

This Opinion is not a  
Precedent of the TTAB

Mailed: November 3, 2020

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

*In re Sundown Sounds Cruise, LLC*

Serial No. 88159692

Herbert W. Larson of Larson & Larson PA  
for Sundown Sounds Cruise, LLC

Marco Wright, Trademark Examining Attorney, Law Office 120,  
David Miller, Managing Attorney.

Before Taylor, Heasley, and Dunn  
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Applicant, Sundown Sounds Cruise, LLC, seeks registration on the Principal Register of the standard character mark SUNDOWN SOUNDS CRUISE (with “SOUNDS CRUISE” disclaimed) for “entertainment services, namely, live musical entertainment performances held on yachts or cruise ships” in International Class 41.<sup>1</sup>

<sup>1</sup> Application Serial No. 88159692 was filed on October 18, 2018, based on a declared intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). Applicant, which had disclaimed the exclusive right to use “CRUISE,” complied with the Examining Attorney’s requirement to disclaim “SOUNDS” in its brief, 6 TTABVUE 2. The

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 of likelihood of confusion with the registered mark SUNDOWN MUSIC FESTIVAL (in standard characters, with "MUSIC FESTIVAL" disclaimed) for "entertainment services in the nature of live musical performances; entertainment services in the nature of a live music festival; entertainment, namely, live music concerts" in International Class 41.<sup>2</sup>

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

### **I. Likelihood of Confusion**

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, mistake, or deception. 15 U.S.C. § 1052(d). We base our determination of likelihood of confusion under Section 2(d) on an analysis of all of the probative facts of record. *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"). In making our determination, we have considered each *DuPont* factor for which there is evidence

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disclaimer has been entered into the record. The final requirement to disclaim the word SOUNDS is therefore moot.

Page references to the application record are to the downloadable .pdf version of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs, motions and orders on appeal are to the Board's TTABVUE docket system.

<sup>2</sup> Registration No. 5426256, issued on the Principal Register on March 20, 2018.

and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019); see *Zheng Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010) (“Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.”)).

“The Lanham Act provides national protection of trademarks in order to secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers.” *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985). Consistent with these purposes, varying weights may be assigned to each *DuPont* factor depending on the evidence presented in a particular case. See *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination”). “In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services.” *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004), cited in *Ricardo Media Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355, 5 (TTAB 2019).

#### **A. Similarity of the Services and Channels of Trade**

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration...,” and the third *DuPont* factor concerns the “similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567; *Stone Lion Capital Partners, LP*

*v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014). A proper comparison of the services “considers whether ‘the consuming public may perceive [the respective goods or services of the parties] as related enough to cause confusion about the source or origin of the goods and services.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (quoting *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002)) quoted in *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1672 (TTAB 2018).

Applicant’s identified services are, once again, “entertainment services, namely, live musical entertainment performances held on yachts or cruise ships,” and Registrant’s services are “entertainment services in the nature of live musical performances; entertainment services in the nature of a live music festival; entertainment, namely, live music concerts.”

Applicant contends that:

...Applicant’s primary business model are single evening cruises on a yacht with music entertainment. The Registrant’s use on the other hand is terrestrial several-day music festivals.

...

Applicant’s customers for its yachting services will not confuse sea bound excursions with that of the Registrant’s terrestrial entertainment-festival related services. Applicant’s services for cruises on a yacht do not exist in the same channels of trade as the Registrant’s mark – one occurs on land – the other at sea.

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the respective customers surely are able to comprehend the difference of a land-based festival and a cruise of a yacht.<sup>3</sup>

However, “[t]he issue, of course, is not whether purchasers would confuse the services, but rather whether there is a likelihood of confusion as to the source of the

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<sup>3</sup> Applicant’s brief, 6 TTABVUE 4-5.

services.” *In re Binion*, 93 USPQ2d 1531, 1535 (TTAB 2009). To create this kind of confusion, “[i]t is sufficient that the respective goods and services are related in some manner, or that the conditions and activities surrounding the marketing of the goods and services are such that they would or could be encountered by the same persons under circumstances that could give rise to the mistaken belief that they originate from the same source.” *DeVivo v. Ortiz*, 2020 USPQ2d 10153, 11 (TTAB 2020) (citing *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012)). To make this determination, we look to the identifications in the application and cited registration. *See Stone Lion Capital Partners v. Lion Capital*, 110 USPQ2d at 1162; *Octocom Sys., Inc. v. Houston Computer Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

As the Examining Attorney correctly notes,<sup>4</sup> the cited registration’s broadly worded recitation “entertainment services in the nature of live musical performances,” encompasses such services, whether on land or at sea. “Where the identification of services is broad, the Board presume[s] that the services encompass all services of the type identified.” *In re Country Oven, Inc.*, 2019 USPQ2d 443903, 4 (TTAB 2019) (quoting *Southwestern Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015)) (internal punctuation omitted). For this reason, Registrant’s broad, unrestricted recitation of live musical performances encompasses Applicant’s narrower recitation of live musical performances held aboard yachts or cruise ships. The services are legally identical. *See In re Integrated Embedded*, 120 USPQ2d 1504,

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<sup>4</sup> Examining Attorney’s brief, 8 TTABVUE 9.

