

This Opinion is not a  
Precedent of the TTAB

Mailed: September 21, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Peag, LLC*

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Serial No. 86019875

Jayson M. Lorenzo of The Law Offices of Jayson M. Lorenzo,  
for Peag, LLC.

Kathleen Lorenzo, Trademark Examining Attorney, Law Office 109,  
Michael Kazazian, Managing Attorney.

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Before Taylor, Hightower and Heasley,  
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Peag, LLC (“Applicant”) seeks registration on the Principal Register of the following stylized mark for “ear buds” in International Class 9:<sup>1</sup>



<sup>1</sup> Application Serial No. 86019875 was filed on July 25, 2013, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The description of the mark states: “The mark consists of the word “EPIC” with the letters “E” and “P” connected, underneath “EPIC” are the words “BY” and “JLAB”, “JLAB” consists of the letters “L”, “A”, and “B” connected in one continuous line.”

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that the applied-for mark so resembles the registered mark **EPIC** (in standard characters) for "loud speakers" in International Class 9<sup>2</sup> as to be likely to cause confusion or mistake, or to deceive.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

#### I. Analysis

We base our determination of likelihood of confusion under Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"); see also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

In the course of applying the *DuPont* factors, we bear in mind the fundamental principles underlying Section 2(d), which are to prevent consumer confusion as to commercial sources and relationships, and to protect registrants from damage caused by registration of confusingly similar marks. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198, 224 USPQ 327, 331 (1985); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566.

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<sup>2</sup> Registration No. 4381863 issued on the Principal Register on August 13, 2013.

We have considered each *DuPont* factor for which there is evidence of record, and have treated any other factors as neutral. *See M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”). Two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1516 (TTAB 2016).

A. Comparison of the Marks

Under the first *DuPont* factor, we compare Applicant’s and Registrant’s marks in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

Applicant argues that the marks differ in appearance because its mark is stylized, whereas Registrant’s mark is in standard characters.<sup>3</sup> But because the registered mark is in standard characters, it may be depicted in any font size, style or color, including a stylization similar to Applicant’s. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 (Fed. Cir. 2012); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084 (TTAB

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<sup>3</sup> Applicant’s brief, 10 TTABVUE 5.

2016). The word “EPIC” comprises the whole of Registrant’s mark and is the dominant component of Applicant’s mark, prominently displayed in large type. Prospective customers encountering Applicant’s mark are likely to notice this identical lead term, to remember it, and to pronounce it when asking for Applicant’s audio equipment. *See Palm Bay Imps.*, 73 USPQ2d at 1692; *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered” when making purchasing decisions).

Applicant cannot avoid likelihood of confusion by adopting Registrant’s entire mark and adding its house mark, “by JLAB,” in small type. “In general, use of a house mark does not obviate confusion.” *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1965 (TTAB 2016). The marks use the same key word, “EPIC,” which conveys the same connotation, of “great or impressive” sound.<sup>4</sup> They are, in consequence, sufficiently similar in terms of their sight, sound and meaning, as well as their commercial impression, such that “persons who encounter the marks would be likely to assume a connection between [Applicant and Registrant].” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012).

The first *DuPont* factor, similarity of the marks, therefore weighs in favor of finding a likelihood of confusion.

#### B. Relationship of the Goods, Channels of Trade, and Classes of Customers

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<sup>4</sup> “Epic”: “very great or large and usually difficult or impressive.” *Merriam-Webster Dictionary*, Applicant’s Response to Office Action, May 13, 2014, p. 15.

Applicant's goods are "ear buds" in Class 9 and Registrant's goods are "loud speakers" in Class 9. An "ear bud" is "a small earphone inserted into the ear."<sup>5</sup> A "loudspeaker" is "a piece of electrical equipment that allows sounds or voices to be heard loudly at a distance."<sup>6</sup>

Applicant argues that:

Here, Applicant's goods are ear buds. Consumers needing a ready-to-use personal listening accessory would seek out Applicant's goods. Applicant's goods are portable. Consumers with Applicant's goods could easily carry them on their person with little to no effort. Further, Applicant's goods are personal in nature, meaning, they are only be used by one person with the max being two people sharing one side of the ear bud.

