

April 6, 2005

United States Patent and Trademark Office
Madison West Building
600 Dulany St.
Alexandria, VA 22313



04-07-2005

U.S. Patent & TMO/TM Mail Rpt Dt. #74

Re: *Petition to Cancel*

Dear Sir or Ma'am,

Enclosed for filing please find the Petition to Cancel the mark JAZZ MENAGERIE, Registration No. 2,824,430 and a check for \$300.00 for filing of the same. If you have any questions or need further information, please contact me at your convenience.

Very truly yours,

A handwritten signature in black ink, appearing to read "Megan M. Auchincloss".

Megan M. Auchincloss

Enclosures

TTAB

Express Mail ED007862495US

Date of Deposit: April 6, 2005

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of trademark Registration No. 2,824,430
For the mark JAZZ MENAGERIE
Registered on March 23, 2004

Eric Holder,

v.

Jim Ludwig d/b/a Happy Dog Music,

Cancellation No. _____

PETITION TO CANCEL

Petitioner's name and address:

Eric Holder
1499 Blake Street, Apt. 2F
Denver, Colorado 80202

Notification should be sent to:

David Mastbaum
Mastbaum & Moffat LLP
P.O. Box 806
Boulder, Colorado 80306

To the best of Petitioner's knowledge, the name and address of the current owner
of the registration are:

Jim Ludwig d/b/a Happy Dog Music
680 Talbot Avenue
Pacifica, California 94044

The above-identified Petitioner believes that he will be damaged by the above-identified registration because Petitioner has been utilizing the mark THE MENAGERIE since February 2000 to identify and to promote his entertainment services. Therefore, Petitioner hereby petitions to cancel the mark JAZZ MENAGERIE, identified above.

The grounds for cancellation are as follows:

1. Petitioner has used the mark THE MENAGERIE to identify entertainment, namely, live performances by a musical band. The mark was first used by the Petitioner in February 2000 and was first used in interstate commerce by the Petitioner on January 22, 2001. The mark has since and continues to be so used in interstate commerce.

2. On December 8, 2003, Petitioner filed an application with the United States Patent and Trademark Office to register its mark for "entertainment, namely, live performances by a musical band" in International Class 41. A copy of the application and the receipt thereof is attached hereto as Exhibit A.

3. In an Office Action dated July 11, 2004, Petitioner was notified that his application for registration had been rejected under Trademark Act § 2(d), 15 U.S.C. § 1052(d), "because the applicant's mark, when used on or in connection with the identified goods/services, so resembles the mark in U.S. Registration No. 2824430 as to be likely to cause confusion, to cause mistake, or to deceive." A copy of the Office Action is attached hereto as Exhibit B.

4. Petitioner first used the mark THE MENAGERIE in February 2000 and has used the mark continuously in interstate commerce since January 22, 2001. Registrant,

according to its application for registration, first used its mark on October 10, 2001.

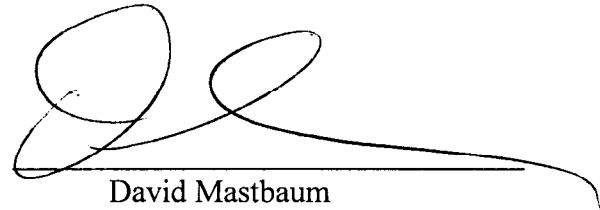
Accordingly, Petitioner's rights in his mark are superior to Registrant's rights.

