

**This Opinion is Not a
Precedent of the TTAB**

Mailed: July 26, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Brian Meneely
—

Serial No. 86751019
—

Louis W. Emmi, Esq.
for Brian Meneely.

Philip Liu,¹ Trademark Examining Attorney, Law Office 109,
Michael Kazazian, Managing Attorney.

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Before Kuhlke, Wellington, and Gorowitz,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Brian Meneely (“Applicant”) seeks registration on the Principal Register of the mark **HIGH R. POWER**, in standard character format, for “audio and video recordings featuring music and artistic performances” in International Class 9.²

¹ The application was reassigned from Examining Attorney Gina M. Fink to Examining Attorney Philip Liu for purposes of the appeal.

² Application Serial No. 86751019 was filed on September 9, 2015, based on an allegation of a bona fide intent to use the mark in commerce under Trademark Act Section 1(b).

The Trademark Examining Attorney has refused registration of Applicant's mark on the ground of a likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in view of the registrations, owned by the same entity, for the

**HIGHER
POWER**

marks HIGHER POWER, in standard character format, and for:

Entertainment in the nature of visual and audio performances, namely, musical group performances; entertainment in the nature of a musical group; entertainment, namely, live performances by a musical group; entertainment services, namely, providing music performances, musical videos, related film clips, photographs, and other multimedia materials on a global computer network; presentation of musical performances; entertainment services in the nature of production and distribution of video and/or audio programs featuring musical performances" in International Class 41.³

When the refusal was made final, Applicant appealed. The appeal has been briefed. For the following reasons, we affirm the likelihood of confusion refusal.

I. Preliminary Matters

Before addressing the merits of the refusal to registration, we note the following issues raised in the Examining Attorney's appeal brief.

Applicant's Brief Exceeds 25 Page Limit

The Examining Attorney raised an objection in his brief⁴ to excessive length of Applicant's brief, namely, that it is 31 pages long and exceeds the 25-page limit set

³ Registration Nos. 3504577 (standard character mark) and 3504580 (stylized mark) issued on September 23, 2008; Section 8 and 15 affidavits have been acknowledged and accepted for each registration.

⁴ 6 TTABVUE 5.

forth by Trademark Rule 2.142(b)(2) (“Without prior leave of the Trademark Trial and Appeal Board, a brief shall not exceed twenty-five pages in length in its entirety, including the table of contents, index of cases, description of the record, statement of the issues, recitation of the facts, argument, and summary”); see also, TBMP § 1203.01 (June 2017) (Form of Brief). Applicant did not file a reply brief or otherwise respond to this objection and, reviewing Applicant’s brief, we agree that it exceeds the page limit.

In view thereof, we have not considered Applicant’s appeal brief. *See In re Thomas*, 79 USPQ2d 1021, 1023 (TTAB 2006) (Board refused to consider applicant’s 29-page brief). In spite of Applicant’s failure to file a conforming appeal brief, we do not treat this as a failure to file a brief which would result in the dismissal of the appeal.⁵ Rather, we consider the appeal on the merits and record before us.

Evidentiary Objections

The Examining Attorney also objects to Applicant’s mere listing of third-party registrations, without attaching copies thereof, in his appeal brief.⁶ Inasmuch as we are not considering Applicant’s brief, as discussed *supra*, the objection is moot. However, we note that Applicant previously provided the same list of third-party

⁵ The fact we have not considered Applicant’s brief is of little consequence in reaching our decision in this appeal since Applicant’s response (filed June 24, 2016) to the first Office Action contains many, if not all, of the arguments set forth in his brief. As noted *infra*, Applicant’s response is part of the record.

⁶ 6 TTABVUE 4.

registrations in his response to the first Office action.⁷ The then-assigned examining attorney responded by giving the following advisory:⁸

The Applicant attached a listing of “HIGHER POWER” (or close approximations), but failed to attached the actual third-party registrations. The Examining Attorney objects to this format, as the registrations are required to be attached as evidence.