1514 (TTAB 2016) (citing *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012)).

To illustrate the point, the Examining Attorney adduces evidence of nine active, use-based third-party registrations that identify live musical performances on cruise ships. For example:<sup>5</sup>

Registration No.	Mark	Pertinent Services
3593946	RESPECT OUR PLANET & Design	Entertainment in the nature of live comedy, dance and musical performances on cruise ships
4555942	CHILLIN' THE MOST	Entertainment in the nature of live musical performances on a cruise ship
5069532	MUSIC WALK	Entertainment services in the nature of presenting live musical performances on cruise ships and on cruise excursions
4743090	THE LEBREWSKI CRUISE	Organizing and hosting themed social entertainment events in the nature of live musical performances and food and beer tasting events on cruise ships
5069532	MUSIC WALK	Entertainment services in the nature of presenting live musical performances on cruise ships and on cruise excursions

This evidence confirms that live musical performances can be provided on cruise ships. Since Applicant's and Registrant's services are legally identical—as both may offer live musical entertainment performances held on yachts or cruise ships—we presume that these services travel through the same channels of trade and are offered or rendered to the same or overlapping classes of purchasers. *In re Information Builders Inc.*, 2020 USPQ2d 10444, 3 (TTAB 2020) (citing *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968)); *see also American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d

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<sup>5</sup> Jan. 30, 2019 Office Action at 11-38.

1022, 1028 (TTAB 2011) (where there are legally identical services, marketing channels of trade and targeted classes of consumers are the same).

While we base our finding on the services as described in the application and registration, we note that the evidence regarding how the marks are actually used corroborates our finding that the services overlap. Registrant offers its musical entertainment services at seaside venues, e.g.:

**SUNDOWN MUSIC FESTIVAL 2016 || EVENT REVIEW**

By **Grant Gilmore** September 28, 2016



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<sup>6</sup> June 21, 2019 Response to Office Action at 21.



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And Applicant offers its services from shore to ship to shore:

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<sup>7</sup> June 21, 2019 Response to Office Action at 22.

<sup>8</sup> Facebook.com/sundownsoundsruise, Jan. 30, 2019 Office Action at 41.



Concertgoers could thus encounter Applicant's and Registrant's services in circumstances that could give rise to the mistaken belief that they originate from the same source. *Coach Servs. v. Triumph Learning*, 101 USPQ2d at 1722. Hence, the second and third *DuPont* factors weigh heavily in favor of finding a likelihood of confusion.

#### B. Similarity of the Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's and Registrant's marks in their entirety, taking into account their appearance, sound, connotation, and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Capital v. Lion Capital*, 110 USPQ2d at 1160; *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff'd* 777 Fed. Appx. 516 (Fed. Cir. 2019), (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). When the marks appear on legally identical services, as they do here, the degree of similarity necessary to support a conclusion of likely confusion declines. *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1244, 1248 (TTAB 2010) (citing *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992)).

Again, the applied-for mark is:

**SUNDOWN SOUNDS CRUISE** (with "SOUNDS CRUISE" disclaimed).

The cited registered mark is:

**SUNDOWN MUSIC FESTIVAL** (with "MUSIC FESTIVAL" disclaimed).

Even though both marks share the first word SUNDOWN, and disclaim the following two words, “focusing on one part, or the prominent part of a mark while ignoring other elements violates the antidissection rule,” Applicant states.<sup>9</sup> Viewed in their entireties, Applicant maintains, the marks are dissimilar.<sup>10</sup> The marks are dissimilar in meaning, it contends, because “FESTIVAL” and “CRUISE” carry differing connotations. “A music festival is ‘a festival, often an annual event, at which a lot of different performers play,’ it states, quoting *Collins English Dictionary*.<sup>11</sup> “Cruise means ‘to sail about touching at a series of ports.’ Applicant’s mark creates no connotation or commercial impression of a festival.”<sup>12</sup>