PRAYER FOR RELIEF

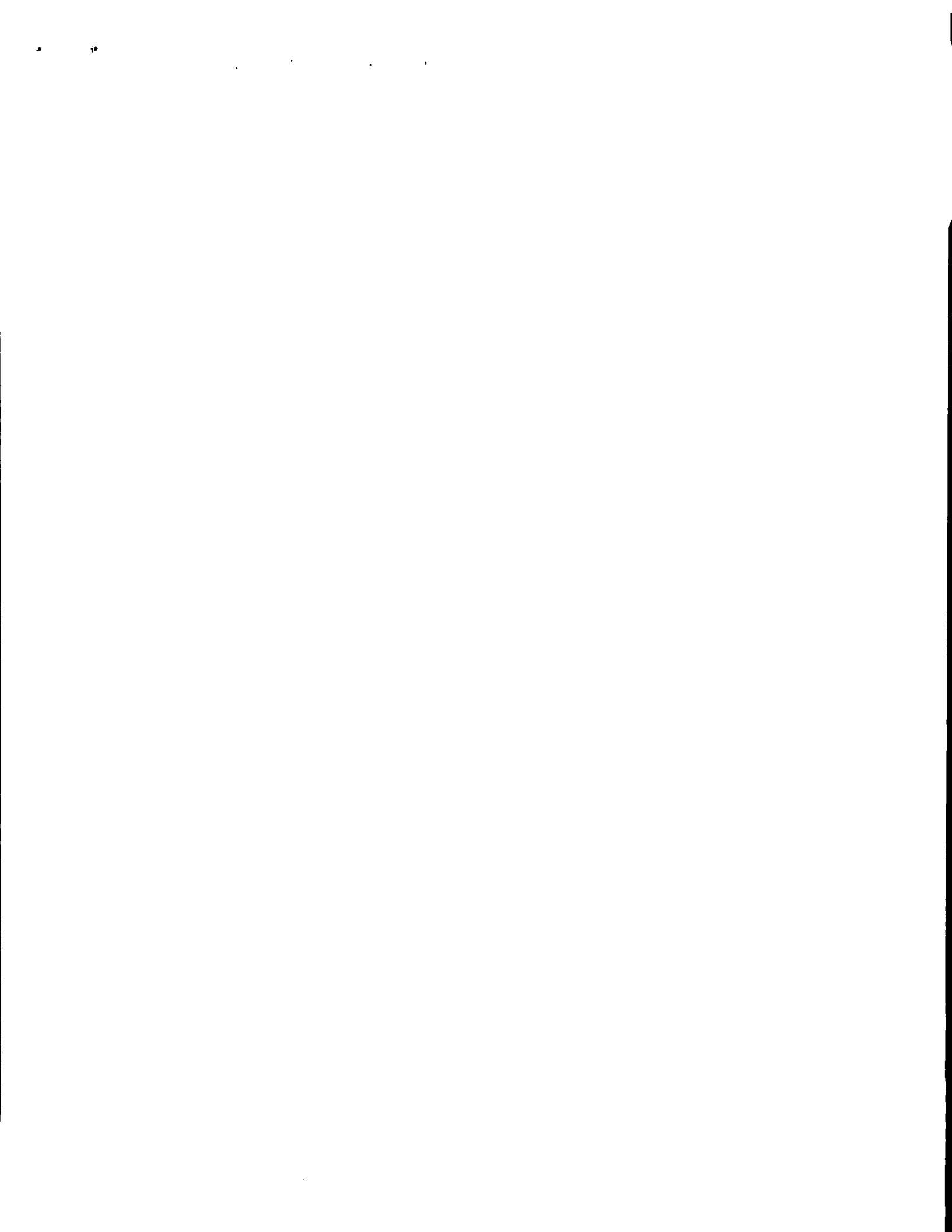
WHEREFORE, for the reasons set forth above, Petitioner requests that the cited registration be cancelled and for such other and further relief as is deemed just and proper.

Dated: April 6, 2005

By:

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

David Mastbaum
Attorney for Petitioner



12-08-2003

U.S. Patent & TMO/c/TM Mail Rpt Dt. #67

Mark: THE MENAGERIE

International Class: 41

Basis: Bona Fide Use

Applicant: Eric Holder, 1305 Highpoint Circle, Golden, CO 80403

Services: Entertainment, namely, live performances by a musical band.

First use: February 2000

First use
in commerce: January 22, 2001

THE MENAGERIE

U.S. Patent & TMO/c/TM
76564039

76564039

TRADEMARK APPLICATION SERIAL NO. _____

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE
FEE RECORD SHEET

12/12/2003 TSMITH 00000062 76564039

01 FC:6001

335.00 DP

4 December 2003

Assistant Commissioner for Trademarks
BOX NEW APP/FEE
2900 Crystal Drive
Arlington, VA 22202-3513

Re: Service Mark Application of Holder, Eric
Mark: THE MENAGERIE

To the Assistant Commissioner:

Enclosed please find the following: 1) an bona fide use application to register the mark THE MENAGERIE on the Principal Register; 2) a drawing of the mark; 3) one specimen of the mark as used in commerce; 4) a check in the amount of \$335.00; and 5) a self-addressed, postage-paid return postcard.

Please call me at the number below if you should have any questions regarding the application or if I can be of further assistance.

