

This Opinion is Not a
Precedent of the TTAB

Mailed: September 30, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Goocher
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Serial No. 87214736
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Ruth Khalsa of LegalForce RAPC Worldwide PC
for Devon Goocher.

Lisa A. Papale,¹ Trademark Examining Attorney, Law Office 122,
John Lincoski, Managing Attorney.

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Before Taylor, Gorowitz and Pologeorgis,
Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Devon Goocher (“Applicant”) seeks registration on the Principal Register of the
mark MYCAH (in standard characters) for the following services:

Entertainment, namely, live music concerts; Production of
music; Providing on-line music, not downloadable, in
International Class 41.²

¹ A different examining attorney was responsible for the application during prosecution.

² Application Serial No. 87214736 was filed on October 25, 2016, based upon an allegation under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), and claiming February 1, 2015 as both the date of first use of the mark and the date of first use in commerce.

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), based on a likelihood of confusion with the mark in U.S. Registration No. 3908350,³ MIKA (in standard characters) for, in relevant part,

Series of musical recordings, musical video recordings; downloadable graphics, video recordings featuring live performances and music via the Internet and wireless devices, in Class 9; and

Entertainment services, namely, live performances by a musical entertainer; providing a web site featuring information about entertainment, music concerts, recording artists and popular culture, and sound and video recordings, in Class 41.

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

I. Applicable Law

Our determination under Section 2(d) is based on an analysis of all of the 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, two key considerations are the similarities between the marks and the similarities

³ Issued January 18, 2011; Section 8 and 15 Affidavits filed and accepted. The Section 15 Affidavit did not cover all of the originally identified goods and services including, "Entertainment services, namely, live performances by a musical entertainer." In addition, the cited registration includes additional goods that were not cited as a bar to registration of Applicant's mark.

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 goods [or services] and differences in the marks”). These factors, and any other relevant *du Pont* factors in the proceeding now before us, will be considered in this decision.

A. Relatedness of the Services/Channels of Trade/Classes of Purchasers

It is well settled that the goods and services of Registrant and Applicant need not be identical or competitive, or even be offered through the same channels of trade, to support a finding of likelihood of confusion. It is sufficient that the respective goods and services are related in some manner, and/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, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d. 1356, 101 USPQ2d 1713, 1723 (Fed. Cir. 2012); *Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423, 1432 (TTAB 1993). The issue here, of course, is not whether purchasers would confuse the goods and services, but rather whether there is a likelihood of confusion as to the source of these goods and services. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 831 (TTAB 1984).

Applicant's services are identified as "entertainment, namely, live music concerts; Production of music; [and] providing on-line music, not downloadable" and Registrant's goods and services are identified as a "series of musical recordings, musical video recordings; downloadable graphics, video recordings featuring live performances and music via the Internet and wireless devices" (Class 9) and "entertainment services, namely, live performances by a musical entertainer; providing a web site featuring information about entertainment, music concerts, recording artists and popular culture, and sound and video recordings (Class 41). We confine our discussion to Registrant's services vis-à-vis those of Applicant because they are closer to Applicant's services than are Registrant's goods.

On comparison, we find Applicant's broadly worded "entertainment, namely, live music concerts" services encompass Registrant's slightly more specific "entertainment services, namely, live performances by a musical entertainer" and the remaining services related and complementary in that they are all services connected with performances in the music industry. Moreover, because we have found Applicant's live music concerts to include Registrant's live musical performances, we need not discuss the similarity of all of Applicant's services because it is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of services within a particular class in the application. *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126, n.5 (TTAB 2015); *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Apple Computer v. TVNET.Net, Inc.*, 90 USPQ2d 1393, 1398 (TTAB 2007).

Nonetheless, to support the relatedness of the services, the Examining Attorney made of record various use-based, third-party registrations, e.g., Registration Nos. 4060911, 4144238, 4359361, 4809117, 5119280, 5150537, 5192768, 5217966, 5275422, and 5280423, that cover the types of services identified in both Applicant's application and the cited registration under the same mark, suggesting that they may emanate from the same source. *Aquamar*, 115 USPQ26 at 1126 n.5; *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). We thus find the services in-part very closely related, if not legally identical, and otherwise closely related for purposes of our likelihood of confusion analysis.