Applicant has submitted a list of registrations. However, the mere submission of a list of registrations or a copy of a private company search report does not make such registrations part of the record. *In re Promo Ink*, 78 USPQ2d 1301, 1304 (TTAB 2006); TBMP §1208.02; TMEP §710.03.

To make third party registrations part of the record, an applicant must submit copies of the registrations, or the complete electronic equivalent from the USPTO’s automated systems, prior to appeal. *In re Jump Designs LLC*, 80 USPQ2d 1370, 1372-73 (TTAB 2006); *In re Ruffin Gaming*, 66 USPQ2d, 1924, 1925 n.3 (TTAB 2002); TBMP §1208.02; TMEP §710.03.

There was ample time between Applicant receiving this information and the filing of his appeal for him to correct the situation, namely, properly and timely introduce copies of third-party registrations. See Rule 2.142(d) (allowing evidence to be introduced up to the filing of appeal); and TBMP § 1207 (Submission of Evidence During Appeal). Applicant did not filed copies of the registrations. Accordingly, Applicant’s list of the third-party registrations contained in his response is not considered. See TBMP § 1208.02.

Finally, the Examining Attorney objects to Applicant’s “references to website links” and asserts that “providing only a web address and/or hyperlink to Internet

⁷ Response filed June 24, 2016.

⁸ Office Action issued on July 15, 2016.

materials is insufficient to make the associated webpages of record.”⁹ The Examining Attorney is correct and the objection is sustained. See TBMP § 1208.03 (involving Internet evidence). The URL addresses have little, if any, probative value and we have disregarded any characterization of or reliance upon the information that may be contained on the corresponding website(s).¹⁰

II. Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also, In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). *See also, In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Similarity of the Marks

We begin by comparing the two marks in their entirety and, in doing so, look to their appearance, sound, connotation and commercial impression. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

⁹ 6 TTABVue 4.

¹⁰ In particular, we note Applicant’s reliance on a website link in his response filed on June 24, 2016; TSDR p. 21.

Here, we find the marks are extremely similar visually. Although Applicant's mark is broken into three elements (versus Registrant's two terms), all marks comprise the same letters in the same order except for Applicant deleting the letter E from HIGHER. As to Registrant's stylized mark, it is only slightly stylized and we must keep in mind that Applicant's standard character mark can appear in any stylization, including one identical to Registrant's. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 (Fed. Cir. 2012); *In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1742-43 (TTAB 2016).

With respect to the aural similarities of the marks, there is no correct pronunciation of a mark and any preferred pronunciation by Applicant "cannot be relied upon to avoid a likelihood of confusion." *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 n.3 (TTAB 1987). *See also In re Viterra*, 101 USPQ2d 1912. While there is the possibility of a slight difference in pronunciation should Applicant's mark be spoken very slowly with the letter R enunciated separately; this would require considerable effort and, generally, persons verbalizing marks do not take this extra time with a purposeful attempt to clearly enunciate every single element. It is far more likely that all marks will be spoken with little, if any, discernible differences to the ear. This can be especially problematic when consumers are recalling or referring to the marks over the telephone without the benefit of viewing them.

In terms of their meaning, because Applicant's mark is the phonetic equivalent, or a mere misspelled version, of the wording HIGHER POWER, it will be understood in the same manner as the registered marks. The substitution of the R. in Applicant's

mark for the –ER ending, following HIGH, has no demonstrated significance and does not change this meaning. The Examining Attorney submitted a printout from Wikipedia defining the term as “coined in the 1930’s in Alcoholics Anonymous (AA) and is used in other twelve-step programs. It is also sometimes referred to as a power greater than ourselves and is frequently abbreviated as HP. The term sometimes refers to a supreme being or deity, or some conception of God.”¹¹ The marks have the connotation and create the same commercial impression, namely, either suggesting an affiliation with AA or evoking a “higher power,” such as a god or religious figure.

In view of the strong similarity between the marks, this *du Pont* factor weighs in favor of finding a likelihood of confusion.

