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PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Thomas William Brewer and Mary M. Brewer*

Serial Nos. 87503471 and 87504846

Gene Bolmarcich of the Law Offices of Gene Bolmarcich,  
for Thomas William Brewer and Mary M. Brewer.

Anna H. Rosenblatt, Trademark Examining Attorney, Law Office 120,  
David Miller, Managing Attorney.

Before Wellington, Goodman and Pologeorgis,  
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

Thomas William Brewer and Mary M. Brewer (“Applicants”) seek registration on the Principal Register of the mark THE TROPICS (in standard characters) for “providing foods and drinks; providing of food and drink via a mobile truck; restaurant; catering services” in International Class 43,<sup>1</sup> as well as of the mark THE TROPICS and design, as displayed below, for “entertainment services in the nature

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<sup>1</sup> Application Serial No. 87504846, filed on June 26, 2017, based on an 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).

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of organizing social entertainment events; entertainment services, namely, live musical and dance performances; night club services; entertainment services, namely, conducting parties” in International Class 41.<sup>2</sup>



The Trademark Examining Attorney refused registration of each of Applicants' marks under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with the registered mark TROPIXX (in standard characters) for the following services in International Class 41:<sup>3</sup>

Entertainment services in the nature of musical sound recording production, audiovisual recording production of music videos; live performances by a musical artist and as a songwriter; music publishing services; Entertainment services in the nature of providing entertainment information by means of a global computer information network related to a music producer, solo recording artists and musical groups; Nightclub services; dance club services; provision of live entertainment, namely, live musical performances by musical bands and DJs; entertainment services, namely, non-downloadable ringtones, pre-recorded music, music videos and graphics presented to mobile communications devices via a global computer network and wireless network; music studios, namely, sound recording studios; publishing services in the nature of music publishing; musical entertainment in the nature of live visual and audio performances by musical groups and DJs;

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<sup>2</sup> Application Serial No. 87503471, filed on June 23, 2017, based on an 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 application includes the following description of the mark: "The mark consists of an image of a palm tree with the word THE inside the upper part of the palm tree. The word TROPICS is to the right of the word THE in stylized text, where the letter T in the word TROPICS is replaced with the image of the palm tree." Color is not claimed as a feature of the mark.

<sup>3</sup> Registration No. 5275856 issued on August 29, 2017.

exhibitions, namely, exhibitions concerning music; providing online music services, namely, providing non-downloadable prerecorded music via global computer network; entertainment services, namely, providing a web site featuring non-downloadable musical performances, musical videos, related film clips, and photographs; providing on-line reviews of music performances, concerts, music albums and recordings and musical artists, providing non-downloadable prerecorded music, information in the field of music, and commentary and non-downloadable articles about music, all on-line via a global computer network; providing podcasts in the field of music, providing webcasts in the field of music.

When the refusals were made final, Applicants appealed. We affirm the refusals to register.

### **I. Appeals Consolidated**

These appeals involve common questions of law and fact and the records are substantially similar. Accordingly, we consolidate and decide both appeals in this single decision. *See In re Binion*, 93 USPQ2d 1531, 1533 (TTAB 2009); Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 1214 (June 2017).

### **II. Likelihood of Confusion**

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *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 or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the

[services] and differences in the marks.”).

### **A. Similarities of the Marks**

We first address the *du Pont* likelihood of confusion factor focusing on “the similarity or dissimilarity of the marks in their entireties 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, 1691 (Fed. Cir. 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) (quotation omitted).

Because this factor is based on the marks in their entireties, 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.”). On the other hand, there is nothing improper in assigning more or less weight to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Nat’l Data*, 224 USPQ at 751.



Applicants' marks are THE TROPICS in standard characters and The cited mark is TROPIXX in standard characters. While there are some differences in appearance of Applicants' marks and the cited mark, the dominant literal portion of Applicants' mark, i.e., the word TROPICS, is the phonetic equivalent of the cited mark and thus legally identical in sound. "Similarity in either form, spelling or sound alone may be sufficient to support a finding of likelihood of confusion." *Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910, 1913 (TTAB 2000). "Despite specific differences in spelling ... the dominant factor for consideration is the likelihood of confusion arising from the similarity in sound of the two words when spoken." *Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (Finding the aural similarities of the marks VEEP and BEEP to be such that confusion would be likely). Because the cited mark is a novel misspelling of the term TROPICS, the marks also have the same connotation and commercial impression.