On the other hand, Registrant's goods are solely for loud speakers. Consumers looking to improve the sound quality in their vehicles would seek out Registrant's goods. Registrant's goods are best classified as an automotive accessory. One must be in possession of a vehicle to even use Registrant's goods. These goods require additional installation and mounting before they can be used. ... Those using Registrant's goods would readily share any audio with multiple persons at a time.<sup>7</sup>

The issue, though, is not whether purchasers would confuse the goods, but whether there is a likelihood of confusion as to the *source* of those goods. *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1471 (TTAB 2016). Goods may be related "if the respective products are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source." *Coach Servs.*, 101 USPQ2d

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<sup>5</sup> Merriam-Webster Dictionary, Office Action of Aug. 10, 2015, p. 15.

<sup>6</sup> MacMillan Dictionary, Office Action of Aug. 10, 2015, p. 11.

<sup>7</sup> Applicant's brief, 10 TTABVUE 9.

at 1722 (quoting *7-Eleven v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). Here, it is clear from the record evidence that Applicant and Registrant's goods, audio equipment, are of a sort that often emanate from the same source under a single mark.

Indeed, the JLAB website shows that it offers both ear buds and speakers.<sup>8</sup>

### SPEAKERS WITH BLUETOOTH

JLab offers the best of portable Bluetooth speakers. With pumping bass, massive sound and long-lasting battery life (like the *Crasher 2.0*), you can enjoy your tunes on the go. Perfect for the beach, a barbecue or just chilling at home. We'll keep you rocking with high quality gear, inspired designs, and world class, hassle free customer support. Plus any speakers come with our one year warranty. Now it's time to [#RockItOut](#) with JLab Audio.



### EARBUDS

Colors, features, mics and massive sound - JLab has the ideal earbuds for you! We'll keep you rocking with high quality gear, inspired designs, and world class, hassle free customer support. Plus any earbuds come with our one year warranty. Now it's time to [#RockItOut](#) with JLab Audio.



JBuds Hi-Fi Earbuds  
\$6.49 ~~\$19.99~~



JBuds with Mic Hi-Fi Earbuds  
\$7.99 ~~\$24.99~~



JBuds J6MS In-Ear Single Earbud  
**Sold Out** - \$13.99 ~~\$44.99~~

<sup>8</sup> JLABAudio.com, Office Action of Aug. 10, 2015, p. 18-22.

Similarly, Applicant’s registration for the mark AUDIO IMAGINED identifies both loud speakers and earbuds.<sup>9</sup>

Registrant also provides speakers and headphones.<sup>10</sup> Since earbuds are a kind of headphone or earphone, consumers could look to both Applicant and Registrant for the same sorts of goods.

The Examining Attorney made of record over a dozen existing third-party use-based registrations showing that various entities have registered a single mark for both loud speakers and ear buds or earphones, including the following:<sup>11</sup>

Mark	Registration No.	Relevant Goods
QZOXX	4748890	Audio headphones; Earphones and headphones; loud speakers; loudspeakers, headphones; music headphones;
SOUNDLUV	4636377	Earphones and headphones; loudspeakers
<b>CREATIVE®</b>	4775342	Headphones; earphones; loudspeakers; portable speakers; wireless speakers; audio speakers.
CINPEL	4671479	Headphones; loudspeakers
SCHMITT	4759350	Earphones; headphones; audio headphones; stereo headphones; personal headphones for use with sound transmitting systems; loudspeakers
COREDY	4764502	Audio headphones; earphones and headphones; loudspeakers;

<sup>9</sup> Reg. No. 4693241, issued Feb. 24, 2015, claiming first use and first use in commerce since at least as early as November 1, 2013. Office Action of Aug. 10, 2015, pp. 36-38.

<sup>10</sup> Office Action of Aug. 10, 2015, pp. 2-4, 17-19.

<sup>11</sup> Office Action of Aug. 10, 2015, pp. 36-74.

SONGTOLD	4776923	Audio headphones; audio speakers; bass speakers; audio speakers; loud speaker systems; loud speakers; loudspeakers;
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These third-party registrations serve to show that loudspeakers and ear buds may be offered to consumers by a single source under a single mark. *See In re Mr. Recipe*, 118 USPQ2d at 1091-92; *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993). Additionally, the Examining Attorney submitted excerpts from various third-party websites showing that the same entities offer loudspeakers and ear buds under the same marks, e.g.:

- **Sony** speakers and ear buds;
- **Bose.com** in-ear fit headphones, earbuds, and speakers;
- **Sonic Electronix** loudspeakers and ear buds;
- **Pioneer** in-ear and on-ear headphones, as well as loudspeakers;
- **ALTEC Lansing** Bluetooth speakers and earbuds;
- **JBL** earbuds and speaker systems;
- **SENNHEISER** loudspeakers and in-ear headphones/earphones.<sup>12</sup>

This evidence supports a finding that the respective goods are related products. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69 (TTAB 2009).