Furthermore, because there are no limitations or restrictions in Applicant's or Registrant's identification of services, we must presume that their respective services are marketed in all normal trade channels for those services, such as on-line ticket sales sites and music venues, and to all normal classes of purchasers for such services, including ordinary purchasers. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). As a result, the channels of trade and classes of purchasers, at a minimum, overlap.

Accordingly, we find that the *du Pont* factors of the relatedness of the services, channels of trade and classes of purchasers strongly favor a finding of likelihood of confusion. Applicant does not argue to the contrary and, in fact, her brief is silent on the issue. Accordingly, those *du Pont* factors strongly favor a finding of likelihood of confusion.

B. Similarity/Dissimilarity of the Marks

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *du Pont* 177 USPQ at 567. “In a particular case, ‘two marks may be found to be confusingly similar if there are sufficient similarities in terms of sound or visual appearance or connotation.’” *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016) (quoting *Kabushiki Kaisha Hattori Seiko v. Satellite Int’l, Ltd.*, 29 USPQ2d 1317, 1318 (TTAB 1991, *aff’d without opinion*, 979 F.2d 216 (Fed. Cir. 1992) (emphasis in the original; citation omitted). *See also Eveready Battery Co. v. Green Planet Inc.*, 91 USPQ2d 1511, 1519 (TTAB 2009) (citing *Krim-Ko Corp. v. The Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”)).

“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*, 101 USPQ2d at 1721. *See also San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Rest. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d mem.*, 972 F.2d 1353 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *L’Oreal v. Marcon*, 102 USPQ2d at

1438; *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). The average customers are ordinary consumers who attend music concerts.

On comparison, it is very likely that consumers will pronounce Applicant's mark MYCAH in the identical way that they would pronounce Registrant's mark MIKA, that is bi-syllabically with the first syllable being pronounced the same as the word "my," as the vowels "I" and "Y" are often interchanged in, for example, common names such as Sidney and Sydney. In the second syllable, both the "C" and "K" can be pronounced with a hard "k" sound as in the words "cat" and "Kentucky," with the "A" and "AH" having the same neutral sound.⁴

We find so in the face of Applicant's arguments to the contrary. First Applicant argues the marks are "in reality" pronounced differently by the two artists, and there is no evidence to establish how MIKA is commonly pronounced. Applicant, citing the Wikipedia evidence attached to its response to an Office Action,⁵ explains that "Registrant changed the spelling of his name from MICA to MIKA because people

⁴ The Examining Attorney requested that the Board take judicial notice of the "Guide to Pronunciation" found in the online version of *Merriam-Webster Dictionary*, and indicated that a copy could be found at the URL provided in her brief. The Board has "made clear that providing hyperlinks to Internet materials is insufficient to make such materials of record." *In re Powermat Inc.*, 105 USPQ2d 1789, 1791 (TTAB 2013) (citing *In re HSB Solomon Assocs. LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012) ("a reference to a website's internet address is not sufficient to make the content of that website or any pages from that website of record.")). Accordingly, the Examining Attorney's request is denied, and the materials at <https://www.merriam-webster.com/assets/mw/static/pdf/help/guide-to-pronunciation.pdf> as well as the attendant arguments will not be further considered. To be clear, our findings are based on the usual pronunciation of common words and names, and not on the pronunciation guide.

⁵ August 18, 2017 Response; TSDR 9-11.

were mispronouncing his name based on its visual appearance,” and that “Applicant’s mark, also her middle name...is commonly pronounced MY-KUH, as shown in the evidence of record.”⁶