Furthermore, while one of Applicants' involved marks comprises both words and a design element consisting of a palm tree, "the verbal portion of the mark is the one most likely to indicate the origin of the [services] to which it is affixed." *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1134 (Fed. Cir. 2015) (quoting *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983)). Greater weight is often given to the wording because it is the wording that purchasers would use to refer to or request the goods or services. *See, e.g., In re Viterra, Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1911

(Fed. Cir. 2012). Moreover, the inclusion of the term “THE” in Applicants’ marks is not significant. When comparing similar marks, the Board has found that inclusion of the definite article “the” at the beginning of a mark, as is the case here, will generally not affect or otherwise diminish the overall similarity between the marks. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009) (finding WAVE and THE WAVE “virtually identical” marks; “[t]he addition of the word ‘The’ at the beginning of the registered mark does not have any trademark significance.”); *In re Narwood Prods. Inc.*, 223 USPQ 1034, 1034 (TTAB 1984) (finding THE MUSIC MAKERS and MUSIC-MAKERS “virtually identical” marks; the inclusion of the definite article “the” is “insignificant in determining likelihood of confusion”).

Applicants argue, *inter alia*, that the use of the letters “XX” in the cited mark creates a different connotation and engenders a dissimilar commercial impression.<sup>4</sup> Specifically, Applicants maintain that the letters “XX” have several different meanings, any of which may be applicable when viewing the cited mark, i.e., (1) kisses, (2) the number “20”, and (3) extra-large (as used on clothing labels).<sup>5</sup> Applicants also contend that the second syllable of the cited mark is “pixx,” which conveys the meaning of “pics” or pictures.<sup>6</sup>

Applicants’ arguments are unpersuasive. Applicants have not introduced any evidence to support their argument that the letters “XX” convey different meanings.

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<sup>4</sup> Applicants’ Appeal Brief, pp. 4-5, 4 TTABUVE 4-5 in application Serial No. 87503471.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

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Moreover, the letters “XX” do not appear separately in the cited mark and, therefore, any meaning the letters “XX” may have independently is not relevant to our analysis. Moreover, Applicants have failed to submit any evidence that consumers would view the “pixx” portion of the cited mark to mean “pics” or pictures.

Quite simply, the dominant portion of Applicants’ marks is identical or virtually identical to the cited mark in appearance, sound, connotation and commercial impression. While we have not overlooked the design element in one of Applicants’ involved marks or the inclusion of the term “the” in both of Applicants’ marks, we nonetheless conclude that Applicants’ marks and the cited mark, when considered in their entireties, are substantially similar.

Thus, the first *du Pont* factor favors a finding of likelihood of confusion.

#### **B. Similarity of the Services**

The next step in our analysis is a comparison of the services identified in Applicants’ applications vis-à-vis the services identified in the cited registration, the second *du Pont* factor. 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. Comps. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); see also *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.2d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002). It is settled that it is not necessary that the respective services be identical or even competitive in order to find that they are related. It is sufficient if the respective services are “related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [services] emanate from the same source.” *Coach Servs. Inc.*, 101 USPQ2d at

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1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); *see also 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). The issue is not whether purchasers would confuse the services, but rather whether there is a likelihood of confusion as to the source of these services. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 832 (TTAB 1984).


#### 1. Applicants' Class 41 Services

As to Applicants' design mark, the Class 41 services covered in this application are identified as "entertainment services in the nature of organizing social entertainment events; entertainment services, namely, live musical and dance performances; night club services; entertainment services, namely, conducting parties." The cited registration includes the identical service of "night club services." Registration must be refused if confusion would be likely as to **any** service recited in an application. *See Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981). Furthermore, Applicants' broadly defined "entertainment services, namely, live musical and dance performances" would encompass the "provision of live entertainment, namely, live musical performances by musical bands and DJs" as identified in the cited registration and, therefore, these services are identical in part.

