

This Opinion is Not a  
Precedent of the TTAB

Mailed: September 17, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Currie*  
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Serial No. 87221626  
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Michael J. Hoisington of Higgs Fletcher & Mack LLP  
for Gabriel Currie.

Andrew Leaser, Trademark Examining Attorney, Law Office 117,  
Travis Wheatley, Managing Attorney.

—  
Before Lykos, Greenbaum and Heasley,  
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Gabriel Currie DBA Echopark (“Applicant”) seeks to register on the Principal Register the composite mark displayed below (with TONE AMPLIFIER disclaimed) for “amplifiers” in International Class 9.<sup>1</sup>

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<sup>1</sup> Application Serial No. 87221626, filed October 31, 2016, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a bona fide intent to use the mark in commerce. The description of the mark is as follows:

The mark consists of the phrase “Newcomb Ultra Tone Amplifier”, with the term “Newcomb” displayed horizontally at the top of the mark, with the “N” and the “B” in larger font than that other letters in “Newcomb”, and the term “Amplifier” displayed horizontally at the bottom of the mark, with the “A”



Applicant has appealed the Trademark Examining Attorney's final refusal to register the mark on the ground that Applicant's mark so resembles the registered mark on the Principal Register ULTRATONE in standard characters for "Audio equipment, namely, keyboard amplifiers and public address (PA) systems" in International Class 9<sup>2</sup> that, when used on or in connection with Applicant's identified goods, it is likely to cause confusion or mistake or to deceive within the meaning of Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).

When the refusal was made final, Applicant appealed and requested reconsideration. After the Trademark Examining Attorney denied the request for

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and "R" in larger font than the other letters in "Amplifier". The terms "Newcomb" and "Amplifier" are separated by a fanciful design consisting of an outer circle bisected by three parallel horizontal lines extending out from the circle with the center line longer than the two outer lines with an inner circle inside of which is the phrase "Ultra Tone" displayed vertically at a 45 degree angle with a line separating the terms "Ultra" and "Tone". The shaded background is not part of the mark. Color is not claimed as a feature of the mark.

<sup>2</sup> Registration No. 3276206, registered on August 7, 2007; renewed.

reconsideration, the appeal was resumed and is now fully briefed. For the reasons explained below, we affirm the refusal to register.

### I. Evidentiary Objection

Before discussing the substance of this appeal, we shall address the Examining Attorney's objection to Applicant's submission as an exhibit to his appeal brief of an entry for "boutique amplifier" from *Wikipedia*. The Examining Attorney has objected on the ground of untimeliness. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), provides in relevant part "[t]he record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal." Applicant does not dispute that he failed to make the *Wikipedia* entry of record during prosecution. Insofar as the Examining Attorney has timely interposed an objection to Applicant's late-filed evidence with his brief, the objection is sustained. The evidence submitted concurrently with Applicant's appeal brief has been given no consideration. *See e.g., In re Fiat Grp. Mktg. & Corporate Commc'ns S.p.A.*, 109 USPQ2d 1593, 1596 (TTAB 2014); *In re Pedersen*, 109 USPQ2d 1185, 1188 (TTAB 2013).<sup>3</sup>

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<sup>3</sup> Applicant contends that the excerpt from *Wikipedia* "is not evidence, it is explanatory matter to help the Board understand the boutique amplifier industry." Reply Brief, p. 1; 10 TTABVUE 2. We disagree with Applicant's characterization of excerpts from *Wikipedia*. The Board's practice with regard to evidence obtained from *Wikipedia* is as follows:

The Board will consider evidence taken from *Wikipedia* so long as the nonoffering party has an opportunity to rebut that evidence by submitting other evidence that may call into question the accuracy of the particular *Wikipedia* information. The better practice with respect to *Wikipedia* evidence is to corroborate the information with other reliable sources, including *Wikipedia*'s sources.

## II. Section 2(d) Refusal - Applicable Law

We direct our attention now to the substantive refusal before us. Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*du Pont*”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (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. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). These factors and others are discussed below. *See M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006) (even within *du Pont* list, only factors that are “relevant and of record” need be considered).

### A. The Goods and Established, Likely-to-Continue Channels of Trade

First we compare the goods, bearing in mind that Applicant’s and Registrant’s respective goods must be compared as they are identified in the application and the cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Computs.*

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TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 1208.03 (2018). In any event, even if the excerpt had been considered, the outcome of this appeal would remain unchanged.

*Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Applicant argues that the involved goods are unrelated because they have distinct purposes. As Applicant explains:

Applicant is a boutique guitar and amplifier builder that has developed a new amplifier model based on a vintage amplifier model designed and built in the 1950s and 1960s that appeals to “gearheads” – guitar players who are interested in guitar and amplifier technology. These amplifiers are the goods identified in the ‘626 Application.

Applicant’s Brief, p. 3; 7 TTABVUE 4. Applicant contends that whereas his products are marketed and sold to “discerning and sophisticated guitarists,” by contrast, Registrant’s keyboard amplifiers and public address systems are sold to the general public. *Id.* at 6; 7 TTABVUE 7.

Applicant’s position represents a misunderstanding of the case law. As noted above, we are required to make our determination based on the identifications as written and not based on extrinsic evidence. *See Stone Lion*, 110 USPQ2d at 1161; *Octocom*, 16 USPQ2d at 1787. Applicant has not applied to register his mark in connection with boutique amplifiers for custom made guitars; rather, the type of amplifier is unspecified. For this reason, Applicant’s broadly worded, unrestricted “amplifiers” necessarily encompass Registrant’s more narrowly identified “keyboard amplifiers.” *See, e.g., In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”). As such, Applicant’s and Registrant’s goods are in-part legally identical. *See Tuxedo Monopoly, Inc. v. General Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986

(CCPA 1981) (it is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application); *see also Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014); *Baseball Am. Inc. v. Powerplay Sports Ltd.*, 71 USPQ2d 1844, 1847 n.9 (TTAB 2004).

