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Mailed:  
June 20, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Iris Music Group

Serial No. 77021415

Iris Music Group, pro se.

Gina M. Fink, Trademark Examining Attorney, Law Office 109  
(Dan Vavonese, Managing Attorney).

Before Grendel, Mermelstein and Wolfson, Administrative  
Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

Iris Music Group (applicant) seeks registration on the  
Principal Register of the mark IRIS MUSIC GROUP (in  
standard character form; MUSIC GROUP disclaimed) for Class  
41 services identified in the application as:

Entertainment services, namely, providing a web  
site featuring musical performances, musical  
videos, related film clips, photographs, and  
other multimedia materials; entertainment  
services, namely, providing prerecorded music,  
information in the field of music, and commentary

and articles about music, all on-line via a global computer network; music composition and transcription for others; music composition for others; music production services; music publishing services; production of sound and music video recordings; motion picture song production; publication of books, of magazines, of journals, of newspapers, of periodicals, of catalogs, of brochures; publication of musical texts; publication of printed matter; record production; record master production; song writing services.<sup>1</sup>

The Trademark Examining Attorney has issued a final refusal to register applicant's mark pursuant to Trademark Act Section 2(d), 15 U.S.C. §1052(d), on the ground that the mark, as applied to the services identified in the application, so resembles the mark IRIS RECORDS, previously registered on the Principal Register (in standard character form; RECORDS disclaimed) for Class 9 goods identified in the registration as "compact discs, audio cassettes, [photograph [sic] - phonograph] records, and prerecorded video tapes featuring musical and vocal performances,"<sup>2</sup> as

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<sup>1</sup> Application Serial No. 77021415. The application was filed on October 15, 2006, based on use in commerce under Trademark Act Section 1(a), 15 U.S.C. §1051(a). January 1, 2005 is alleged in the application as the date of first use of the mark, and May 17, 2005 is alleged as the date of first use of the mark in commerce.

<sup>2</sup> Reg. No. 3520632, issued on October 21, 2008. The Office's electronic record of this registration identifies the "records" listed in the identification of goods as "photograph records." In the context of the rest of the identified goods, and because the goods are classified in Class 9, it is apparent that the word "photograph" is a misspelling of the word "phonograph." We shall refer to these goods in this opinion as "[phonograph] records." We add that our decision in this case would be the same even if

to be likely to cause confusion, to cause mistake, or to deceive.

Applicant has appealed the final refusal. After careful consideration of the evidence of record and the arguments made by applicant and the Trademark Examining Attorney, we affirm the refusal to register.

Our likelihood of confusion determination under Section 2(d) is a legal conclusion, based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue (the *du Pont* factors). See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997).

"While it must consider each factor for which it has evidence, the Board may focus its analysis on dispositive factors, such as similarity of the marks and relatedness of the goods [and/or services]." *Han Beauty Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 USPQ2d 1557, 1559 (Fed. Cir.

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we were to disregard this item in the registrant's identification of goods, because the remaining items in the identification of goods suffice in themselves to support the Section 2(d) refusal. See discussion below at footnote 5.

2001). See also *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1244 (TTAB 2010) ("In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services.").

Under the first *du Pont* factor, we determine the similarity or dissimilarity of applicant's mark and the cited registered mark when they are viewed in their entireties in terms of appearance, sound, connotation and commercial impression. See *Palm Bay Imports, Inc.*, 73 USPQ2d 1689, 1692. The test, under the first *du Pont* factor, 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 overall commercial impressions as to be likely to cause confusion when used on or in connection with the goods and/or services at issue. This necessarily requires us to take into account the fallibility of memory over time and the fact that the average purchaser retains a general rather than a specific impression of trademarks. See *In re Association of the United States Army*, 85 USPQ2d 1264, 1269 (TTAB 2007); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1468 (TTAB 1988).

Additionally, although the marks at issue must be considered in their entirety, it is well-settled that one feature of a mark may be found to be more significant than another in terms of the mark's function as a source-indicator, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark, and in comparing the marks at issue under the first *du Pont* factor. See *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004).

In the present case, we find that the arbitrary word IRIS is the dominant feature in the commercial impressions created by both marks. The words MUSIC GROUP in applicant's mark and the word RECORDS in the cited registered mark are non-distinctive if not generic terms as applied to the respective goods and services, and they therefore contribute little or nothing to the respective marks' functions as source-indicators. It is the word IRIS that prospective purchasers are likely to perceive and recall as the primary indication of the source of the respective goods and services.

When we compare the marks in terms of appearance, sound, connotation and commercial impression, we find that they are identical to the extent that they both are

dominated by the arbitrary word IRIS. The marks are dissimilar to the extent that applicant's mark also includes the non-distinctive words MUSIC GROUP while the cited registered mark also includes the non-distinctive word RECORDS. However, when we compare the marks in their entireties, we find that this difference in the non-distinctive wording of the respective marks is greatly outweighed by the basic similarity between the marks which arises from the presence in both marks of the arbitrary and dominant word IRIS.

For these reasons, we find that the marks when viewed in their entireties are similar, and that this similarity of the marks under the first *du Pont* factor supports a conclusion that confusion is likely.

The second *du Pont* factor requires us to determine the similarity or dissimilarity of the goods and/or services as they are identified in the application and in the cited registration, respectively. See *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203-04 (Fed. Cir. 2003).

It is not necessary that the respective goods and/or services be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. The issue is not whether consumers

would confuse the goods and/or services themselves. Rather, the goods and/or services need only be sufficiently related that consumers would be likely to assume, upon encountering the goods and/or services marketed under the marks at issue, that the goods and/or services originate from, are sponsored or authorized by, or are otherwise connected to the same source. See *Black & Decker Corp. v. Emerson Electric Co.*, 84 USPQ2d 1482, 1492 (TTAB 2007); *In re Wilson*, 57 USPQ2D 1863, 1866-67 (TTAB 2001).

