

**THIS OPINION IS NOT A
PRECEDENT OF
THE T.T.A.B.**

Hearing: April 24, 2017

Mailed: June 28, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

Brock
v.
Turner

—————
Opposition No. 91214199
to Application Serial No. 85776225

—————
Brent Hawkins, Clark T. Gordon, and Jodi Benassi of McDermott Will &
Emery LLP,
for Dave Brock.

Evan S. Cohen, Esq.,
for Nicholas Turner aka Nik Turner.

—————
Before Richey, Deputy Chief Administrative Trademark Judge, and Ritchie
and Gorowitz, Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

On November 9, 2012, Nicholas Turner aka Nik Turner (“Mr. Turner”) applied to register NIK TURNER’S HAWKWIND, in standard characters, for services ultimately identified as “entertainment services, namely, live musical performances by an individual or musical group,” in International

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Class 41.¹ Dave Brock (“Mr. Brock”), filed an opposition to the registration of Mr. Turner’s mark on the ground that Mr. Turner’s mark is likely to cause confusion with Mr. Brock’s mark, HAWKWIND. Mr. Brock alleges in the Notice of Opposition that he was a founding member of the band HAWKWIND in 1969, and that he is the only continuous member of the band to date.² Mr. Brock further alleges that he has “extensive common law rights in and to the HAWKWIND mark in the United States,” that the “mark is synonymous with the musical group led by Mr. Brock,” that the mark is “famous” in the United States and throughout the world, and that Mr. Turner’s use and registration of ‘NIK TURNER’S HAWKWIND’ for the applied-for services is likely to cause confusion, deception, and/or mistake with respect to Mr. Brock’s HAWKWIND mark.³ In regard to these assertions, Mr. Brock also asserted a claim of a false suggestion of a connection.⁴

In his answer, Mr. Turner states as follows:⁵

Turner admits that Opposer Dave Brock (“Brock”) currently styles himself as the “leader” of the band that performs as HAWKWIND, but Brock’s current version of HAWKWIND is simply one of the many versions of the band that have toured since the band’s formation in late 1969.

¹ Application Serial No. 85776225 filed November 9, 2012, under Section 1(b) of the Trademark Act, asserting a bona fide intent to use in commerce.

² 1 TTABVUE 3.

³ 1 TTABVUE 3-4, 7.

⁴ Mr. Brock also asserted a claim of dilution with his notice of opposition but did not pursue it further, instead narrowing the focus of the opposition in his brief to the claims under Sections 2(d) and 2(a) of the Trademark Act. *See* 52 TTABVUE 12.

⁵ 4 TTABVUE 2.

Mr. Turner otherwise denied the salient allegations of the notice. Mr. Turner further asserted several affirmative defenses including unclean hands.⁶ Both parties filed briefs, and Mr. Brock filed a reply brief. An oral hearing was held at the request of Mr. Brock, and was presided over by this panel.

The Record

The record consists of the pleadings; the file of the involved application; Mr. Brock's first notice of reliance on its pleaded application; Mr. Brock's second notice of reliance on printed materials; Mr. Brock's third notice of reliance on the prosecution history of its U.S. Application Serial No. 79150777; Mr. Turner's first notice of reliance on printed materials; and the following declarations and expert witness reports submitted by the parties, along with exhibits attached therewith,

For Mr. Brock:⁷

1. Expert witness report of Ian Abrahams, dated December 4, 2015;
2. Expert witness report of Ed Vulliamy, dated December 3, 2014;
3. Expert witness report of Malcolm Dome, dated December 2, 2014;
4. Declaration of Adam Velasco, managing director of Cherry Red Records, dated December 22, 2015;

⁶ 4 TTABVUE 8. We note that Mr. Turner did not pursue or show proof of his affirmative defenses on brief, and we consider them to be waived.

⁷ The parties filed a stipulation agreeing to accept submission of testimony by declaration. 21 TTABVUE 2. The parties further agreed to allow submission of the expert reports previously exchanged during discovery. 24 TTABVUE 2.

