

May 7, 2009

J. David Sams
Chief Administrative Trademark Judge
Trademark Trial and Appeal Board
U.S. Patent and Trademark Office
Madison East, Concourse Level Room C 55
600 Dulany Street
Alexandria, VA 22314

VIA HAND DELIVERY

Opposition No. 91177156
H-D Michigan, Inc. v. Bryan Broehm
Application Serial No. 78896325

Mark:



05-07-2009

Dear Chief Judge Sams:

U.S. Patent & TM Office Mail Room #51

We attach a copy of the Board's decision in the above-identified opposition proceeding. For the reasons cited below, Opposer respectfully requests your consideration in designating this decision as citable precedent.

Opposer believes that this decision will add value to the Board's jurisprudence and to the existing body of trademark law. In particular, this decision addresses an area of trademark law that is the subject of very few citable decisions, namely, that a logo may function as a trademark and become famous for the identified goods, separate and apart from the associated wording in the mark. This decision is also important legal precedent for brand owners to the extent that it details the nature and extent of evidence necessary to establish that a mark is truly famous for purposes of a likelihood of confusion finding. Thus, the decision can serve as a valuable guide to practitioners and brand owners in litigating likelihood-of-confusion cases before the Board.

In addition, this is the first decision of any tribunal in the United States to hold Harley-Davidson's Bar & Shield logo famous. As a result, this decision is valuable legal precedent, and Harley-Davidson should have the opportunity to rely on this decision as citable precedent in its future trademark enforcement efforts. The designation of this decision as citable precedent may reduce the need for litigation before the Board and the courts concerning Harley-Davidson's marks.

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Opposer appreciates your consideration of this matter. Please direct any communications regarding this matter to the undersigned.

Respectfully,



Linda K. McLeod

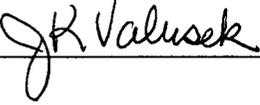
LKM/jkv
Enclosure

cc: Bryan Broehm (with enclosure)

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing letter to Chief Administrative Trademark Judge J. David Sams was served by first class mail, postage prepaid, on this 7th day of May 2009, upon Applicant, Bryan Broehm, at the following address:

Bryan Broehm
331 Gazetta Way
West Palm Beach, FL 33413-1053



THIS OPINION
IS NOT A PRECEDENT OF
THE TTAB

Mailed: April 28, 2009

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

H-D Michigan LLC¹
v.
Bryan C. Broehm

Opposition No. 91177156
to Application No. 78896325
filed on May 30, 2006

David M. Kelly, Linda K. McLeod and Jonathan M. Gelchinsky
of Finnegan, Henderson, Farabow, Garrett & Dunner for H-D
Michigan LLC.

Bryan C. Broehm, *Pro Se*.

Before Seeherman, Walters and Holtzman, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

H-D Michigan LLC filed its opposition to the
application of Bryan C. Broehm to register the mark shown
below for "hats, headwear, shirts, T-shirts," in

¹ The original opposer and owner of the pleaded registration, H-D Michigan, Inc., is now H-D Michigan LLC by merger and change of name recorded with the USPTO. Thus, we have substituted H-D Michigan LLC for the original opposer.

International Class 28.² The application includes a description of the mark as follows: "The mark consists of the Christian Cross with a banner in front with the name HOLY-DIVINESON on the banner and the name JESUS written on the cross above the banner, and CHRIST written on the cross below the banner."



As grounds for opposition, opposer asserts that applicant's mark, when applied to applicant's goods, so resembles opposer's previously used and registered marks HARLEY, HARLEY-DAVIDSON and a "bar and shield logo" for a wide variety of goods and services, including clothing items, as to be likely to cause confusion, under Section 2(d) of the Trademark Act.³

² Application Serial No. 78896325, filed May 30, 2006, based upon an allegation of a bona fide intention to use the mark in commerce in connection with the identified goods.

³ Opposer made of record status and title copies of 63 registrations that it owns. We have considered only those registrations that were also pleaded in the notice of opposition. Opposer did not amend its notice of opposition to add the additional registrations, nor does the record show that the parties tried the issues of likelihood of confusion or dilution with respect to these unpleaded registrations by either express or implied consent.

Opposer also asserts a claim of dilution, alleging that its pleaded marks became famous before the filing date of the subject application.

Applicant, in his answer, denied the salient allegations of the claims.