The goods identified in the cited registration are "compact discs, audio cassettes, [phonograph] records, and prerecorded video tapes featuring musical and vocal performances." The services identified in applicant's application include, *inter alia*, "entertainment services, namely, providing prerecorded music ... on-line via a global computer network." We find that these services of applicant's and the goods identified in the cited registration are similar and related, in that they both involve the marketing and sale of pre-recorded music to consumers, merely through different media. We also find that the goods identified in the cited registration are similar and related to certain other of the services identified in applicant's application, i.e., "music production services"; "production of sound and music video

recordings"; and "record production," because consumers are likely to assume that there is a source connection or relationship between a record production company and the finished pre-recorded music products that a record production company would be expected to produce and market.

Supporting these findings of the relatedness of applicant's services and registrant's goods are the numerous use-based third-party registrations made of record by the Trademark Examining Attorney, which include in their identifications of goods and services both goods of the type identified in the cited registration and services of the type identified in applicant's application.<sup>3</sup> Although such registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have probative value to the extent that they serve to suggest that the goods and/or services listed therein are of a kind which could be marketed by a single source under a single mark. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6.

Applicant argues, based on its review of the prosecution history of the application which matured into

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<sup>3</sup> See, e.g., Reg. Nos., 3648845, 3119363, 3773556, 3514173, 3541959, 3541960, 3500244 and 3195281.



the cited registration (which applicant has made of record), that the scope of protection to which the cited registration is entitled should be limited because the registrant's actual pre-recorded music products feature only a very limited number of musical artists, who do not overlap with the musical artists featured by applicant. However, in our comparison of the respective goods and services under the second *du Pont* factor, "...it is the identification of goods [and/or services] that controls, not what extrinsic evidence may show about the specific nature of the goods [and/or services]. ... An applicant may not restrict the scope of the goods [and/or services] covered in the cited registration by argument or extrinsic evidence." *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1647 (TTAB 2008). Because the goods identified in the cited registration are not limited in any way, we must presume that they encompass any and all goods of the type identified.<sup>4</sup>

For all of these reasons, we find that the goods identified in the cited registration and the services

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<sup>4</sup> Moreover and as a factual matter, there is no evidence to support applicant's implied contention that consumers normally would identify and distinguish the source of goods and/or services produced by different record companies or labels based solely on the roster of artists that each label features, and not on the marks under which the companies market their respective goods and/or services.

identified in applicant's application are similar and related. This finding under the second *du Pont* factor supports a conclusion that confusion is likely.<sup>5</sup>

Applicant argues that the owner of the cited registration has impliedly consented to registration of applicant's mark.<sup>6</sup> Applicant bases this argument on the asserted fact that the registrant sent a cease and desist letter to applicant five years ago regarding applicant's use of its mark, but has not corresponded with applicant since then. Applicant also asserts that it sent an e-mail to the registrant in which it requested that the registrant provide a written consent to applicant's registration of applicant's mark, and that the registrant has never responded. Applicant argues that these asserted facts establish that the registrant apparently believes that confusion is unlikely to result from applicant's and the

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<sup>5</sup> The similarity of registrant's goods and the specific services of applicant's discussed above suffices as the basis for refusing registration as to all of the services identified in applicant's Class 41 identification of services. "Likelihood of confusion may be found based on any item that comes within the identification of goods in the involved application and registration." *In re La Peregrina Ltd.*, 86 USPQ2d 1645 at 1646. See also *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

<sup>6</sup> We shall consider this argument under the tenth *du Pont* factor, i.e., "the market interface between applicant and the owner of a prior mark." See *In re Association of the United States Army*, 85 USPQ2d 1264, 1274).

registrant's co-existence in the marketplace, that the registrant apparently does not object to applicant's registration of applicant's mark, and that registration of applicant's mark therefore should be allowed based on the registrant's implied consent to such registration.

However, there is no evidence that the registrant has expressly and affirmatively consented to applicant's registration of the mark. In the absence of such evidence, we will not infer any such consent by the registrant, nor will we infer that the registrant has no objection to registration of applicant's mark. *See In re Association of the United States Army*, 85 USPQ2d 1264, 1274; *In re Thomas*, 79 USPQ2d 1021, 1028 (TTAB 2006).

In summary, based on our finding that applicant's mark IRIS MUSIC GROUP and the cited registered mark IRIS RECORDS are similar, and on our finding that applicant's services are similar and related to the goods identified in the cited registration, we conclude that a likelihood of confusion exists. Both applicant's services and registrant's goods directly involve and feature the production and/or marketing of pre-recorded musical entertainment. Music consumers encountering these goods and services under these similar marks dominated by the arbitrary word IRIS are likely to assume that a source,

sponsorship, licensing or other connection or relationship exists. Even if such consumers might perceive and/or recall the difference in the non-distinctive and/or generic wording appearing in the two marks, i.e., MUSIC GROUP and RECORDS, they are likely to assume that IRIS RECORDS is a division of or is otherwise related to IRIS MUSIC GROUP, or vice versa.

For all of the reasons discussed above, we conclude that a likelihood of confusion exists. We have carefully considered all of applicant's arguments to the contrary, but we are not persuaded by them. To the extent that any doubts might exist as to the correctness of our conclusion that confusion is likely (and we have none), we must resolve such doubts against applicant. See *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993).

Decision: The refusal to register is affirmed.