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5. Declaration of Dave Law, administrator of the official HAWKWIND website, www.HAWKWIND.com, dated January 29, 2016;
6. Declaration of Brian Troyan, senior researcher at McDermott, Will & Emery, dated January 29, 2016;
7. Declaration of Sam Kirwan, administrator of the HAWKWIND Facebook fan group page, dated January 25, 2016;
8. Declaration of Jonathon Darbyshire, bass player and vocalist for HAWKWIND, dated February 3, 2016;
9. Declaration of Dave Brock, founding member and leader of HAWKWIND, dated February 2, 2016;
10. Declaration of Kris Tait, wife of Mr. Brock and manager of HAWKWIND, dated February 2, 2016;
11. Rebuttal Declaration of Adam Velasco, dated May 16, 2016;
12. Rebuttal Declaration of Dave Brock, dated May 17, 2016; and
13. Rebuttal Declaration of Kris Tait, dated May 17, 2016

For Mr. Turner:

1. Expert witness report of Dave Thompson, dated February 18, 2016;
2. Declaration of Brian Perera, President of Cleopatra Records, dated March 30, 2016; and
3. Declaration of Nicholas Turner, aka Nik Turner, an early member of HAWKWIND and active musician, dated March 30, 2016.

Background Findings

Opposer Dave Brock is a musician who founded the band HAWKWIND in 1969.⁸ The band has been in constant existence since Mr. Brock formed the band over 47 years ago.⁹ HAWKWIND is considered one of the pioneers of “progressive rock” or “space rock.”¹⁰ While many band members have come and gone through the years, Mr. Brock is the only remaining founding member, and the only continuous member of the band.¹¹ Mr. Brock is widely considered to be the leader of HAWKWIND.¹² Mr. Turner admitted that Mr. Brock is the only remaining continuous member of HAWKWIND, and that all others “were asked to leave and have been replaced.”¹³ He further admitted that “Dave Brock exercises artistic control over the current performances of the HAWKWIND” as well as over “current recordings”¹⁴ having “continuously performed” with the band “since at least as early as 1970.”¹⁵

Current bass player and vocalist Mr. Darbyshire commented, “what makes it a ‘HAWKWIND’ album IS Dave.”¹⁶ Expert witness Mr. Dome also asserted that HAWKWIND is “inextricably linked with Dave Brock . . . Dave Brock is HAWKWIND, and HAWKWIND is Dave Brock.”¹⁷ Expert witness

⁸ 37 TTABVUE 2.

⁹ 37 TTABVUE 2. 33 TTABVUE 5.

¹⁰ See 36 TTABVUE.

¹¹ 37 TTABVUE 2.

¹² 37 TTABVUE 2.

¹³ Response to Request For Admission No. 4; 30 TTABVUE 7.

¹⁴ Response to Request For Admission Nos. 13 and 14; 30 TTABVUE 9.

¹⁵ Response to Request For Admission No. 5; 30 TTABVUE 8.

¹⁶ 35 TTABVUE 3.

¹⁷ 25 TTABVUE 24.

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Mr. Abrahams referred to them as “synonymous”,¹⁸ and Mr. Vulliamy echoed that he is “the man synonymous with the band.”¹⁹

HAWKWIND first toured in the United States in 1974.²⁰ The band returned to the United States for tours a number of times over the decades, playing over 100 shows, with the most recent tour occurring in 2007.²¹ An additional tour was intended and attempted in 2013, and several venues were booked.²² However, Mr. Brock cancelled the tour for health reasons.²³

HAWKWIND has been selling recordings in the United States since at least 1972.²⁴ Releases have continued in more recent years through Cherry Red Records, which owns rights to many of HAWKWIND’s recordings. In 2015, HAWKWIND’s “Sonic Attack” was re-released.²⁵ Mr. Brock has established that recordings are currently available in the United States “in the form of CDs, vinyl records, and DVDs” at Amazon.com.”²⁶ Mr. Turner has also admitted that “HAWKWIND recordings are sold in the United States through Amazon.com as well as through other retail outlets.”²⁷

Mr. Turner asserts in his declaration that he was “one of the founding members of HAWKWIND.”²⁸ He admits in responses to requests for

¹⁸ 25 TTABVUE 6.

¹⁹ 25 TTABVUE 17.

²⁰ See 37 TTABVUE 2, 37.

²¹ 37 TTABVUE 2, 106; 48 TTABVUE 3.

²² 37 TTABVUE 6; 38 TTABVUE 3, 62; 51 TTABVUE 7.

²³ 37 TTABVUE 6-7; 51 TTABVUE 8.

²⁴ 33 TTABVUE 13.