The Record

The record consists of the pleadings; the file of the involved application; certified status and title copies of pleaded registrations owned by opposer; various specified responses of applicant to opposer's interrogatories and requests for admissions, and various printed publications, all made of record by opposer's notices of reliance; and the testimony depositions by opposer of Scott Beck, Director of Marketing Harley-Davidson Motor Company, and Laura Johnson, opposer's counsel's litigation clerk, both with accompanying exhibits. The evidence submitted by applicant was untimely, it was stricken by the Board's order of January 1, 2009, and it has been given no consideration. Both parties filed briefs on the case.

Factual Findings

Opposer has established the subsistence and its ownership of the pleaded registrations. Of these registrations, we note the details of the following four registrations, which are particularly relevant herein:
(emphasis added)

Registration No. & Status	Mark	Goods/Services
<p>Registration No. 1205380 [issued 8/17/82; Renewed; Sec. 15 declaration acknowledged]</p>		<p>"Clothing, namely, T-shirts," in International Class 25 (as well as good in International Class 12)</p>
<p>Registration No. 1263936 [issued 1/17/1984; Renewed ; Sec. 15 declaration acknowledged]</p>		<p>"Clothing, namely, T-shirts, jackets, blue jeans, sweat shirts, underwear, nightshirts, bandanas, headwear, socks, boots, cycle riding suits, aprons, belts and suspenders," in International Class 25 (as well as goods in additional classes)</p>
<p>Registration No. 1571032 [issued 12/12/1989; Renewed; Sec. 15 declaration acknowledged]</p> <p>Disclaimer of CLOTHES</p>		<p>"Clothing, namely, jeans, T-shirts and jackets," in International Class 25</p>
<p>Registration No. 1660539 [issued 10/15/1991; Renewed; Sec. 15 declaration acknowledged]</p> <p>Disclaimer of MOTORCYCLES</p>		<p>"belts, decorative boot straps, leather bandanas, boot tips, chaps, coveralls, denim pants, gloves, halter tops, hats, caps, heel guards, heel spurs, jackets, neckties, night gowns, night shirts, pants, rain suits, shirts, socks, sole plates, suspenders, sweaters,</p>

		sweatshirts, tank tops, athletic shoes, shoes, boots, T-shirts, underwear, vests, and wristbands (as well as goods in additional classes)
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** We refer throughout this opinion to opposer's design marks generally as "the bar and shield logos."

Opposer has manufactured and sold motorcycles under the mark HARLEY-DAVIDSON since 1903; and it has used HARLEY-DAVIDSON MOTORCYCLES on the bar and shield logo in connection with motorcycles and parts since 1910. Opposer began using the HARLEY-DAVIDSON MOTORCYCLES bar and shield logo in 1914 in connection with sweaters, jackets and vests and, over the years, expanded use of this mark to a wide variety of products, including everything from clothing, jewelry, belts, wallets and chains to billiard tables, pool cues and telephones. Since at least the early 1980's, opposer has used the bar and shield logo with the name HARLEY-DAVIDSON appearing on the cross bar of the logo, the word "Motor" appearing on the shield above the bar, and different words appearing on the shield below the bar, including "Company," "Cycles," and "Clothes" in connection with a wide variety of goods and services.

In 1977, opposer began using the bar and shield logo with no wording in connection with jewelry, shirts, T-

shirts, sweatshirts, and headwear such as hats and caps, as shown below.



Opposer's use of the blank bar and shield logo has expanded to use in connection with a wide variety of goods and on fixtures at opposer's dealerships.

Opposer's bar and shield logo, blank and with various wording, is used both on tags and labels and imprinted on clothing and other products. Opposer's use of its marks has been continuous to the present. Opposer licenses the use of its marks for a wide variety of goods and services. Opposer has approximately 650 dealerships in the United States that sell its motorcycles, parts, clothing, accessories and other branded items. Opposer's clothing items and headwear are sold through its own dealerships to motorcycle enthusiasts, and through kiosks, seasonal outlets, and third-party retailers such as Wal-Mart, Target, Kmart and various box stores to the general mass market.

Additionally, opposer has registered and licenses marks that incorporate its bar and shield logo for particular constituencies, such as police, sheriffs and fire departments. For example, opposer has used the marks shown

below in connection with, at least, shirts, T-shirts, caps and hats.