Because the goods are legally identical in part and unrestricted as to trade channels, we must also presume that these particular goods will be sold in the same channels of trade and will be bought by the same classes of purchasers. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011). Accordingly, these *du Pont* factors weigh in favor of finding a likelihood of confusion.

#### B. The Marks

Next, we consider “the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. 2005) (quoting *du Pont*, 177 USPQ at 567). “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." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). Our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) ("It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion."). Finally, it is well-settled that where, as here, the goods are identical in part, less similarity between the marks is needed for us to find a likelihood of confusion. *Coach Servs.*, 101 USPQ2d at 1721; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) ("When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.").

Applicant argues that the Examining Attorney improperly focuses on the wording ULTRA TONE in the applied-for mark without giving due consideration to the additional wording, design and appearance. In Applicant's view, the stylized carrier as well as the wording NEWCOMBE and AMPLIFIER provide meaningful distinctions with Registrant's word mark ULTRATONE. Applicant criticizes the Examining Attorney for purportedly dissecting the marks and placing a disproportionate emphasis on the shared literal portion.

We acknowledge the specific differences in sight and sound pointed out by Applicant. However, we disagree with Applicant's contention that the Examining Attorney has improperly dissected the marks and that they are overall different in sight, sound, meaning and commercial impression. In reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Stone Lion*, 110 USPQ2d at 1161 (citing *In re Nat'l Data Corp.*, 224 USPQ at 751). ULTRA TONE, as centrally positioned in a circular carrier, attracts the consumer's attention, and as such is the dominant element. The term NEWCOMBE, which appears above the circular carrier, and the generic word AMPLIFIER which appears below, are ancillary in nature. The first and last letters of NEWCOMBE and AMPLIFIER are presented in a larger size stylized font designed to function as a border to the circular design element carrying the wording ULTRA TONE. As aptly put by the Examining Attorney:

The applied-for mark places the wording "ULTRA TONE" directly in the center of the mark, separated from the other wording by a circular border design that creates an almost "bullseye"-type display, with horizontal lines further drawing the eye to the center of the mark. The words "NEWCOMB" and "AMPLIFIER" are stylized such that they frame the inner portion of the mark containing the "ULTRA TONE" wording, which also ensures that a consumer's attention is drawn [to] the "ULTRA TONE" wording first before the other wording is considered.



Examining Attorney's Brief, 9 TTABVue 9. Thus, the additional wording and graphics in the registered mark fail to mitigate the similarities in sound and appearance.

With regard to connotation and commercial impression, the dominant element in Applicant's mark is the term ULTRA TONE, the entirety of Registrant's word mark ULTRATONE. As such, the marks engender a similar meaning and commercial impression. *Cf. Seaguard Corp. v. Seaward Int'l, Inc.*, 223 USPQ 48, 51 (TTAB 1984) (SEAGUARD and SEA GUARD "are, in contemplation of law, identical"). Although the additional wording and design elements in Registrant's mark present dissimilarities, they are not sufficient to overcome the strong similarities in sound, connotation and overall commercial impression that the marks share due to the identity of the dominant element, ULTRA TONE. We find the similarities outweigh the dissimilarities. Thus, when comparing the marks overall, they are similar in sight, sound, connotation and commercial impression. This *du Pont* factor also weighs in favor of finding a likelihood of confusion.

### C. Strength of the Cited Mark

Applicant argues that the cited mark ULTRATONE is conceptually weak because it is laudatory and therefore merely descriptive within the meaning of Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1). ULTRATONE is registered on the Principal Register without any claim of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f). Marks that are merely descriptive of the goods or services may not be registered on the Principal Register absent a showing of

acquired distinctiveness under Section 2(f). As such, Applicant's contention that ULTRATONE is merely descriptive of the identified goods constitutes an impermissible collateral attack on the cited registration. As explained by the Board in *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517 (TTAB 2016).

Trademark Act Section 7(b) provides that “[a] certificate of registration of a mark upon the principal register provided by this chapter shall be prima facie evidence of the validity of the registered mark.” Although that section establishes only “prima facie evidence of ... validity,” it has long been settled that the validity of a cited registration cannot be challenged in an ex parte proceeding. As the Federal Circuit and its predecessor court have stated, “As long as the registration relied upon ... remains uncanceled, it is treated as valid and entitled to the statutory presumptions.” *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1535 (Fed. Cir. 1997) (quoting *Cosmetically Yours, Inc. v. Clairol Inc.*, 424 F.2d 1385, 165 USPQ 515, 517 (CCPA 1970)).

*See also In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007) (“inasmuch as the cited mark is registered on the Principal Register, we must assume that it is at least suggestive and we cannot entertain applicant’s argument that the registered mark is descriptive of registrant’s services.”). We therefore deem this factor neutral.

#### D. Conclusion

After considering all of the evidence of record and arguments pertaining to the *du Pont* likelihood of confusion factors, each of the *du Pont* factors discussed above either favors a finding of likelihood of confusion or is neutral. The marks are similar in sound, appearance, connotation and commercial impression. This, coupled with the legally identical nature of the goods in part, marketed in the same trade channels to

the same consumers, supports a finding that there is a likelihood of confusion between Applicant's mark and the registered mark.

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