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<sup>12</sup> Office Action of Nov. 13, 2013, pp. 9-22; Office Action of Jan. 7, 2015, pp. 23-41; Office Action of Aug. 10, 2015, pp. 75-94; Office Action of March 5, 2016, pp. 3-48.



Applicant argues that its ear buds sell at retail for \$70 or less, whereas Registrant's goods are "automotive accessories," which sell at retail for over \$500 and require installation.<sup>13</sup> However, Applicant's and Registrant's respective goods must be compared as they are identified in the application and the cited registration. *See In re Cordua Rests. LP*, 823 F.3d 594, 118 USPQ2d 1632, 1636 (Fed. Cir. 2016); *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Applicant's identification of goods is for "ear buds," with no restriction as to price, and Registrant's identification of "loud speakers" is not limited by price or to automotive speakers. Absent such restrictions, the goods identified in the subject Application and Registration are presumed to travel in the usual trade channels for such goods (which the record demonstrates is primarily audio equipment retailers) to the same potential purchasers, including the general listening public. *See Stone Lion*, 110 USPQ2d at 1161-62.

JLAB's president, Win Cramer, avers that he has "personally looked through each of the retailer websites that sell 'Epic by JLAB' and did not come across any EPIC products being offered for sale by the Registrant."<sup>14</sup> But since there is no restriction on Registrant's channels of trade, no limitation will be applied, and Registrant may presumably expand into channels of trade in competition with Applicant. *Id.*; *see also B & B v. Hargis*, 113 USPQ2d at 2049. Based on the record evidence, we find that the second and third *DuPont* factors favor finding a likelihood of confusion.

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<sup>13</sup> Applicant's brief, 10 TTABVUE 11.

<sup>14</sup> Cramer Declaration, ¶ 5, Response to Office Action, July 7, 2015, pp. 72-73.

C. The Number and Nature of Similar Marks on Similar Goods

Turning to the sixth *DuPont* factor, our primary reviewing court, the Court of Appeals for the Federal Circuit, has stated that “evidence of third-party use of similar marks on similar goods ‘can show that customers have been educated to distinguish between different marks on the basis of minute distinctions.’” *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)). “The weaker an opposer’s mark, the closer an applicant’s mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection.” *Juice Generation*, 115 USPQ2d at 1674.

Applicant contends that Registrant’s EPIC mark is weak and should be afforded a narrow scope of protection based on TESS printouts for over 50 third-party EPIC-formative registered marks for a range of differing goods, e.g.:<sup>15</sup>

Mark	Registration No.	Goods
EPIC PRO ACADEMY & Design	4763319	Downloadable educational course materials in the field of real estate investing.
EPIC ARENA	4659184	Computer game software
THE EPIC BOX	4588798	Apparatus and instruments for conveying, distributing, transforming, storing, regulating or controlling electric current.

<sup>15</sup> July 7, 2015 Response to Office Action, pp. 80-203; Request for Reconsideration, Feb. 10, 2016, pp. 24-133. Argument in Applicant’s brief, 10 TTABVUE 13-17.

Mark	Registration No.	Goods
A WORLD OF THE VERSUS EPIC	4574740	Computer game software and providing on-line computer games
EPIC OF CREATION	4735773	Audio recordings featuring music; digital music downloadable from the Internet; downloadable musical sound recordings; downloadable music via the internet and wireless devices; sound recordings featuring music
EINHORN'S EPIC COOKIES & Design	4689165	Video recordings and downloadable films featuring cartoon characters and cartoon plots; Printed publications, namely, comic books; Cookies, pastry, confectionery made of sugar
EPIC SKATER	4653274	Computer software for mobile phones, portable media players, handheld computers, tablet computers, and gaming consoles, namely, softward for video gaming
EPIC	4393884	Communication system, namely, two way radios and voice amplifiers for use by firefighters, industrial workers, first responders and military personnel and telecommunications and data networking hardware, namely, devices for transporting and aggregating voice, date,

		and video communications across multiple network infrastructures and communications protocols
Mark	Registration No.	Goods
EPIC	1001994	Pre-recorded phonograph records
EPIC (stylized)	0585841	Grooved phonograph records
EPIC	3058011	Downloadable musical sound and musical video recordings; computerized online retail services for musical sound and musical video recordings; streaming of audio material, namely musical recordings, on the Internet; providing online entertainment namely, providing sound and video recordings in the field of music and musical based entertainment
	3433014	Musical sound recordings; audiovisual recordings featuring music and musical based entertainment;
EPIC OF CREATION	4735773	Audio recordings featuring music; digital music downloadable from the Internet; downloadable musical sound recordings; downloadable music via the internet and wireless devices; sound recordings featuring music.