Opposer advertises in numerous widely-distributed print publications, usually with double-page ads, on television and radio, at sporting events, through catalogs and brochures and it has a substantial advertising presence on the Internet. Its advertising is for both its motorcycles and many of its other products, including its clothing and headwear. Opposer distributes numerous catalogs and brochures for its various products, including its clothing and headwear. Opposer has sponsored professional sports teams, publishes two magazines for its riders and enthusiasts, has a "Harley Owners Club" known as "H.O.G.S.," has had numerous celebrities such as Jay Leno and Mickey

Roarke appear in its advertisements, and has placed its products in numerous movies and television shows since at least the 1950's. Additionally, opposer has had books written about its motorcycles and company history and it has received numerous unsolicited "mentions" in a significant number of widely-distributed publications and periodicals.

Opposer submitted confidential evidence of licensee royalties, wholesale and retail revenues, promotional activities and advertising expenses for the several years before the trial commenced. Suffice it to say, these figures are very substantial. Additionally, opposer's witness, Scott Beck, Director of Marketing at Harley-Davidson Motor Company, stated that by 1920, opposer was the largest motorcycle manufacturer in the world; that, at the time of trial, opposer was the largest heavyweight motorcycle manufacturer in the world, owning 58% of the U.S. marketshare for motorcycles; and that, for at least the five years before trial, opposer was ranked in the top 50 of inter-brand rankings in terms of brand value and strength.

Applicant is an individual who chose the proposed mark to use in connection with motorcycle-related clothing with Christian themes, rather than with "the dark and evil paraphernalia associated with the motorcycle-riding culture." (Response to Interrogatory No. 7.) He admits that he was aware of opposer's marks before selecting his

mark and that, in fact, he used the Harley-Davidson shield and bar marks as "the inspiration" for his design and he admits that the marks "share geometric aspects." (Admission Nos. 2, 11-13, and 19.) Applicant also admits that opposer's marks HARLEY-DAVIDSON, HARLEY, and the shield and bar logo marks are famous and well known to the general public in connection with motorcycles. (Admission Nos. 4-9.)

To date, applicant has used the proposed mark only as a decal on his own helmet and T-shirts; he has also registered the domain names www.holy-divineson.com and www.holydivineson.com. Applicant owns a Harley-Davidson motorcycle; he has purchased parts, T-shirts, clothing and accessories from opposer; and he is a member of the Harley Owners Group (H.O.G.).

Analysis

Standing

Opposer has established its standing to oppose registration of the involved application. In particular, opposer has properly made its pleaded registrations of record and, further, has shown that it is not a mere intermeddler. Opposer's use and registration of its marks establish that opposer has standing. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023

(Fed. Cir. 1999); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

Priority

In view of opposer's ownership of valid and subsisting registrations, there is no issue regarding opposer's priority. *King Candy, Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Additionally, opposer has established its use of the blank bar and shield logo, which we find particularly relevant herein, in connection with, inter alia, shirts, T-shirts, hats and caps since at least 1977, which is long prior to the filing date of this application. Since applicant claims only an intention to use the mark, and has not submitted any evidence of earlier use, his filing date is the earliest date on which he is entitled to rely.

Thus, the only issue to decide herein under Section 2(d) is likelihood of confusion.

Likelihood of Confusion

Our determination of likelihood of confusion under Section 2(d) must be 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). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d

1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). Opposer must establish that there is a likelihood of confusion by a preponderance of the evidence. In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). See also *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein. The relevant *du Pont* factors in the proceeding now before us are discussed below.

Considering the issue of likelihood of confusion, we focus our comments on opposer's previously-used blank logo and shield mark for shirts, T-shirts, hats and caps and, with respect to opposer's pleaded and established registrations, on the four registrations that are described *infra*, since these are the marks and registrations that are the closest to applicant's mark and goods.

Fame

We turn first to the factor of fame because this factor plays a dominant role in cases featuring a famous or strong

mark. *Recot Inc. v. Becton*, 214 F.3d 1322, 54 F.2d 1894 (Fed. Cir. 2000); *Kenner Parker Toys Inc. v. Rose Arts Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992). Famous marks are accorded more protection precisely because they are more likely to be remembered and associated in the public mind than a weaker mark. *Id.* Indeed, "[a] strong mark . . . casts a long shadow which competitors must avoid." *Id.* A famous mark is one "with extensive public recognition and renown." *Id.* See also *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 73 USPQ2d at 1694. Given the nature of opposer's goods and services, the relevant consuming public herein comprises the general public.