Relatedness of Applicant’s Goods and Registrant’s Services

We turn now to the *du Pont* factor involving the relatedness of goods and services. It is settled that in making our determination, we must look to the goods as identified in the application vis-à-vis the services recited in the cited registrations. *See Octocom Sys., Inc. v. Houston Computers Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). The issue is not whether consumers would confuse the goods and services, but rather whether they would be confused as to the source of the goods and services. *Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973); *In re Rexel Inc.*, 223 USPQ 830, 831 (TTAB 1984). The goods and services need only be sufficiently related that consumers would be likely to assume, upon

¹¹ Attached to December 26, 2015 Office Action.

encountering the goods and services under similar marks, that the goods and services originate from, are sponsored or authorized by, or are otherwise connected to the same source. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

To show that audio and video recordings featuring music and entertainment in the nature of musical group performance services and are related, the Trademark Examining Attorney submitted ten use-based, third-party registrations which individually cover both musical recordings, like Applicant's, as well as musical entertainment services, like Registrant's.¹² These registrations are probative because they suggest that the goods and service are of a type which may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). Indeed, the Examining Attorney submitted Internet evidence showing that various well-known artists, such as Ariana Grande, Madonna, Bruce Springsteen, Prince, The Rolling Stones, Arcade, Neil Young, Jay Z, Radiohead, Jack White, and Rage Against The Machine, provide audio and video recordings featuring music and artistic performances as well as live performances and markets the goods and services under the same mark.¹³

¹² *Id.*

¹³ Attached to July 15, 2016 Office Action.

Consumers seeing the service mark of musical performers on the cover of musical sound recordings would understand that the mark identifies the performer of the music on the sound recording and will also believe that the performers are the source of the musical sound recording. That is, a consumer already familiar with the entertainment services of a musical act may, upon encountering musical recordings bearing a similar mark, mistakenly believe that the recordings involve the same musicians.

Accordingly, we find that musical sound recordings and musical group entertainment services are closely related and this *du Pont* factor also weighs in favor of finding a likelihood of confusion.

Other Factors and Conclusion

We have reviewed the entire record properly before us in this appeal, including arguments set forth by Applicant in his response to the first Office action.¹⁴ Although Applicant made arguments with regard to certain *du Pont* factors that are not addressed above, there is no relevant evidence to support these arguments. For example, Applicant argues that the Examining Attorney “did not indicate that actual confusion was a factor in her assessment of Applicant’s mark” and that “Applicant has used the name ‘High R. Power’ for two years, without any apparent mix-ups with ‘Higher Power’ listed under the Registrant’s name.”¹⁵ Applicant then concludes that

¹⁴ Filed June 24, 2016.

¹⁵ *Id.* at p. 29.

“these factors tilt in favor of Applicant.”¹⁶ We disagree with Applicant’s conclusion and point out that the involved application is not based on use in commerce. More importantly, there is no evidence to support Applicant’s assertions. The Federal Circuit has offered the following regarding the weight to be given to an assertion of no actual confusion by an applicant in an *ex parte* proceeding:

With regard to the seventh *DuPont* factor, we agree with the Board that Majestic’s uncorroborated statements of no known instances of actual confusion are of little evidentiary value. *See In re Bissett-Berman Corp.*, 476 F.2d 640, 642, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of appellant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight, [citation omitted], especially in an *ex parte* context.

Majestic Distilling, 65 USPQ2d at 1205; *see also In re Integrated Embedded*, 120 USPQ2d 1504, 1515 (TTAB 2016).

Accordingly, we weigh the *du Pont* involving instances of actual confusion and all other factors for which there is no evidence of record, as neutral in our overall likelihood of confusion analysis.

Ultimately, in view of the very strong similarity between Applicant’s applied-for mark HIGH R. POWER and the registered mark, HIGHER POWER (in standard characters and stylized), and the demonstrated close relationship between Applicant’s audio and video recordings featuring music and artistic performances and

¹⁶ *Id.* at p. 30.

Registrant's musical group performance entertainment services, we conclude there is a likelihood of confusion between them.

Decision: The refusal to register Applicant's mark HIGH R. POWER is affirmed.