²⁵ 33 TTABVUE 90.

²⁶ 32 TTABVUE 3.

²⁷ Response to Request For Admission No. 16; 30 TTABVUE 10.

²⁸ 44 TTABVUE 2.

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admission, however, that he was not one of the actual founding members of the band, but rather was “invited to join” the band after “helping with transport and gear.”²⁹ This is consistent with testimony from Mr. Brock³⁰ and of expert witness Ian Abrahams.³¹ Both parties agree that Mr. Turner first left HAWKWIND in 1976.³² Mr. Brock notes that Mr. Turner joined HAWKWIND again briefly from 1982 through 1984.³³ Mr. Turner acknowledges, however, that he was never in a position of control over the band or its name as was Mr. Brock, stating “I, like every other member of the ‘classic’ line-up, was forced out of the band by Dave Brock.”³⁴

Over the years, Mr. Turner has played with different bands under different names.³⁵ Some of these included use of the term “HAWKWIND.”³⁶ In 1994, Mr. Turner played in the United States under the name NIK TURNER’S HAWKWIND.³⁷ Mr. Brock took action against Mr. Turner for his use of the term “HAWKWIND” in a court of the United Kingdom, resulting in a settlement and consent agreement in 2002 in the Bristol County Court,³⁸ reading in relevant part as follows:³⁹

²⁹ Response to Request For Admission Nos. 1 and 2; 30 TTABVUE 7.

³⁰ 37 TTABVUE 4.

³¹ 25 TTABVUE 8.

³² Response to Request For Admission No. 8; 30 TTABVUE 8; 37 TTABVUE 3; 44 TTABVUE 2.

³³ 37 TTABVUE 4.

³⁴ 44 TTABVUE 2.

³⁵ 48 TTABVUE 3.

³⁶ 44 TTABVUE 5.

³⁷ 44 TTABVUE 5; 48 TTABVUE 3 .

³⁸ 48 TTABVUE 4.

³⁹ 48 TTABVUE 114-115.

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1. The Defendant will not use the following names “HAWKWIND”, “XHAWKWIND”, “X-HAWWIND” and/or “XHAWKWIND.COM” in relation to any trade whatsoever (save as set out in paragraphs 3 and 4 below).
4. For the avoidance of doubt, the Defendant may describe himself using the words “ex-HAWKWIND” or “formerly of HAWKWIND” or “an ex-member of HAWKWIND” or “a former member of HAWKWIND”, with the “ex -=”, “formerly of”, “an ex-member of” and “a former member of” in the same or bigger size font than the “HAWKWIND”. The aforementioned descriptions shall not be used in a larger font size than the name of the Defendant’s band.

Mr. Brock’s counsel acknowledged at oral hearing that this agreement is limited in enforcement to the United Kingdom, and not the United States.

Standing and Priority

Standing is a threshold issue that must be proven in every *inter partes* case. *See Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) (“The facts regarding standing . . . must be affirmatively proved. Accordingly, [plaintiff] is not entitled to standing solely because of the allegations in its [pleading].”). To establish standing in an opposition, Mr. Brock must show both “a real interest in the proceedings as well as a ‘reasonable’ basis for his belief of damage.” *See Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999). Mr. Brock has established standing in his pleading and testimony in that his application for the mark HAWKWIND was suspended on the ground of likelihood of confusion with Mr. Turner’s pending application.⁴⁰ *See Empresa Cubana del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir.

2014); Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 309.03(b) (June 2017). We further find that Mr. Brock has established his standing, in showing a reasonable belief of damage, as a competitor of Mr. Turner's.

To establish priority on a likelihood of confusion claim brought under Trademark Act Section 2(d), a party must establish that, vis-à-vis the other party, it owns “a mark or trade name previously used in the United States ... and not abandoned....” Trademark Act Section 2, 15 U.S.C. §1052. A party may establish its own prior proprietary rights in a mark through ownership of a prior registration, actual use or through use analogous to trademark use, such as use in advertising brochures, trade publications, catalogues, newspaper advertisements and Internet websites which create a public awareness of the designation as a trademark identifying the party as a source. *See* Trademark Act §§2(d) and 45, 15 U.S.C. §§ 1052(d) and 1127. *See also T.A.B. Systems v. PacTel Teletrac*, 77 F.3d 1372, 37 USPQ2d 1879 (Fed. Cir. 1996).

