

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: May 1, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re McLoughlin

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Serial No. 86837550

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Phillip Thomas Horton, Esq. for Patrick K. McLoughlin.

Katherine Foss, Trademark Examining Attorney, Law Office 125 (Mark Pilaro, Managing Attorney).

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Before Wellington, Greenbaum, and Masiello, Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

Patrick K. McLoughlin (“Applicant”) filed an application for registration on the Principal Register of the mark THE CYRKLE in standard characters for the following services:

Entertainment in the nature of live performances by a musical band; Entertainment, namely, live music concerts; Entertainment, namely, live performances by a musical band; Entertainment, namely, live performances by rock groups, in International Class 41.¹

¹ Application Serial No. 86837550 was filed on December 2, 2015 under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), on the basis of Applicant’s asserted use of the mark in commerce, stating August 15, 1966 as the date of first use and first use in commerce.

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as used in connection with Applicant's services, so resembles the mark THE CIRCLE as to be likely to cause confusion, or to cause mistake, or to deceive. The cited mark is registered on the Principal Register in standard character form for the following goods and services:

Compact discs featuring music; Digital media, namely, CDs, DVDs, downloadable audio files, featuring musical sound recordings and live musical performances; Musical sound recordings; Musical video recordings, in International Class 9;

Clothing, namely, shorts, shirts, t-shirts, tank tops, bathing suit, jackets, hats and caps, in International Class 25; and

Entertainment services in the nature of live musical performances; Live performances by a musical group, in International Class 41.²

The Examining Attorney based her refusal on the goods in Class 9 and the services in Class 41. When the refusal was made final, Applicant appealed to this Board. Applicant and the Examining Attorney have filed briefs.

A. Evidentiary matter.

Applicant attached to his brief seven pages of evidence consisting of a Wikipedia entry, lists of the results of two Google searches, and a list of the results of a search on the USPTO's TESS database.³ The Examining Attorney objects to such evidence

² Reg. No. 5002604 issued on July 19, 2016.

³ 4 TTABVUE 15-21.

on the ground that it is untimely.⁴ The objection is well taken. “Evidence should not be filed with the Board after the filing of a notice of appeal. If the appellant or the examining attorney desires to introduce additional evidence after an appeal is filed, the appellant or the examining attorney should submit a request to the Board to suspend the appeal and to remand the application for further examination.” Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d); *see also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1207.01 (June 2017). The evidence attached to Applicant’s brief has not been considered.

B. Refusal under Section 2(d).

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 issue of likelihood of confusion as set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services at issue. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

1. The goods and services; trade channels; customers.

We first consider the similarity or dissimilarity of the goods and services as identified in the application and the cited registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-62 (Fed. Cir. 2014); *Octocom Sys. Inc. v. Hous. Computs. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787

⁴ Examining Attorney’s brief, 6 TTABVUE 5-6.

(Fed. Cir. 1990). In our analysis, we will focus our attention on Registrant's services in Class 41, because they are more closely related to Applicant's services than are Registrant's Class 9 goods.

In comparing Applicant's "Entertainment in the nature of live performances by a musical band" and Registrant's "Entertainment services in the nature of live musical performances; Live performances by a musical group," we find that they are legally identical. Both Registrant and Applicant render live musical performances by a musical band (group).

Because Applicant's and Registrant's services are legally identical, we must presume that the channels of trade and classes of customers are the same. *See Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994). *See also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012).

Applicant argues:

Traditionally, consumers of these [services] are sophisticated insofar as the unique and distinguishing spelling of Applicant's name is well known Additionally, consumers looking for the band will know the history behind the unique spelling.⁵

However, there is no evidence of such sophistication or of consumers' knowledge of the history behind the mark. The customers for these services include ordinary consumers who have no particular sophistication; and we must base our analysis "on

⁵ Applicant's brief at 12, 4 TTABVUE 13.

the least sophisticated potential purchasers.” *Stone Lion Capital v. Lion Capital*, 110 USPQ2d at 1163 (internal quotation marks omitted). Moreover, there is no evidence to indicate that consumers would exercise more than an ordinary degree of care in selecting the services. Accordingly, we find that the *du Pont* factors relating to the similarity of the services, the trade channels through which they travel, and the customers to whom they are offered favor a finding of likelihood of confusion.

2. The marks.

We consider next the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). “The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017) (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)) (internal quotation marks omitted).