Applicant’s argument is belied, however, by the Examining Attorney’s evidence of over 15 webpage screenshots from third-party entities that provide live musical performances, such as music **festivals**, on cruise ships.<sup>13</sup> Representative samples include:

- **THE ROCK BOAT XX** — “The Galaxy’s greatest floating music festival,” featuring “5+ stages of music,” and “Dozens of your favorite artists” on a five-day cruise from Miami to Harvest Caye, Belize and Roatan, Honduras;<sup>14</sup>
- **SAIL ACROSS THE SUN** — “FESTIVAL DETAILS” include “5 stages of music,” “4 days to unwind at sea,” on a ship cruising from Miami to Nassau, Bahamas and Great Stirrup Cay;<sup>15</sup>

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<sup>9</sup> Applicant’s brief, 6 TTABVUE 5.

<sup>10</sup> Applicant’s brief, 6 TTABVUE 5-6.

<sup>11</sup> June 21, 2019 Response to Office Action at 6, 10 (citing CollinsDictionary.com), incorporated by reference in Applicant’s brief, 6 TTABVUE 2.

<sup>12</sup> June 21, 2019 Response to Office Action at 7 (citing merriam-webster.com).

<sup>13</sup> Sept. 27, 2019 Office Action at 8-28.

<sup>14</sup> TheRockBoat.com, *id.* at 12.

<sup>15</sup> SailAcrossTheSun.com, *id.* at 16.

- **COUNTRY CRUISING** — “This country music festival on a cruise ship will bring you all the best performances” on a six night Caribbean cruise from Fort Lauderdale, Florida to Belize City, Belize, Cozumel, Mexico, and Key West, Florida;<sup>16</sup>
- **THE JAZZ CRUISE** — “With over 200 hours of music, 100 jazz musicians and a legion of loyal guests from all over the world,” it touts “The Greatest Jazz Festival At Sea” cruising from Miami to Costa Maya to Cozumel to Key West;<sup>17</sup>  
  
and
- **THE SUPERCUISE XIV** — “Full-Ship Music Festival at Sea,” “8 days and nights of jazz, soul, comedy, gospel, and funk!” sailing from Fort Lauderdale, Florida to “three beautiful Caribbean ports of call.”<sup>18</sup>

In example after example, we see that music festivals and cruises are not mutually exclusive.<sup>19</sup>

Applicant emphasizes the marks’ differences in sound, stating that the “alliteration, assonance, and rhyming pattern of Applicant’s mark is distinct from Registrant’s mark. As a result, consumers are able to distinguish ‘Sundown Sounds Cruise’” from ‘Sundown Music Festival’ despite use of the common word, *Sundown*.<sup>20</sup>

As the Examining Attorney correctly observes, however, the difference in sound does not overcome the overall similarity of the marks. The proper focus is on the recollection of the average consumer, who retains a general rather than specific impression of the marks. *In re FabFitFun*, 127 USPQ2d at 1675. So “there is nothing

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<sup>16</sup> CountryCruising.com, *id.* at 21.

<sup>17</sup> TheJazzCruise.com, *id.* at 22-23.

<sup>18</sup> CapitalJazz.com, *id.* at 24.

<sup>19</sup> Sept. 27, 2019 Office Action at 8-28.

<sup>20</sup> Applicant’s brief, 6 TTABVUE 6.

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 consideration of the marks in their entireties.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985)).

Both marks begin with the word SUNDOWN. “Thus, upon encountering each mark, consumers must first notice this identical lead word.” *Century 21 Real Estate v. Century Life*, 23 USPQ2d at 1700, *cert. denied*, 506 U.S. 1034 (1992). *Accord 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”).

Although consumers would not ignore the words that follow—SOUNDS CRUISE in one mark and MUSIC FESTIVAL in the other—the fact that they are disclaimed as descriptive or generic indicates that they are less likely to be impressed upon their minds and remembered as source indicators than the prominently placed word SUNDOWN. *See In re Detroit Athletic Co.*, 128 USPQ2d at 1049-50 (quoting MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 23:42: “The fact that in a registration, certain descriptive or generic terms are disclaimed indicates that those terms are less significant and the other parts of the mark are the dominant parts that will impact most strongly on the ordinary buyer.”).