Sincerely,



Viva R. Moffat

Enclosures

1620 Market Street, Suite 3W
Denver, Colorado 80202

720.974.4000 *phone* 720.974.4050 *fax*
www.mastlaw.com

Of Counsel, Arthur H. Travers

BOX NEW APP
FEE

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
APPLICATION FOR TRADEMARK REGISTRATION
PRINCIPAL REGISTER

Mark: THE MENAGERIE
International Class: 41
Basis: Bona Fide Use
Applicants: Eric Holder, 1305 Highpoint Circle, Golden, CO 80403

Assistant Commissioner for Trademarks
Box NEW APP - FEE
2900 Crystal Drive
Arlington, VA 22202-3513

To the Assistant Commissioner for Trademarks:

The above-identified applicant has adopted and is using in commerce the trademark shown in the accompanying drawing to identify **entertainment, namely, live performances by a musical band**, in International Class 41. Applicants request that the mark be registered in the United States Patent and Trademark Office on the Principal Register.

The trademark was first used by Applicant in **February 2000** and was first used in interstate commerce by Applicant on **January 22, 2001**. The mark has since and is continuing to be so used in interstate commerce.

The trademark is used on advertising materials for Applicant's services, including press kits and Applicant's website. One specimen showing the mark as actually used is submitted herewith.

Applicant hereby appoints, David Mastbaum and Viya R. Moffat, of the firm Mastbaum & Moffat, LLP, whose address is P.O. Box 806, Boulder, CO 80306, as its attorneys, with full power of substitution and revocation, to prosecute the application to register, to transact all business in the Patent and Trademark Office and the courts in connection therewith, and to receive the Certificate of Registration.

**[The remainder of this page has intentionally been left blank.
Declaration and signature page follows.]**

DECLARATION

The undersigned declarant declares that he believes he is the owner of the mark sought to be registered; that he is entitled to use the mark sought to be registered; that to the best of his knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in identical form or in such near resemblance thereto as may be likely, when used, to cause confusion, or to cause mistake, or to deceive; that the facts set forth in this application are true; and that all statements made on information and belief are believed to be true; and further, that the statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of the application or document or any registration resulting therefrom.

Dated: 11/17/03



Eric Holder



12-08-2003

U.S. Patent & TMOfo/TM Mail Rcpt Dt. #67

Mark: THE MENAGERIE

International Class: 41

Basis: Bona Fide Use

Applicant: Eric Holder, 1305 Highpoint Circle, Golden, CO 80403

Services: Entertainment, namely, live performances by a musical band.

First use: February 2000

First use
in commerce: January 22, 2001

THE MENAGERIE

U.S. Patent & TM Ofc/TM

76564039

the Menagerie



This cd is enhanced.... put it in your computer

contact:
Jeremy Walker
720-839-6440
jwalker@themenagerie.org

www.themenagerie.org

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FILING RECEIPT FOR TRADEMARK APPLICATION

Dec 27, 2003

This acknowledges receipt on the FILING DATE of the application for registration for the mark identified below. The FILING DATE is contingent upon all minimum filing date requirements being met. Your application will be considered in the order in which it was received. Action on the merits should be expected from the United States Patent and Trademark Office (USPTO) approximately six months from the FILING DATE. When inquiring about this application, include the SERIAL NUMBER, FILING DATE, OWNER NAME and MARK.

VIVA R. MOFFAT
MASTBAUM & MOFFAT, LLP
P.O. BOX 806
BOULDER, CO 80306

**ATTORNEY
REFERENCE NUMBER**

PLEASE REVIEW THE ACCURACY OF THE FILING RECEIPT DATA.

A request for correction to the filing receipt should be submitted within 30 days. Such request may be submitted by mail to: COMMISSIONER FOR TRADEMARKS, 2900 CRYSTAL DRIVE, ARLINGTON, VIRGINIA 22202-3514; by fax to 703-308-9096; or by e-mail to tmfiling.receipt@uspto.gov. The USPTO will review the request and make corrections when appropriate.

SERIAL NUMBER: 76/564039
FILING DATE: Dec 8, 2003
REGISTER: Principal
LAW OFFICE: 110
MARK: THE MENAGERIE
MARK TYPE(S): Service Mark
DRAWING TYPE: Stylized words, letters, or numbers
FILING BASIS: Sect. 1(a) (Use in Commerce)

ATTORNEY: Viva R. Moffat
OWNER: Holder, Eric (NOT PROVIDED, Unknown)
1305 Highpoint Circle
Golden, COLORADO 80403

FOR: entertainment, namely, live performances by a musical band
INT. CLASS: 041
FIRST USE: Feb 2000 USE IN COMMERCE: Jan 22, 2001

ALL OF THE GOODS/SERVICES IN EACH CLASS ARE LISTED

ADDITIONAL INFORMATION MAY BE PRESENT IN THE USPTO RECORDS



UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 76/564039

APPLICANT: Eric Holder

76564039

CORRESPONDENT ADDRESS:
VIVA R. MOFFAT
MASTBAUM & MOFFAT, LLP
P.O. BOX 806
BOULDER, CO 80306

RETURN ADDRESS:
Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3514

MARK: THE MENAGERIE

CORRESPONDENT'S REFERENCE/DOCKET NO: N/A

Please provide in all correspondence:

CORRESPONDENT EMAIL ADDRESS:

1. Filing date, serial number, mark and applicant's name.
2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and e-mail address.