Inasmuch as Mr. Brock has not pleaded ownership of any registered trademark, Mr. Brock must rely on his common law use of HAWKWIND as a trademark to prove priority. In order for a plaintiff to prevail on a claim of likelihood of confusion based on its ownership of common law rights in a mark, the mark must be distinctive, inherently or otherwise, and plaintiff must show priority of use. *See Otto Roth & Co. v. Universal Foods Corp.*, 640

⁴⁰ 51 TTABVUE 9, 20; 50 TTABVUE 5-12.

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F.2d 1317, 209 USPQ 40 (CCPA 1981) There is no dispute that the term HAWKWIND is inherently distinctive for musical recordings and for entertainment services in the nature of live musical performances, and we find that it is.

As noted, we find that Mr. Brock was one of the founders of the HAWKWIND band and that he is the only continuous member of the band. We have also found that Mr. Brock is the creative leader of the band, controlling the comings and goings of other band members over the years. As such, we find that he has controlled the nature and quality of the HAWKWIND mark for musical recordings and for entertainment services in the nature of live musical performances in the United States, having established a priority for musical recordings in the United States of 1972 and of live musical performances of 1974. *See Robi v. Reed*, 173 F.3d 736; 50 USPQ2d 1315 (9th Cir. 1999) (founding member of band who was in band continuously while others came and went controls trademark); *See also Commodores Entm't Corp. v. McClary*, 2014 BL 289837 (M.D. Fla. 2014) (“When members of a band dispute ownership of a mark associated with the band, courts have found that members who remain active and associated with the band have better title to the mark than those who do not.”); *aff'd, unpubl'd Commodores Entm't Corp. v. McClary*, 648 Fed. Appx. 771 (11th Cir. 2016).

Mr. Turner argues that Mr. Brock abandoned the mark for live musical performances through nonuse, pointing out that Mr. Turner and HAWKWIND have not toured in the United States since 2007. In this regard, Mr. Turner argues in his brief that due to a lack of regular and recurring use, Mr. Brock fails to use the mark “in the ordinary course of trade,” citing 15 U.S.C. § 1127. Mr. Brock responds on reply that although he may delay a decade between tours in the U.S., this is not unusual in the industry.⁴¹ To establish an industry norm, Mr. Brock asks us to take judicial notice of the touring schedule of the Rolling Stones. We decline to do so, as this is not appropriate material for judicial notice.⁴² Mr. Turner, on the other hand, submitted the testimony of Mr. Perera, who stated that “other British musical groups – specifically in the ‘progressive rock’ genre” have made a “concerted effort to perform here in the United States.” He further noted that these bands, including such well known bands as Jethro Tull, Yes, Asia and King Crimson, tour much more regularly. He notes that “[a]lthough some of these are not presently as active as they once were, all of them made an effort to tour here quite frequently, that is, at least once a year.”⁴³ It is not clear, since he speaks in past tense, whether Mr. Perera is referencing current

⁴¹ 54 TTABVUE 16.

⁴² We note further that while Mr. Brock refers to the Rolling Stones tour schedule from the 1980s as being “widely published in sources available through the internet,” he did not include any such sources with his reply brief. See 54 TTABVUE 16, n.1.

⁴³ 43 TTABVUE 3.

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touring by these bands, or only past behavior, as HAWKWIND itself toured more frequently in the United States in the early years of the band.⁴⁴

We find, regardless, that Mr. Brock did not intend to abandon the mark for live musical performances because HAWKWIND has continued touring elsewhere and HAWKWIND was planning to tour in the United States at least as recently as 2013, taking substantial steps to do so, before the tour was cancelled for reasons related to Mr. Brock's health. Musical recordings by HAWKWIND are still available in the United States, and have been continuously since the 1970s. Thus there has been no abandonment by Mr. Brock of the HAWKWIND mark. *See Kingsmen v. K-Tel Int'l, Ltd.*, 557 F.Supp. 178, 220 USPQ 1045, 1049 (S.D.N.Y. 1983) ("Even though plaintiffs disbanded their group in 1967 and ceased recording new material, there is no evidence suggesting that they failed to use the name Kingsmen during the period from 1967 to the present to promote their previously recorded albums.") The *Kingsmen* court likened the situation to a band like the Beatles that "has disbanded and ceased performing and recording" but is not deemed to have abandoned its mark because it continues to receive royalties from prior albums. *See also Marshak v. Treadwell*, 58 F.Supp.2d 551 (D.N.J. 1999), *aff'd* 240 F.3d 184, 57 USPQ2d 1764, 1775 (3d Cir. 2001) (finding that there has been no abandonment of band's common law rights where, despite absence of new recordings or tours in the United States, original recordings

⁴⁴ *See* 37 TTABVUE 2, 35-106.

