not. Rel., Exh. C (Resp. Interrog. No. 9.); Heath Test., pp. 31-32, 42. Applicant attempts to distinguish the classes of purchasers for the parties' goods arguing that its target market includes "fans of any and all genres of music." However, this group of consumers would of course include fans of rap and hip hop music. In fact, Mr. Heath stated that he wanted to acquire a celebrity rapper to promote the product. Heath Test., p. 42. Also, the record shows specific promotion of the device with hip hop or rap music. For example, applicant's profile on the MOG social website (mog.com) lists 13 "Artists You Should Know About" which includes Snoop Dogg as well as other rap and hip hop artists such as "Jay-Z" and "Diddy" (Id., pp. 74, 77; Exhs. 3, 19); and applicant's MySpace page features the hip hop music of Kanye West. Id., Exhs. 2-3; Ortiz Decl., Exh. F.

Conditions of purchase

Opposer's musical recordings and applicant's music sharing device, which retails for about $30, are both relatively low cost, ordinary consumer items that are likely to be purchased casually and on impulse, thus increasing the risk of confusion. *Recot*, supra at 1899.

Variety of goods

As we noted, opposer has associated his SNOOP DOGG mark and name with a variety of products and services, such as music, clothing, consumer electronic devices, automobiles and sports events. Thus, this factor, as well as the relatedness of the goods, would favor opposer. See Genesco Inc. v. Martz, 66 USPQ2d 1260, 1271 (TTAB 2003) ("this factor may favor a finding that confusion is likely even if the goods are not obviously related"); and Uncle Ben's Inc. v. Stubenberg International Inc., 47 USPQ2d 1310 (TTAB 1998).

Similarity or dissimilarity of the marks

We turn then to a comparison of applicant's SNOOPTUNES mark with SNOOP DOGG and Snoop and a determination of the similarity or dissimilarity of the marks in their entireties. See *du Pont*, supra. See also Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). While marks must be compared in their entireties, one feature of a mark may have more significance than another in creating a commercial impression, and in such a case there is nothing improper in giving greater weight to that more significant feature. In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant has taken an essential element of opposer's famous mark and name SNOOP DOGG and incorporated that term in its own mark SNOOPTUNES. Consumers encountering applicant's mark are

likely to view the term SNOOP in applicant's mark as a reference to the shortened form of opposer's mark and name SNOOP DOGG. See Marshall Field & Co. v. Mrs. Fields Cookies, 25 USPQ2d 1321, 1333 (TTAB 1992) ("companies are frequently called by shortened names, such as Penney's for J.C. Penney's, Sears for Sears and Roebuck..., Ward's for Montgomery Ward's, and Bloomies for Bloomingdale's"); Big M. Inc. v. United States Shoe Corp., 228 USPQ 614, 616 (TTAB 1985) ("[W]e cannot ignore the propensity of consumers to often shorten trademarks"). Furthermore, as we indicated, and as applicant admits, Snoop is a commonly used, well recognized nickname for SNOOP DOGG. Applicant's mark SNOOPTUNES incorporates this distinctive nickname in its entirety.

The only additional element in applicant's mark is the word TUNES. As shown by the dictionary entries submitted by opposer the word "tune" essentially refers to a song or music.[13] This term is at least descriptive of an electronic device that allows music sharing, and therefore, it is less significant than SNOOP in creating an impression. See *National Data Corp.*, supra ("That a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale

[13] For example, the *Random House Webster's College Dictionary* defines "tune" as meaning "a succession of musical sounds forming an air or melody"; *The New Oxford American Dictionary* (2001) defines "tune" as "a melody, esp. one that characterizes a certain piece of music."

for giving less weight to a portion of a mark"). Furthermore, the term SNOOP, as the first part of SNOOPTUNES that purchasers will hear or see when encountering applicant's mark, is more likely to have a greater impact on purchasers and be remembered by them. See *Palm Bay*, supra at 1692 ("The presence of this strong distinctive term [VEUVE] as the first word in both parties' marks renders the marks similar, especially in light of the largely laudatory (and hence non-source identifying) significance of the word ROYALE.").

Because SNOOP is a significant component, or the only component, of opposer's mark and names, and the same term SNOOP conveys the strongest impression in applicant's mark, the respective marks and names are similar in sound and appearance.

The marks are also very similar in meaning and commercial impression, with SNOOPTUNES suggesting songs or "tunes" by SNOOP DOGG or Snoop. In fact, applicant admits that "Snoop Tune," at least in its singular form, would bring opposer's name and music to mind. Heath Test., pp. 101-103. We also note that a Google search for "snoop tunes" resulted in websites related to either applicant or Snoop Dogg. Ortiz Decl., Exh. D. In addition, references by the media to opposer's music as, for example, a "Snoop track" (*The Boston Herald*, supra) and a "Snoop disc" (*Rolling Stone*, supra) reinforce this perception.

Applicant argues that the marks have different meanings and commercial impressions. In explaining the derivation of

applicant's mark, Mr. Heath states that "snoop" has a meaning of "snooping" "because people sharing music, they're able to essentially listen in without the broadcaster knowing that they're listening. So in a sense, they're snooping." Heath Test., pp. 15-16. Applicant contends that "tunes" has a double meaning referring not only to songs, but also to "when you tune in to someone's tunes...actually tuning in to another person's media that they're broadcasting" Id. Applicant maintains that its mark as a whole refers to "snooping tunes," as the device allows others to "snoop" the "tunes."