The primary difference between the marks THE CYRKLE and THE CIRCLE is the substitution of the internal letters YRK (in Applicant’s mark) for the letters IRC (in Registrant’s mark), which creates a difference in appearance. Otherwise, the marks share seven letters in the same order in common, and to that extent they are somewhat similar in appearance. In sound, the marks are identical; Applicant admits

as much in his brief (“[T]here is no denying the Cyrkle is pronounced ‘circle,’ . . .”).⁶ The identical pronunciation of the marks causes them to have identical meanings, because customers will recognize the common word “circle” in both marks. “Circle” has many meanings, and may refer to the common geometric shape; however, as applied to people, it can also mean “[a] group of people sharing an interest, activity, or achievement.”⁷ In any event, as applied to musical groups, both marks would be understood to have the same meaning. We note, moreover, that “circle” has no relevant meaning in the context of musical performance services and is, therefore, inherently strong as a source-indicator.

Applicant argues unpersuasively that the two marks have different connotations in the context of the respective services of Applicant and Registrant, yet he ascribes to them nearly identical connotations:

In this context, Applicant’s trademark creates a connotation of [a] 60’s band that plays and performs music entertainment for others. . . . In this context, the registered trademark creates a connotation of a band that plays and performs music entertainment.⁸

We do not agree with Applicant’s assessment of the connotation of the marks. In the context of musical performing groups, the meaning or connotation of THE CIRCLE and THE CYRKLE (pronounced “the circle”) would be immediately perceived by

⁶ Applicant’s brief at 9, 4 TTABVUE 5.

⁷ THE AMERICAN HERITAGE DICTIONARY (5th ed. 2018), at <ahdictionary.com>. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

⁸ Applicant’s brief at 11, 4 TTABVUE 12.

customers as having one of the meanings of the common word “circle” (most likely the meaning of a group of people sharing an activity).

Applicant argues that the overall commercial impressions created by the two marks are distinct:

Applicant’s trademark THE CYRKLE creates a commercial impression of a unique 60’s band. . . . [T]he registered trademark THE CIRCLE creates a [sic] no immediate commercial impression other than a typical circle.⁹

We do not agree that the marks’ commercial impressions are so different. There is nothing in Applicant’s mark that inherently suggests the era of the 1960’s or the idea of a band. Because both marks would be pronounced in such a way as to suggest the common words “the circle,” the idea of a “circle” is the primary aspect of the marks’ commercial impressions. We bear in mind that the marks at issue are for use in connection with identical services. “When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.” *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). *See also Bridgestone Ams. Tire Operations LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012) (“When the goods are identical, the appearance of a mark of similar sound, appearance, or connotation is more likely to cause confusion than if the goods are significantly different.”). Under the circumstances, we find that the similarities

⁹ *Id.* at 9, 4 TTABVUE 10.

between the marks outweigh the differences, and the *du Pont* factor of the similarity or dissimilarity of the marks weighs in favor of a finding of likelihood of confusion.

3. Absence of actual confusion.

Applicant points out that there is no evidence of record indicating that there has been actual confusion relating to the marks at issue. Applicant argues that such absence of confusion is meaningful especially because the Examining Attorney has argued that the services of Applicant and Registrant travel in the same trade channels.

We disagree. It is true that, in our analysis above, we have presumed that the channels of trade and classes of customers for the services of Applicant and Registrant are the same. That is a legal presumption based upon the fact that Applicant's services are legally identical to those of Registrant. *In re Viterra Inc.*, 101 USPQ2d at 1908. It is not evidence of actual marketplace conditions of a type that would cause us to expect that, if confusion were ever to occur, it should already have occurred. Applicant has presented no evidence regarding the extent to which Applicant's and Registrant's marks have been used, whether they have ever been used concurrently, whether they have ever been used in the same geographic markets, or any other factors that would indicate whether there have been meaningful opportunities for confusion to actually occur. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000); *Gillette Can. Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992).

While examples of actual confusion may be strong evidence indicating a likelihood of confusion, an absence of such evidence is not compelling evidence that there is no likelihood of confusion, particularly in an *ex parte* proceeding in which the cited registrant cannot appear. *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003) (“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, especially in an *ex parte* context.”). Thus, we cannot conclude from the lack of instances of actual confusion that confusion is not likely to occur.

4. Conclusion.

We have considered all of the arguments and evidence of record, including those not specifically discussed herein, and all relevant *du Pont* factors. We treat as neutral any factors that we have not discussed in this decision. Applicant’s mark is partly similar in appearance to Registrant’s mark, and is identical in sound and meaning. Overall, the two marks create very similar commercial impressions. The services of Applicant and Registrant are legally identical, and would travel through the same channels of trade and be offered to the same classes of customers. The relevant customers include ordinary consumers who would exercise only an ordinary degree of care in selecting the services. We find that Applicant’s mark, as used in connection with Applicant’s services, so resembles the cited registered mark as to be likely to cause confusion or to cause mistake or to deceive.

Decision: The refusal under Section 2(d) is affirmed.