“continue to be played and sold in the United States” and some have been re-released).

Because we find that Mr. Brock did not abandon his common law rights in the mark for live musical performances, we find that Mr. Brock’s priority in the mark, which was established in 1974, persists. Mr. Turner’s earliest priority date for NIK TURNER’S HAWKWIND is 1994. Accordingly, we find that Mr. Brock has established priority for purposes of likelihood of confusion.

Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the relevant, probative evidence in the record related to a likelihood of confusion. *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); *see also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. *See Federated Foods, Inc. v. Fort Howard 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 goods and differences in the marks.”). We discuss the *du Pont* factors for

which there is relevant argument and evidence. The others we consider to be neutral.

The Goods and Services and Channels of Trade

The application identifies “entertainment services, namely, live musical performances by an individual or musical group,” for which Mr. Brock has also demonstrated priority. As such, the services offered by the parties are identical. Mr. Brock has also established use of the mark in connection with related musical recordings.⁴⁵

As for the channels of trade, Mr. Brock has established that his live musical performances are offered via the same types of venues and locales, if not necessarily the exact same locations, as those offered by Mr. Turner.⁴⁶ For example, when Mr. Brock and his manager planned his 2013 United States tour, they soon found out that Mr. Turner was also planning a tour including some of the same cities “on the night following HAWKWIND performances.”⁴⁷ We find that the channels of trade overlap.

These *du Pont* factors weigh in favor of finding a likelihood of confusion.

The Marks

We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imps.*, 73 USPQ2d at 1692. In comparing the marks, we are mindful that the test is not whether the marks can be distinguished when subjected to a side-by-side

⁴⁵ See 33 TTABVUE 2.

⁴⁶ 38 TTABVUE 4.

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comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods and/or services offered under the respective marks is likely to result. *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average consumer, who retains a general rather than specific impression of the marks. *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Mr. Brock's mark is HAWKWIND. Mr. Turner's mark is NIK TURNER'S HAWKWIND, which incorporates in full Mr. Brock's mark and makes it the possessive of the personal name by which Mr. Turner is known, Nik Turner. Case law dictates that adding a personal possessive to a trademark makes it no less confusingly similar. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) (GASPAR'S ALE and JOSE GASPAR GOLD); *In re Riddle*, 225 USPQ 630 (TTAB 1985) ("ACCUTUNE" and "RICHARD PETTY'S ACCU TUNE"); *see also Ky. Fried Chicken Corp. v. Smith*, 351 F.Supp. 1311, 175 USPQ 154, 155 (E.D. Mich. 1972) (AL'S KENTUCKY FRIED CHICKEN and KENTUCKY FRIED CHICKEN).

We find that the marks are substantially similar in sight, sound, and commercial impression. Regarding the latter, we further note that Mr.

⁴⁷ 38 TTABVUE 3.

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Turner referred in his declaration to NIK TURNER'S HAWKWIND as "my version of HAWKWIND." 44 TV 6. This indicates exactly the problem. Consumers are likely to assume that Mr. Turner is simply offering another "version" or offshoot of HAWKWIND, which they would associate with Mr. Brock's HAWKWIND.

Accordingly, we find that, when considered in their entireties, the marks are similar in sight and sound, and are substantially similar in commercial impression, and this *du Pont* factor also weighs in favor of finding likelihood of confusion.

Fame

Mr. Brock asks that we consider the commercial strength of his mark. In particular, Mr. Brock asserts that the HAWKWIND mark is famous among the relevant concert-going public.⁴⁸ Fame, where it exists, plays a dominant role assessing likelihood of confusion. *Kenner Parker Toys Inc. v. Rose Arts Indus., Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992).

HAWKWIND has had a continuous and to some degree a changing fan base, with some original fans now in their 60s, and other, younger fans, adding on through the decades.⁴⁹ Several experts have written about HAWKWIND over the years, in various publications including articles and books.⁵⁰ Dave Brock received a lifetime achievement award for his work with

⁴⁸ 52 TTABVUE 39.