In this case, applicant has admitted that opposer's marks, including the bar and shield logo marks, are famous and that "[t]he Harley-Davidson bar and shield logo was used as an inspiration for my design." (Brief, p. 2.) Moreover, the evidence establishes that not only has opposer conducted extensive promotion and advertising and made numerous sales of, at least, motorcycles, clothing and headwear, but its marks and goods have been the focus of substantial public attention in the form of books and numerous unsolicited articles from the popular press referring to opposer's goods

and its marks.⁴ Therefore, we conclude that the fame of opposer's HARLEY-DAVIDSON, HARLEY and bar and shield logo marks in connection with motorcycles and, at least, accessories such as clothing and headwear is established in this case. In particular, we note the use of the bar and shield logo, both blank and with various wording, especially in connection with police, sheriff and firefighter badges. What remains constant among these marks is the shape of the bar and shield logo, regardless of wording or additional matter. Thus, we find that the bar and shield logo, regardless of wording and other matter, is itself a famous mark in connection with at least motorcycles, clothing and headwear.

This *du Pont* factor of the fame of opposer's marks weighs strongly in opposer's favor.

The Goods

It is well established that the goods and/or services of the parties need not be similar or competitive, or even offered through the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective goods and/or services of the parties are

⁴ While the articles are admissible, such evidence may not be considered as proof of the statements therein. *Life Zone*, 87 USPQ2d at 1956 n.5; *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1717 n.2 (TTAB 2007). Thus, while the statements in the articles are not proof of their truth, we have considered the fact that such a large number of articles have been written to demonstrate some public recognition of opposer and its goods.

related in some manner, and/or that the conditions and activities surrounding the marketing of the goods and/or services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. See *Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993); and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978). The issue, of course, is not whether purchasers would confuse the goods and/or services, but rather whether there is a likelihood of confusion as to the source of the goods and/or services. In *re Rexel Inc.*, 223 USPQ 830 (TTAB 1984). The question of likelihood of confusion must be determined based on an analysis of the goods and/or services recited in applicant's application vis-à-vis the goods and/or services identified in opposer's pleaded registration(s). *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992).

There is no question that applicant's goods are identical to the same goods identified in the four registrations set forth earlier in this opinion, i.e., "T-shirts" in Registration Nos. 1205380, 1263936 and 1571032, "shirts" in Registration No. 1660539, and "headwear" and "hats and caps" in Registration Nos. 1263936 and 1660539,

respectively. We also conclude that opposer has used its blank bar and shield logo in connection with goods that are identical to the goods identified in the application. Thus, we conclude that the goods of the parties are legally identical.

The *du Pont* factor of the similarities of the goods weighs in opposer's favor.

Trade Channels, Purchasers and Conditions of Sale

As indicated above, opposer's and applicant's goods are identical. Thus, we must presume that these identical goods are rendered in identical trade channels and are purchased by the same consumers. See *Canadian Imperial Bank of Commerce v. Wells Fargo Bank, N.A.*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). As noted above, the purchasers comprise the general public, and these ordinary consumers would use nothing more than ordinary care in making their purchasing decisions. Moreover, these identical goods are not usually expensive items warranting particular care in making a purchasing decision.

Thus, the *du Pont* factors of the trade channels, purchasers and conditions of sale weigh in opposer's favor.

The Marks

We note that, in determining likelihood of confusion, a lesser degree of similarity between two parties' marks is required when the marks are applied to identical goods or

services. *HRL Associates, Inc. v. Weiss Associates, Inc.*,
12 USPQ2d 1819 (TTAB 1989). Further, as the Board stated in
In re J.M. Originals, 6 USPQ2d 1393 (1987):

A finding of likelihood of confusion need not necessarily be premised on a finding that prospective purchasers would not be able to distinguish the two marks when used on identical or closely related goods. Even if prospective purchasers could distinguish the two marks, a finding of likelihood of confusion may nevertheless be premised on a finding that these prospective consumers would erroneously believe, because of the similarities in the marks, that goods bearing the two marks emanate from the same, albeit perhaps anonymous, source.

With respect to the involved marks, we examine the similarities and dissimilarities of the marks in their appearance, sound, meaning, and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 73 USPQ2d at 1692.

We note that as the fame of a mark increases, as in the case of opposer's marks, the degree of similarity between the marks necessary to support a conclusion of likely confusion declines. *Bose Corp. v. QSC Audio Products Inc.*, 63 USPQ2d at 1309. As applicant has pointed out, there are specific differences between the marks, however, "a purchaser is less likely to perceive differences from a famous mark." *B.V.D. Licensing v. Body Action Design*, 846 F.2d 727, 730, 6 USPQ2d 1719, 1722 (Fed. Cir. 1988) (Nies, J., dissenting) (*emphasis in original*), and quoted with approval in *Kenner Parker, supra*.