Even according to applicant the primary meaning of "TUNES" in the context of its mark is "songs," and furthermore Mr. Heath acknowledges that applicant intended to convey that meaning: "[W]e understood that everybody was really hot on iTunes, the brand. ... Somewhat, you know, in order just to capitalize on the fact that they were in the market of MP3 players and had something...close enough to iTunes that the market could remember." Id., p. 17. Moreover, in relation to this music sharing device, it is more likely that the public would associate SNOOPTUNES with the famous music entertainer and mark SNOOP DOGG rather than with some function of the device.[14]

[14] Whether marks such as Apple Records and Apple Computers or various third-party marks that allegedly include the term "SNOOP" co-exist in the marketplace is irrelevant to the question of whether there is a likelihood of confusion in the case before us which must be decided on its own facts and record.

Applicant argues that opposer's television and film roles generally portray opposer as a thug, drug dealer, and drug user, that he is introduced on talk shows as "The Rapper" or the "Gangsta Rapper," and that in view of this "public persona" the public can readily distinguish the marks as used on the respective goods and services. Brief, p. 4. This image, even if accurate, does nothing to diminish the similarity between the marks. It is clear from the record that opposer has achieved a more mainstream celebrity image, but regardless, the fact remains that SNOOPTUNES conveys the impression of songs or music of or by SNOOP DOGG or Snoop, whatever opposer's image.

Because of the similarities between the marks and the extent of public recognition of SNOOP DOGG and Snoop in connection with music, consumers are likely to believe that opposer is using or authorizing the use of a slightly different version of his mark or name, and mistakenly assume that applicant's music-sharing device is therefore licensed, sponsored by or in some way associated with opposer.

The *du Pont* factor of the similarity of the marks strongly favors a finding of likelihood of confusion.

Actual confusion

Applicant acknowledges two instances of actual confusion. Opp's. Not. Rel.; Exh. C (App's. Resp. to Interrog. No. 10). Applicant states that it received two e-mails in connection with applicant's MySpace profile, each of which included an inquiry

regarding applicant's relationship with opposer. In one instance, Mr. Heath states that during the course of an email exchange with a potential distributor for applicant's product in Australia, Mr. Heath said that "we might be able to acquire a rapper, celebrity rapper...to help promote the product. And...his response was 'Is it Snoop Dogg?' ... And I said immediately, 'No.'" Heath Test., p. 42. When Mr. Heath was asked on cross-examination why the distributor asked about Snoop Dogg, Mr. Heath responded "Well, I'm assuming because, you know we said rapper, and SnoopTunes, you know, he knew that we were, you know -- he knew our web site." Id., p. 95. In the other instance, according to Mr. Heath, applicant's MySpace page received an email inquiring whether applicant was related to Snoop Dogg.

Contrary to applicant's contention, the existence of two instances of confusion is not insignificant for a variety of reasons including the relatively short period of overlapping use of the marks and the limited evidence as to the extent of public exposure to applicant's mark. Moreover, the basis for applicant's contention, i.e., that there are over 300 million registered users of the MySpace website, is irrelevant. A more relevant consideration might be the total number of inquiries or communications that applicant receives on its personal page of the website but no such evidence has been provided.

In any event, it is well settled that evidence of actual confusion is not required in order to establish likelihood of confusion. See Herbko International Inc. v. Kappa Books Inc., 308 F.3d 1156, 64 USPQ2d 1375 (Fed. Cir. 2002); and Weiss Associates, Inc. v. HRL Associates, Inc., 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990). Under the circumstances, and since it is not clear that there has been a substantial opportunity for confusion to arise, we find that even the lack of any evidence of actual confusion would not establish that confusion would not be likely to occur from the contemporaneous use of these marks.

Applicant's intent

Opposer contends that applicant adopted its mark in bad faith, noting that applicant concedes that SNOOP DOGG is famous and that it is familiar with opposer's music. Establishing bad faith requires a showing that applicant intentionally sought to trade on opposer's good will or reputation. See Big Blue Products Inc. v. International Business Machines Corp., 19 USPQ2d 1072 (TTAB 1991). Opposer has not made this showing. Furthermore, applicant has offered a plausible "good faith" explanation, supported by the record, for its adoption of the mark.[15]

However, at a minimum, applicant was clearly aware of opposer's marks and names, and as the newcomer, had the

[15] We will not infer from applicant's statement that it sought to capitalize on a relationship with Apple's iTunes mark that applicant willfully sought to associate its mark with opposer.

obligation to avoid confusion by adopting a mark which is not similar to those marks and names. In re Shell Oil Co., 992 F.2d 91204, 26 USPQ2d 1687 (Fed. Cir. 1993); and Nina Ricci S.A.R.L. v. E.T.F. Enterprises Inc., 889 F.2d 1070, 12 USPQ2d 1901 (Fed. Cir. 1989).

CONCLUSION

In view of the similarity between applicant's mark and opposer's mark and names, and considering the fame and the broad scope of protection to which opposer's mark and names are entitled, we find that the respective goods are sufficiently related that confusion is likely to result from the applicant's use of the marks on its goods.

Decision: The opposition is sustained.