⁴⁹ 25 TTABVUE 16.

⁵⁰ 25 TTABVUE 4 (Abrahams); 15 (Vulliamy); 24 (Dome).

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HAWKWIND from “Prog Magazine” in 2013.⁵¹ HAWKWIND also received a Mojo Maverick award in 2010.⁵² While it appears that HAWKWIND has enjoyed most of its fame in the United Kingdom, Mr. Brock’s web administrator comments that “[t]he data indicates that there were at least 400,000 sessions originating in the United States” between 2009 and 2015.⁵³ The official HAWKWIND Facebook administrator also confirmed that there is a sizeable U.S. contingent, stating that “a selected post reached 51,721 people in the United Kingdom over a 28 day period, and the same post reached 11,453 people in the United States over the same period.”⁵⁴

Mr. Brock admits that “Mr. Brock does not have ticket sales and/or attendance figures” for his performances, asserting that this is “typically more relevant to promoters than actual performers.”⁵⁵ However, he further notes that the band has continued on, touring and recording albums over a period of 47 years. The evidence indicates that HAWKWIND toured in the United States fairly regularly between 1974 and 2007, with the numbers decreasing in later years, and with a further attempt in 2013. There are also U.S. releases on recordings dating back to 1972, and continuing through the re-released “Sonic Attack” album in 2015.

Through all of this, it is apparent that HAWKWIND is not as well known in the United States as it is in the United Kingdom. It also appears that the

⁵¹ 37 TTABVUE 3.

⁵² 37 TTABVUE 3.

⁵³ 31 TTABVUE 6; 16-29.

⁵⁴ 34 TTABVUE 3.

fame of the band has waned over the past decade, at least among the relevant U.S. consumers, with fewer recording purchases and fewer web hits in recent years, as well as, of course, fewer tours.⁵⁶ That said, we find that Mr. Brock has attained a certain degree of renown for the HAWKWIND mark among concert goers in the United States. *See Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1735 (Fed. Cir. 2017) (per curiam) (fame in the 2(d) context is not an all-or-nothing measure and a showing of some fame “warrants reasonable weight, among the totality of the circumstances”).

Bad Faith

Mr. Brock further urges us to consider that Mr. Turner adopted the mark NIK TURNER’S HAWKWIND in bad faith. In support of this argument, Mr. Brock refers to statements Turner purported made as reported in news articles that Mr. Brock submitted with his notice of reliance. Mr. Brock further refers to a legal settlement between the parties in the United Kingdom in 2002. The news articles are not admissible for the truth of the matter stated therein. Fed. R. Evid. 802. Regarding the United Kingdom settlement, Mr. Brock’s counsel acknowledged at oral hearing that it is outside the scope of United States jurisdiction. Accordingly, we find this factor to be neutral.

Actual Confusion

⁵⁵ 52 TTABVUE 39.

⁵⁶ *See* 31 TTABVUE 6; 37 TTABVUE 9-105.

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Finally, Mr. Brock asks us to consider instances of actual confusion between Mr. Brock's HAWKWIND mark and Mr. Turner's NIK TURNER'S HAWKWIND. Mr. Brock refers to "emails sent directly to HAWKWIND management, as well as posts to HAWKWIND's social media pages."⁵⁷ Evidence of actual confusion is highly probative. *See In re Majestic Distilling Co., Inc.*, 65 USPQ2d at 1205 ("A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion."); J. Thomas McCarthy, 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:13 (4TH Ed. June 2017) ("Any evidence of actual confusion is strong proof of the fact of a likelihood of confusion.") Examples highlighted by Mr. Brock include the following:⁵⁸

Facebook post 12 November: So I am confused which version of HAWKWIND is touring first and second in spring?⁵⁹

Facebook chat November 10: Calling all music fans, we've got something for you this week! . . . THURS – Nik Turner's HAWKWIND, . . .
Response: It's not HAWKWIND.⁶⁰

Facebook post May 19: We have some great news! We got The Mumzees on the bill at big festival called the "Meltasia Music Festival. They will be sharing the stage with The Black Lips, HAWKWIND, and a bunch of awesome bands.⁶¹

Email to HAWKWIND administrator 28 May 2014: Just followed the link from Meltasia festival to your facebook page,

⁵⁷ 52 TTABVUE 41.