Applicant has clearly delineated the specific differences between the word and design components of his mark and opposer's bar and shield marks and we agree that these differences exist. However, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in their entireties that confusion as to the source of the services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). With this standard in mind, we find that the marks are remarkably similar in appearance. Both parties' marks consist of a similarly-shaped shield with a rectangular bar bisecting the shield. It is essentially immaterial that applicant's shield has slightly rounded edges or that the rectangle bisecting applicant's mark has additional matter backlighting it. We agree that with the religious wording in applicant's mark, the bar and shield could be perceived as a variation of a cross; however, the same could be said of opposer's bar and shield design if it contained religious wording.

Considering the wording in applicant's mark and opposer's bar and shield logo marks that contain wording,

the font used to display the wording in both parties' marks is essentially the same, and the placement of the words on the respective bar and shield logos is, similarly, the same. In opposer's marks, the predominant, non-descriptive wording HARLEY-DAVIDSON is on the rectangular cross-bar. In applicant's mark, the word HOLY-DIVINESON appears on the comparable cross-bar. This wording is similar to opposer's wording to the extent that it consists of two words separated by a hyphen, the first word is shorter than the second word, the first and second words begin with "H" and "D" respectively, and the second word ends in "SON."

It is often the case that the word portion of a design mark, rather than the particular display, may have a greater impact on purchasers and be remembered by them. See *In re Appetito Provisions Co., Inc.*, 3 USPQ2d 1553 (TTAB 1987). However, in this case, because of the fame of the blank bar and shield logo and the fact that opposer uses this logo with various different wording in equally famous marks, we find that the bar and shield design is an integral part of opposer's marks and contributes equally with the words to the commercial impressions of opposer's marks. See *Parfums de Coeur Ltd. v. Lasarus*, 83 USPQ2d 1012 (TTAB 2007) (torso design in mark has strong visual impact that engages viewer before word BODYMAN in mark).

The look of the parties' marks is so similar that purchasers familiar with opposer's marks are likely to assume that the respective identical and closely related goods emanate from the same source or a source authorized by opposer. This is particularly true where, as here, opposer has used its bar and shield logo alone; opposer has modified it to use different wording above and below HARLEY-DAVIDSON; and opposer has created modified marks for special interest groups to use on T-shirts, hats and caps, such as sheriffs, police and firefighters, and persons supporting those groups. It would not be unreasonable for purchasers to assume that applicant's bar and shield logo on shirts, T-shirts, hats and headwear is another mark created by opposer for a religious special interest group.

We have given no weight to applicant's argument that his mark is a parody. Parody is an imitation for comic effect or in ridicule (see *Merriam-Webster's Collegiate Dictionary*, 11th ed. 2003), but we do not see how copying the essential elements of opposer's marks and using religious wording is a parody. Moreover, parody is not a defense if the marks would otherwise be considered confusingly similar. See, e.g., *Columbia Pictures Industries, Inc. v. Miller*, 211 USPQ 816, 820 (TTAB 1981) ("The right of the public to use words in the English language in a humorous and parodic manner does not extend to

use of such words as trademarks if such use conflicts with the prior use and/or registration of the substantially same mark by another.")

We conclude that the appearance and commercial impression of applicant's mark and opposer's bar and shield logo is similar and the similarities in these two elements outweigh any differences in pronunciation and connotation. See *In re White Swan Ltd.*, 9 USPQ2d 1534 (TTAB 1988); and *In re Lamson Oil Co.*, 6 USPQ2d 1041 (TTAB 1988) (similarity in only one of the elements of sight, sound, and meaning is sufficient to find marks similar). Thus, the *du Pont* factor of the similarities of the marks weighs in opposer's favor.

Conclusion

Having considered all of the evidence properly in the record and all of the parties' arguments, including those not specifically referenced herein, we find that the *du Pont* factors weigh strongly in favor of a finding of likelihood of confusion.

We conclude that consumers familiar with opposer's famous HARLEY-DAVIDSON bar and shield logo marks and opposer's famous blank bar and shield logo for the above-noted wide variety of goods and services, including goods identical to those of applicant, would be likely to believe, upon encountering applicant's design mark for "hats, headwear, shirts, T-shirts," that the goods and services

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originate from or are associated with or sponsored by the opposer.

Dilution

In view of the decision to sustain the opposition on the ground of likelihood of confusion, it is not necessary to consider opposer's dilution claim.

Decision: The opposition is sustained on the ground of likelihood of confusion, and registration to applicant is refused.