Moreover, the disclaimed descriptive words do not differentiate Applicant's and Registrant's services, as "sounds" refers to a "musical style,"<sup>21</sup> and a music "festival," as we have seen, can take place on a "cruise." In the eyes of consumers, SUNDOWN would thus remain the marks' prominent, dominant component. Despite the difference in the marks' sounds, consumers who are familiar with Registrant's SUNDOWN MUSIC FESTIVAL mark and then see Applicant's SUNDOWN SOUNDS CRUISE mark are likely to believe that Registrant has adopted a variation of its original mark for live musical entertainment at sea. *See In re Max Capital Grp. Ltd.*, 93 USPQ2d at 1244, 1248.

Applicant argues that "SUNDOWN" is diluted and weak:

[A Trademark Electronic Search System (TESS)] list of 47 third-party registrations reveals the word Sundown is used broadly for a wide variety of goods and services. Goods and services associated with the word Sundown include a wide array of goods and services, namely eyewear, calcium supplements, ladies' purses, blackout curtains, car audio equipment, tourist agency services, landscape design and construction, plastic vacuum hoses for swimming pools, livestock trailers, grass seed, and construction and repair of offshore oil and gas wells.<sup>22</sup>

Applicant continues:

Numerous examples exist of goods in the entertainment industry coexisting in the marketplace without consumer confusion despite the shared use of the word Sundown.

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<sup>21</sup> Merriam-Webster.com, MacmillanDictionary.com, April 14, 2020 Office Action (response to request for reconsideration) at 4-5.

<sup>22</sup> Applicant's brief, 6 TTABVue 3 (citing TESS listing, March 24, 2020 request for reconsideration at 11-12).

<b>Mark</b>	<b>Reg. No.</b>	<b>Goods</b>
BURNDOWN AT SUNDOWN!	4028559	Organizing and conducting entertainment events, namely racing competitions featuring automobiles, motorcycles, trucks and go-carts
DOWNTOWN SUNDOWN 5K	4217428	Athletic and sports event services, namely, arranging, organizing, operating and conducting foot races
SUNDOWN COOKOUT	1994860	Conducting entertainment exhibitions in the nature of a cookout and western show
SUNDOWN RUSH	5399810	Entertainment, namely, live performances by a musical band
SUNDOWN	5445411	Event management services, namely, organization of educational events, namely, programs in the field of the importance of sports and health for educational purposes
VELVET SUNDOWN	5435701	. . . organizing games in the field of video game competitions . . .

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We find, though, that this third-party evidence fails to show that the shared element SUNDOWN is weak, either conceptually or commercially.

To begin with, the TESS listing submitted by Applicant did not make the underlying 47 listed third-party registrations of record. *See Edom Labs. Inc. v.*

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<sup>23</sup> Applicant’s brief, 6 TTABVUE 3-4 (citing to printouts of third-party registrations, March 24, 2020 request for reconsideration at 13-24).

*Lichter*, 102 USPQ2d 1546, 1550 (TTAB 2012); *Truescents LLC v. Ride Skin Care LLC*, 81 USPQ2d 1334, 1337 (TTAB 2006). And the listing does not indicate the goods or services with which those third-party marks were used. Accordingly, this evidence is entitled to no probative weight on the question of the strength of the term SUNDOWN for live musical performances.

The six registered third-party marks in Applicant's table above were properly introduced in evidence.<sup>24</sup> But only one, SUNDOWN RUSH, has services similar to Registrant's: "entertainment, namely live performances by a musical band." A single third-party registration is not sufficient to establish that Registrant's mark is a weak mark entitled to only a narrow scope of protection. *See In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016) ("[O]ne third-party registration has little probative value, especially in the absence of evidence that the mark is in use on a commercial scale or that the public has become familiar with it.")).

The remaining "third-party registrations submitted by Applicant ... do not identify goods and services related to the goods and services at issue here and, therefore, have no bearing on the scope of protection to be accorded to Registrant's ... mark." *In re Information Builders*, 2020 USPQ2d 10444 at 8.

Moreover, "In this case there is no evidence of third-party usage, there is only evidence of just a few third-party registrations. The existence of [third-party] registrations is not evidence of what happens in the market place or that customers are familiar with them. *In re Inn at St. John's*, 126 USPQ2d at 1746 *aff'd* 777 Fed.

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<sup>24</sup> Printouts of third-party registrations, March 24, 2020 request for reconsideration at 13-24.

Appx. 516 (Fed. Cir. 2019) (quoting *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) (internal punctuation omitted)). Applicant's third-party evidence thus fails to demonstrate that the shared word "SUNDOWN" is a weak element as used in connection with Registrant's and Applicant's live musical entertainment services.

Notably, neither Registrant nor Applicant has disclaimed "SUNDOWN," indicating that the word is inherently distinctive. Consequently, the third-party registration evidence does not diminish the registered mark's entitlement to protection against registration of Applicant's mark. SUNDOWN MUSIC FESTIVAL is entitled to the normal scope of protection accorded registered marks. 15 U.S.C. § 1057(b).