⁵⁸ All posts and emails are included as shown in the record.

⁵⁹ 38 TTABVUE 14.

⁶⁰ 38 TTABVUE 15-16.

⁶¹ 38 TV 18.

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but cant see on the page where to buy tickets from yourselves?
Are you going/performing or is it a scam?⁶²

Email to HAWKWIND administrator 28 May 2014: Hey HWHQ
I just purchased ticket to Meltasia festival I am so happy your
coming to NA after all thanks for not forgetting us.⁶³

Email HAWKWIND administrator 28 May 2014: I didn't realise
you were playing the US. Where can I get tickets?⁶⁴

Email HAWKWIND administrator 27 May 2014: I've just seen
an advert on the Meltasia Festivals page on facebook informing
me that HAWKWIND will be playing in the USA in September
and noticed that they are also advertising this through the
HAWKWIND website as a link to the above festival. Can you
please clarify this rather confusing issue as I was sure that Nik
Turner would be playing under the name Nik Turners
HAWKWIND.⁶⁵

Mr. Brock did not demonstrate that he or anyone on his behalf followed up
with any of these consumers regarding any actual confusion. Furthermore,
Mr. Brock did not submit evidence that these consumers are actually located
in the United States. Some, in fact, clearly are not, as they referred to being
outside the U.S.:

Email to HAWKWIND administrator 27 May 2014: Hi. Just
seen that your playing the US, that's great . . . got some mates
over there who will be well happy . . . nice one guys⁶⁶

Email HAWKWIND administrator 28 May 2014: to Hi guys, I
was wondering what's happening in September, as I was going
to try to get along to the gig in Portugal but I saw today that you
are playing a festival in the USA Meltasia at the beginning of
the month. Is this part of a tour over there?⁶⁷

⁶² 38 TTABVUE 21.

⁶³ 38 TTABVUE 22.

⁶⁴ 38 TTABVUE 25.

⁶⁵ 38 TTABVUE 28.

⁶⁶ 38 TTABVUE 19.

⁶⁷ 38 TTABVUE 20.

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Email HAWKWIND administrator 27 May 2014: Hi, just a quick query regarding the HAWKWIND concert in Lafayette in September this year, at the Meltasia Festival. It doesn't seem to be mentioned on your main website and I'd just like to confirm that HAWKWIND will be playing before making any travel arrangements. I'll be travelling to the US in anyway hopefully, but will make the effort to program in a "detour" to Georgia just to see your guys play!⁶⁸

One hosting venue booked for HAWKWIND's 2013 tour, however, did apparently experience confusion as noted by the following post:⁶⁹

Revolution Music Room (The Rev Room)
We were told by the promoter that it was HAWKWIND performing with Pallbearer on 1/9 Is this not the case? I realize that there has been legal action over the name, but are we advertising this incorrectly? If so, I'm 100% responsible for pulling the wrong image but we were told "HAWKWIND and Pallbearer".
• Plz feel free to email me directly at chris@lovelivemusic.com to discuss

As such, while it does appear that some consumers may have been confused, particularly during the 2013-2014 time period between the HAWKWIND mark and the NIK TURNER'S HAWKWIND mark, it is unclear as to the extent of this confusion, and in particular, there is

⁶⁸ 38 TTABVUE 24.

⁶⁹ 38 TTABVUE 62.

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insufficient information in the record regarding the nature and extent of confusion by United States consumers. Thus we find this factor to weigh slightly in favor of likelihood of confusion.

Conclusion

Considering all of the arguments and evidence of record as they pertain to the relevant *du Pont* factors, we find that parties offer identical services and Mr. Brock has established that he offers otherwise related goods under a similar mark, through some of the same and similar channels of trade, to some of the same classes of consumers. We further find that Mr. Brock's HAWKWIND mark has achieved a degree of renown, and although Mr. Brock has not shown bad faith by Mr. Turner in his registration of NIK TURNER'S HAWKWIND, there has been some indication of actual confusion. Overall, we find that Mr. Brock has established priority and there is a likelihood of confusion between the marks.⁷⁰

DECISION: The opposition is sustained.

⁷⁰ In light of our conclusion on likelihood of confusion, we do not find it necessary to reach the merits of Mr. Brock's claim of false suggestion of a connection.