With regard to Applicants' remaining Class 41 entertainment services not specifically addressed above, the Trademark Examining Attorney submitted evidence demonstrating that these services are closely related to Registrant's services. Specifically, the Trademark Examining Attorney made of record five live third-party,



use-based registrations identifying Applicants' services listed in their involved application and the services identified in the cited registration.<sup>7</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 services listed therein are of a kind which may emanate from a single source under a single mark. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). The third-party registrations are identified below:

- DANCEAHOLIC (Reg. No. 4884177) is registered on the Principal Register for, *inter alia*, "Entertainment services in the nature of organizing social entertainment events; Entertainment services in the nature of live audio performances by bands, comedians, dancers; Entertainment services in the nature of live musical performances; Entertainment services in the nature of live visual and audio performances by actors, bands, comedians, dancers; Entertainment services in the nature of live visual and audio performances, namely, musical band, rock group, gymnastic, dance, and ballet performances; Entertainment services in the nature of live visual and audio performances, namely, musical, variety, news and comedy shows; Entertainment services in the nature of live vocal performances by wedding bands; Entertainment services, namely, conducting parties; Night club services";
- MARLO HAMPTON (Reg. No. 5077423) is registered on the Principal Register for, *inter alia*, "Entertainment services in the nature of organizing social entertainment events; Entertainment services in the nature of presenting live musical performances; Entertainment, namely, live music concerts; After-hours night club services; Entertainment services, namely, conducting parties,";
-  (Reg. No. 5103470) is registered on the Principal Register (under Section 2(f) for the wording TROPICAL ISLANDS) for, *inter alia*, "Children's entertainment services, namely, Providing children's party

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<sup>7</sup> December 29, 2016 Final Office Action, TSDR pp. 20-39, in application Serial No. 87503471.

- centers for the purpose of entertaining children and celebrating birthdays; Provision of live entertainment, namely, live musical performances, live clown shows, live stage performances in the nature of plays, dance performances and concerts; entertainment services provided by vocalists, namely, live performances by a choir, vocal musical band or vocalist; Entertainment in the nature of theater productions; Provision of club entertainment services, namely, night club services and theatrical and musical floor shows provided at night clubs;
- STILL ON COUNT (Reg. No. 5086544) is registered on the Principal Register for, *inter alia*, “Entertainment services in the nature of arranging social entertainment events; Entertainment services in the nature of live audio performances by comedians and musicians; Entertainment services in the nature of live musical performances; Entertainment services in the nature of live visual and audio performances by comedians and musicians; Entertainment services in the nature of live visual and audio performances, namely, musical, variety, news and comedy shows; Entertainment services in the nature of live visual and audio performances by an actor; Entertainment services in the nature of live vocal performances by comedians and musicians; Entertainment services in the nature of organizing social entertainment events; Entertainment services, namely, conducting parties; After-hours night club services,” and
  - OZIE B (Reg. No. 5333598) is registered on the Principal Register for, *inter alia*, “Entertainment services in the nature of live musical performances; Entertainment services in the nature of organizing social entertainment events; Entertainment services in the nature of presenting live musical performances; Entertainment services in the nature of musical attractions; Entertainment services, namely, conducting parties; Entertainment, namely, live music concerts; After-hours night club services; Entertainment services in the nature of live musical performances; Entertainment services in the nature of live disc jockey performances; Entertainment services in the nature of presenting live musical performances; Entertainment, namely, live music concerts.”

The Trademark Examining Attorney also submitted Internet evidence consisting of excerpts from the websites of NYX Entertainment & Events, A Music Plus, Power Plant Live, City Connection Entertainment & Productions, and Xfinity Live!,<sup>8</sup>

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<sup>8</sup> December 29, 2017 Office Action, TSDR pp. 7-19, in application Serial No. 87503471. The Board notes that while the Trademark Examining Attorney identified, albeit untimely, the

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demonstrating that the same entity commonly provides the organizing of social entertainment events, live musical and dance performances, nightclub services, and the conducting of parties, and markets these services under the same mark.

## 2. Applicants' Class 43 Services

With respect to Applicants' standard character mark, their application covers "providing foods and drinks; providing of food and drink via a mobile truck; restaurant; catering services" in International Class 43. The Trademark Examining Attorney has submitted evidence showing these services are closely related to some of the entertainment services identified in the cited registration. Specifically, the Trademark Examining Attorney submitted live use-based third-party registrations, namely, Registration Nos. 2274735, 3985425, 4031607, 4112038, 4473119, 4725806, 5043216, 5173774, and 5182334,<sup>9</sup> as well as Internet evidence consisting of excerpts