Taken in their entirety, we find that the marks are more similar than dissimilar, and the first *DuPont* factor weighs in favor of finding a likelihood of confusion.

### C. Consumers' Sophistication and Care

Under the fourth *DuPont* factor, we consider "[t]he conditions under which and buyers to whom sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing." *DuPont*, 177 USPQ at 567.

In the course of prosecution, Applicant asserted that "Applicant's and Registrant's consumers are highly sophisticated." Specifically, it argued, "Applicant's and Registrant's consumers purchase tickets for the services with knowledge of where the



services will be located. The examiner presents no evidence of consumer confusion between a festival and a cruise.”<sup>25</sup>

In its brief on appeal, Applicant now purports to incorporate by reference the arguments it made during the course of prosecution, including, presumably, its “care and sophistication” argument.<sup>26</sup> The Examining Attorney correctly objects, pointing out that such arguments, even if made during the course of prosecution, are waived if they are not carried forward in briefs before the Board.<sup>27</sup> Indeed, the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) provides that “If an applicant, in its appeal brief, does not assert an argument made during prosecution, it may be deemed waived by the Board.” TBMP § 1203.02(g) (2020).

We agree that the argument need not be considered, and answer it only for the sake of completeness. Applicant’s argument is unavailing for several reasons.

First, Applicant’s assertion that concertgoers are careful and sophisticated is just that: an assertion. Attorney argument is not evidence, *Enzo Biochem Inc. v. Gen Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005), and Applicant provides no reason to believe that music enthusiasts who frequent beach or cruise concerts are particularly discriminating as to anything other than their musical preferences.

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<sup>25</sup> Applicant’s June 21, 2019 Response to Office Action at 8-9.

<sup>26</sup> “Applicant incorporates by reference its arguments in its Response to Office Action dated June 21, 2019.” Applicant’s brief, 6 TTABVUE 2.

<sup>27</sup> “The Examining Attorney objects and respectfully requests that any argument not presented in Applicant’s Appeal Brief be deemed waived by the Board.” Examining Attorney’s brief, 8 TTABVUE 13.

Second, we must base our decision on the least sophisticated potential purchasers. *Stone Lion Capital Partners v. Lion Capital*, 110 USPQ2d at 1163. Since there is no restriction in the subject application and registration as to price or quality, there is no reason to infer that the concertgoers will be particularly sophisticated, discriminating, or careful in making their purchases. *Bd. of Regents v. So. Illin. Miners, LLC*, 110 USPQ2d 1182, 1193 (TTAB 2014) (“Although some of the parties’ more knowledgeable consumers may be more careful in their purchase, neither the registrations nor the applications contain limitations on the classes of customers. We therefore must not limit our consideration of this factor to the more sophisticated purchasers within the classes of potential customers.”).

Third, Applicant made its “care and sophistication” assertion in the context of arguing that concertgoers could distinguish between concerts staged on land and at sea.<sup>28</sup> But as we have seen, the issue is whether they could distinguish the source or sponsorship of the services, not the services themselves. *In re Binion*, 93 USPQ2d at 1535.

And fourth, in any event, “even if Applicant’s unsupported argument is credited, purchaser sophistication does not always result in a finding that confusion is unlikely, especially where legally identical in part goods and services are involved and ... the marks are similar.” *In re Information Builders*, 2020 USPQ2d 10444 at 4. “In other words, even careful purchasers who do notice the difference in the marks will not ascribe it to differences in the source of the [services], but will see the marks

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<sup>28</sup> “The examiner presents no evidence of consumer confusion between a festival and a cruise.” Applicant’s June 21, 2019 Response to Office Action at 9.

as variations of each other, pointing to a single source.” *In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1739 (TTAB 2018).

Hence, even if Applicant’s assertion is given due consideration (or more consideration than it is due), we have no reason to conclude that ordinary concertgoers will exercise more than an ordinary degree of care. This factor is neutral.

## II. Conclusion

When we consider the record and the relevant likelihood of confusion factors, and all of the arguments relating thereto, we conclude that consumers familiar with Registrant’s services offered under its mark would be likely to believe, upon encountering services offered under Applicant’s mark, that the services originated with or are associated with or sponsored by the same entity. There is therefore a likelihood of confusion under Section 2(d) of the Trademark Act. 15 U.S.C. § 1052(d).

**Decision:** The refusal to register Applicant’s mark is affirmed.