OFFICE ACTION

TO AVOID ABANDONMENT, WE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF OUR MAILING OR E-MAILING DATE.

Serial Number 76/564039

The assigned examining attorney has reviewed the referenced application and determined the following.

Section 2(d) - Likelihood of Confusion Refusal

The examining attorney refuses registration under Trademark Act Section 2(d), 15 U.S.C. §1052(d), because the applicant's mark, when used on or in connection with the identified goods/services, so resembles the mark in U.S. Registration No. 2824430 as to be likely to cause confusion, to cause mistake, or to deceive. TMEP §§1207.01 *et seq.* See the enclosed registration.

For the reasons discussed below, the examining attorney concludes that confusion as to the source or sponsorship of the goods /services is likely between applicant's mark THE MENAGERIE for "entertainment, namely, live performances by a musical band," and registrant's mark JAZZ MENAGERIE for "phonograph records featuring jazz music; pre-recorded CDs featuring jazz music."



The examining attorney must analyze each case in two steps to determine whether there is a likelihood of confusion. First, the examining attorney must look at the marks themselves for similarities in appearance, sound, connotation and commercial impression. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). Second, the examining attorney must compare the goods or services to determine if they are related or if the activities surrounding their marketing are such that confusion as to origin is likely. *In re August Storck KG*, 218 USPQ 823 (TTAB 1983); *In re International Telephone and Telegraph Corp.*, 197 USPQ 910 (TTAB 1978); *Guardian Products Co., v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978). TMEP §1207.01 *et seq.*

The mere deletion of a term from a registered mark is not sufficient to overcome a likelihood of confusion under Section 2(d). *Coca-Cola Bottling Co. v. Joseph E. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (C.C.P.A. 1975) (“BENGAL” and “BENGAL LANCER”); *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406 (C.C.P.A. 1967) (“THE LILLY” and “LILLI ANN”); *In re El Torito Restaurants Inc.*, 9 USPQ2d 2002 (TTAB 1988) (“MACHO” and “MACHO COMBOS”); *In re United States Shoe Corp.*, 229 USPQ 707 (TTAB 1985) (“CAREER IMAGE” and “CREST CAREER IMAGES”); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985) (“CONFIRM” and “CONFIRMCELLS”); *In re Riddle*, 225 USPQ 630 (TTAB 1985) (“ACCUTUNE” and “RICHARD PETTY’S ACCU TUNE”); *In re Cosvetic Laboratories, Inc.*, 202 USPQ 842 (TTAB 1979) (“HEAD START” and “HEAD START COSVETIC”). TMEP §1207.01(b)(iii).

The marks create a substantially similar commercial impression. The dominant feature of the respective marks is MENAGERIE. While the examining attorney cannot ignore a disclaimed portion of a mark and must view marks in their entireties, one feature of a mark may be more significant in creating a commercial impression. *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (C.C.P.A. 1976); *In re El Torito Restaurants Inc.*, 9 USPQ2d 2002 (TTAB 1988); *In re Equitable Bancorporation*, 229 USPQ 709 (TTAB 1986). Disclaimed matter is typically less significant or less dominant.

The goods/services of the parties need not be identical or directly competitive to find a likelihood of confusion. They need only be related in some manner, or the conditions surrounding their marketing be such, that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods/services come from a common source. *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984); *Guardian Products Co., Inc. v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978). TMEP §1207.01(a)(i).

The goods and services are related. Those who offer musical recordings may also offer musical entertainment services under the same mark, as demonstrated by applicant’s specimen of record, the packaging for a CD.

On the basis of the close similarities between the marks and the fact that the marks will be used on closely related goods/services, the likelihood of confusion exists.

The applicant should also note the following additional ground for refusal.