The sixth *DuPont* factor, however, concerns the number and nature of similar marks “*in use on similar goods.*” *DuPont*, 177 USPQ 567 (emphasis added). Most of

Applicant's cited third-party marks range far afield of audio equipment, encompassing EPIC-formative marks for an array of unrelated goods such as battery relays and contactors, electrical circuitry, computer e-commerce software, mobile phones, computer hardware, airborne avionics systems, agricultural control systems, digital video recorders, and an electronic control console for use with thermoplastic resin extrusion machinery.<sup>16</sup> They are, in consequence, of little assistance in determining whether Registrant's mark for loudspeakers is so diluted that it can be easily distinguished from a highly similar mark for ear buds. *See In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009) (citing *Key Chems., Inc. v. Kelite Chems. Corp.*, 464 F.2d 1040, 175 USPQ 99, 101 (CCPA 1972) (third-party registrations for unrelated goods of little probative value)). The remaining half-dozen registrations for sound recordings or phonograph records refer to music content, not audio equipment, and even if they were deemed remotely related to Registrant's goods, they are too few and far between to undermine the conceptual strength of Registrant's mark. *Cf. Juice Generation*, 115 USPQ2d at 1672 n.1 (at least 26 relevant third-party uses or registrations of record for restaurant services); *accord In re Morinaga Nyugyo Kabushiki Kaisha*, Serial No. 86338392, \_\_ USPQ2d \_\_ (TTAB Sept. 8, 2016).

Furthermore, there is no evidence of the extent of these third-party marks' use in commerce, so there is no evidence that the general listening public has become so familiar with a multiplicity of the same or similar marks for audio equipment that it can distinguish them based on minor differences. *See In re Mighty Leaf Tea*, 601 F.3d

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<sup>16</sup> *Id.*

1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010); *In re C. H. Hanson Co.*, 116 USPQ2d 1351, 1353 (TTAB 2015) (citing *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973); *Carl Karcher Enters. Inc. v. Stars Rests. Corp.*, 35 USPQ2d 1125, 1130-31 (TTAB 1995)). Applicant's third-party evidence thus fails to undermine the strength of Registrant's EPIC mark, either conceptually or commercially, as an indicator or a single source.

Finally, Applicant contends that the cited Registration once coexisted with a registration on the Principal Register for the mark EPIC (in standard characters) for "earphones; in-ear monitors not for medical purposes."<sup>17</sup> Since the Office issued Registrant's subject registration in 2013 without citing this other then-subsisting EPIC earphone registration as a basis for refusal, Applicant infers that the Office implicitly found no likelihood of confusion between Registrant's mark and EPIC for earphones.<sup>18</sup> Suffice to say that the prior determination to which Applicant alludes does not bind the Board, much less the Office, and each application must be considered on its own merits and record. *In re Cordua Rests.*, 823 USPQ2d at 1635 (citing *In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218 (Fed.Cir. 2009); *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed.Cir. 2009)). In this case, the record evidence supports the Examining Attorney's determination that Applicant's and Registrant's marks are similar, and that they would appear on related goods, which would travel in the same channels of trade to the same class of

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<sup>17</sup> Registration No. 3417784, issued on April 29, 2008, cancelled on December 5, 2014 for failure to file an acceptable declaration under Section 8.

<sup>18</sup> Applicant's brief, 10 TTABVUE 17-19.

customers. Applicant, having been afforded the opportunity to contest these findings on the merits, has failed to show that third-party registrations in any way reduce the likelihood of confusion evinced by the first through third *DuPont* factors.

Accordingly, this factor is neutral.

## II. Conclusion

Having considered all of the arguments and evidence of record, including the evidence and arguments that we have not specifically discussed herein, and all relevant *DuPont* factors, we find that: Applicant's and Registrant's marks are similar in appearance, sound, connotation and commercial impression; their respective goods are related, and would travel through the same channels of trade to the same classes of customers; and the existence of third-party marks does not impair the strength of Registrant's mark or negate the likelihood of confusion. All other factors are deemed neutral. We thus find that Applicant's and Registrant's marks so resemble one another as to be likely to cause confusion, or to cause mistake, or to deceive under Section 2(d) of the Trademark Act.

**Decision:** The refusal to register Applicant's mark

 is affirmed.