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URLs for these websites in her brief, she nonetheless failed to identify them or the date upon which these websites were accessed during the prosecution of Applicants' application. *See In re Mueller Sports Med., Inc.*, 126 USPQ2d 1584, 1586 (TTAB 2018) (the requirement that Internet printouts must include a date and source/URL applies equally to evidence submitted by Examining Attorneys in ex parte cases as it does to parties involved in inter partes cases, and is important because it ensures that an applicant can verify the information presented in the case); *see also* Trademark Manual of Examination Procedure (TMEP) § 710.01(b) (Oct. 2017) ("When making Internet evidence part of the record, the examining attorney must both (1) provide complete information as to the date the evidence was published or accessed from the Internet, and its source (e.g., the complete URL address of the website), and (2) download and attach the evidence to the Office action."). Applicants, however, did not object to the submission of this evidence on these procedural grounds and, therefore, any objection to this evidence by Applicants has been waived. *Mueller Sports Med.*, 126 USPQ2d at 1586-87; *In re Int'l Business Machs. Corp.*, 81 USPQ2d 1677, 1682 n.9 (TTAB 2006) (Board considered web pages that did not include web addresses because applicant did not object to them).

<sup>9</sup> December 29, 2017 Office Action, TSDR pp. 36-68, in application Serial No. 87504846. The Trademark Examining Attorney also submitted Reg. No. 4020239. This registration, however, has been canceled pursuant to Section 8 of the Trademark Act, 15 U.S.C. § 1058, and therefore will be given no consideration. *See Black & Decker Corp. v. Emerson Elec. Co.*,

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from the websites of Mac's Nightclub and Restaurant, Weber's, Angelica's, Wilf's, Coastal Bars and Restaurants, Dublin Deck, Five Spot, Maine Street Nightclub, Room 38, and Savor,<sup>10</sup> that demonstrate that third parties offer services relating to the provision of food and beverages, and entertainment services in the nature of live entertainment, catering services and night club services, under the same mark.

Applicants argue that the parties' services are different because Registrant's use of the word "by" in its description of services, specifically in the phrases "live performances by a musical artist and as a songwriter," "live musical performances by musical bands and DJs," and "musical entertainment in the nature of live visual and audio performances by musical groups and DJs" demonstrate that Registrant's services are directly provided by a musical artist, unlike Applicants' services which do not include the word "by."<sup>11</sup> Applicants' argument is unpersuasive. Applicants' services are broadly identified as "entertainment services, namely, live musical and dance performances," which would encompass entertainment services by a particular artist.

The record establishes that Applicants' services and Registrant's services are offered by third parties under the same marks. As such, when the services are offered under the similar trademarks here, consumers are likely to believe that the services

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84 USPQ2d 1482, 1487 n.9 (TTAB 2007) (canceled registrations have no probative value).

<sup>10</sup> *Id.*, TSDR pp. 7-35. Again, the Trademark Examining Attorney failed to provide the URLs and date of access of these websites during prosecution but since Applicants did not object we have considered them.

<sup>11</sup> Applicants' Appeal Brief, pp. 3-4, 4 TTABVUE 5-6 in application Serial No. 87503471; Applicants' Appeal Brief, pp. 3-4, 4 TTABVUE 5-6 in application Serial No. 87504846.

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originate from the same source. Accordingly, the second *du Pont* factor also favors a finding of likelihood of confusion.

### **C. Similarities in Trade Channels and Classes of Purchasers**

Next we consider established, likely-to-continue channels of trade, the third *du Pont* factor. Because some of Applicants' and Registrant's entertainment services are identical or identical in part, and there are no restrictions on those services in the respective identifications, these identical and identical in part services are "presumed to travel in the same channels of trade to the same class of purchasers." *Viterra*, 101 USPQ2d at 1908 (Fed. Cir. 2012) (legally identical goods are presumed to travel in same channels of trade to same class of purchasers) (quotation omitted); *United Glob. Media Grp. Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011).

With regard to the trade channels of the parties' services which are not identical or identical in part, the only evidence relating to the channels through which these services travel is the third-party website evidence discussed above. This evidence shows these services may be provided in the same market to overlapping purchasers.

In view of the foregoing, the third *du Pont* factor weighs in favor of finding a likelihood of confusion.

### **III. Conclusion**

We have considered all of the arguments and evidence of record, including those not specifically discussed herein, and all relevant *du Pont* factors. Because we have found that the marks at issue are similar and that Applicants' identified services are

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identical, identical in part, or closely related to Registrants' services and that they would move in the same or overlapping trade channels and would be offered to the same or similar classes of purchasers, we conclude that Applicants' marks, as used in connection with the services identified in the applications, so resemble the cited mark as to be likely to cause confusion or mistake, or to deceive under Section 2(d) of the Trademark Act.

***Decision:*** The refusals to register Applicants' marks in application Serial Nos. 87503471 and 87504846 under Section 2(d) of the Trademark Act are affirmed.