Specimen

The specimen is unacceptable as evidence of actual service mark use because it does not show how the mark is used in connection with the live performances by a band. The applicant must submit a specimen showing the mark as it is used in commerce. 37 C.F.R. §2.56. Examples of acceptable specimens are signs, photographs, brochures or advertisements that show the mark used in the sale or advertising of the services. For live entertainment services, acceptable specimens include a photograph of the group or individual in performance with the name displayed, *e.g.*, the name printed on the drum of a band. For any entertainment service, advertisements or radio or television listings showing the mark may be submitted, but the specimens must show that the mark is used to identify and distinguish the services recited in the application, not just the performer. *See In re Ames*, 160 USPQ 214 (TTAB 1968) (advertisements for records show use of the mark for entertainment services rendered by a musical group, where the advertisements prominently featured a photograph of musical group and gave the name, address and telephone number of a booking agent). TMEP section 1301.04(d). TMEP §§1301.04 *et seq.* The applicant must verify, with an affidavit or a declaration under 37 C.F.R. §2.20, that the substitute specimen was in use in commerce at least as early as the filing date of the application. 37 C.F.R. §2.59(a); TMEP §904.09.

Pending an adequate response to the above, the examining attorney refuses registration under Trademark Act Sections 1, 2, 3 and 45, 15 U.S.C. §§1051, 1052, 1053 and 1127, because the record does not show use of the proposed mark as a service mark. TMEP §§904.11 and 1301.02 *et seq.*

Although the examining attorney has refused registration, the applicant may respond to the refusal to register by submitting evidence and arguments in support of registration.

If the applicant chooses to respond to the refusal to register, the applicant must also respond to the following informalities.

Drawing

Applicant must submit the following standard character claim: "The mark is presented in standard characters without claim to any particular font style, size, or color." 37 C.F.R. §2.52(a).

Entity

The applicant must indicate what type of entity is applying, for example, an individual, partnership, corporation or joint venture. 37 C.F.R. §2.32(a)(3); TMEP §803.03.

The applicant must indicate his national citizenship for the record. Trademark Act Section 1, 15 U.S.C. §1051; 37 C.F.R. §2.32(a)(3)(i); TMEP §803.04.

If the applicant has any questions or needs assistance in responding to this Office action, please telephone the assigned examining attorney.

/Priscilla Milton/
Examining Attorney

Law Office 110

(703) 308-9110 Ext. 423

How to respond to this Office Action:

To respond formally using the Office's Trademark Electronic Application System (TEAS), visit <http://www.uspto.gov/teas/index.html> and follow the instructions.

To respond formally via regular mail, your response should be sent to the mailing Return Address listed above and include the serial number, law office and examining attorney's name on the upper right corner of each page of your response.

To check the status of your application at any time, visit the Office's Trademark Applications and Registrations Retrieval (TARR) system at <http://tarr.uspto.gov/>

For general and other useful information about trademarks, you are encouraged to visit the Office's web site at <http://www.uspto.gov/main/trademarks.htm>

FOR INQUIRIES OR QUESTIONS ABOUT THIS OFFICE ACTION, PLEASE CONTACT THE ASSIGNED EXAMINING ATTORNEY.

Print: Jul 10, 2004

76378613

DESIGN MARK

Serial Number

76378613

Status

REGISTERED

Word Mark

JAZZ MENAGERIE

Standard Character Mark

No

Registration Number

2824430

Date Registered

2004/03/23

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(1) TYPED DRAWING

Owner

Ludwig, Jim DBA Happy Dog Music INDIVIDUAL UNITED STATES 680 Talbot Avenue Pacifica CALIFORNIA 94044

Goods/Services

Class Status -- ACTIVE. IC 009. US 021 023 026 036 038. G & S: phonograph records featuring jazz music; pre-recorded CDs featuring jazz music. First Use: 2001/10/10. First Use In Commerce: 2001/10/10.

Disclaimer Statement

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "JAZZ" APART FROM THE MARK AS SHOWN.

Filing Date

2002/03/05

Examining Attorney

GEARIN, AMY

Attorney of Record

Robyn Freedman

JAZZ MENAGERIE

*** User:pmilton ***

#	Total Marks	Dead Marks	Live Viewed Docs	Live Viewed Images	Status/ Search Duration	Search
01	76	50	26	8	0:01	*mcnag*[bi,ti]
02	2	0	2	1	0:02	*mcnaj*[bi,ti]
03	1	1	0	0	0:02	*minaj*[bi,ti]
04	0	0	0	0	0:02	*mynaj*[bi,ti]
05	0	0	0	0	0:01	*mynag*[bi,ti]
06	8	4	4	0	0:02	*minag*[bi,ti]

Session started 7/10/04 9:30:56 PM

Session finished 7/10/04 9:39:12 PM

Total search duration 0 minutes 10 seconds

Session duration 8 minutes 16 seconds

Default NEAR limit=1ADJ limit=1

Sent to TICRS as Serial Number: 76564039