While both Applicant and Registrant may have a desired or particular pronunciation of their respective names, for purposes of a likelihood of confusion analysis, there is no "correct" or certain pronunciation of a mark because it is impossible to predict how the public will pronounce a particular mark; therefore, "correct" pronunciation cannot be relied on to avoid a likelihood of confusion. *See, e.g., In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012) (upholding the Board’s affirmance of a Section 2(d) refusal to register XCEED for agricultural seed based on a likelihood of confusion with the registered mark X-SEED and design, SEED disclaimed, for identical goods); *Centraz Indus. Inc. v. Spartan Chem. Co. Inc.*, 77 USPQ2d 1698, 1701 (TTAB 2006) (acknowledging that "there is no correct pronunciation of a trademark" and finding ISHINE (stylized) and ICE SHINE, both for floor finishing preparations, confusingly similar); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 n.3 (TTAB 1987) ("[C]orrect pronunciation as desired by the applicant cannot be relied upon to avoid a likelihood of confusion."); *Kabushiki Kaisha Hattori Tokeiten v. Scutto*, 228 USPQ 461 (TTAB 1985) (holding SEYCOS and design for watches, and SEIKO for watches and clocks, likely to cause confusion); *In re Energy Telecomms. & Elec. Ass’n*, 222 USPQ 350 (TTAB 1983) (holding ENTELEC and design for association services relating to

⁶ 4 TTABVUE 8.

telecommunications and other electrical control systems for use in the energy related industries, and INTELECT for promoting, planning, and conducting expositions and exhibitions for the electrical industry, likely to cause confusion). As we found, the marks are capable of being pronounced as phonetic equivalents, and ordinary consumers, who, upon first encountering either Applicant's or Registrant's mark in the marketplace, would not necessarily have the knowledge of Registrant's name change and his intended pronunciation or of the pronunciation preferred by Applicant.

We also are similarly unpersuaded by Applicant's unsupported argument that likelihood of confusion is unlikely because relevant consumers "are most likely to encounter the marks visually on streaming and downloadable music site [sic], online music video and fan sites."⁷ Consumers availing themselves of these sites for the first time upon a friend's oral recommendation may not even appreciate the differences in appearance.

Applicant also argues that Registrant is "prominent enough to have been nominated for many and [winning] several World, British, and American music awards," and therefore "the relevant consumers will know or quickly learn the proper pronunciation of [Registrant's] name is MEE-KAH."⁸ To the extent that Applicant is arguing that the cited mark is so famous that it would not be confused with Applicant's mark on the basis of sound, we point out that in an *ex parte* analysis of

⁷ 4 TTABVUE 8.

⁸ *Id.*

the *du Pont* factors for determining likelihood of confusion, the “fame of the mark” factor is normally treated as neutral when no evidence as to fame has been provided. See *In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006); see also *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009) (noting that the absence of evidence as to the fame of the registered mark “is not particularly significant in the context of an ex parte proceeding”). Here, Applicant’s evidence of fame consists only of a single Wikipedia article that, in part, summarizes Registrants awards and accolades. Such evidence falls far short of establishing fame of the cited mark. Moreover, while the fame of Registrant’s mark is a factor that *could* be considered in a likelihood of confusion analysis under *du Pont*, “[a]s the fame of a mark increases, the degree of similarity between the marks necessary to support a conclusion of likely confusion declines.” See *Starbucks U.S. Brands, LLC v. Ruben*, 78 USPQ2d 1741, 1750 (TTAB 2006).

At bottom, there is no question that the respective marks could be pronounced the exact way and we find them to be phonetically equivalent. Similarity in sound alone may be sufficient to support a finding that the marks are confusingly similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); see *In re 1st USA Realty Prof’ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007); see also, TMEP §1207.01(b)(iv).

“Of course, two marks may be extremely similar or even identical in one aspect (sound, appearance or connotation), and yet not be confusingly similar because of significant differences in one or more of the other two aspects.” *Hattori Seiko v. Satellite*, 29 USPQ2d at 1318. That is not so here. While, as Applicant points out, the

two marks contain a different number of letters, Applicant's five and Registrant's four, and only share the letters "M" and "A," resulting in marks that on a side-by-side basis are dissimilar, that is not the proper test for comparison. Instead, we must determine their similarity in terms of their overall commercial impressions. *See Coach Servs. Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1721. Here, in addition to being phonetically identical, both marks convey a commercial impression of a personal name or moniker under which the respective services are performed. We also note that since both Applicant's mark and the cited mark are in standard characters, they may be presented in any style, regardless of font, size, or color. *See Viterra* 101 USPQ2d at 1909. Thus, Applicant's mark could be displayed in lettering the same as or significantly resembling that of the cited mark.

Keeping in mind the fallibility of memory, and the general impression often conveyed by trademarks, we find that despite the differences in appearance, the marks in their entirety, are quite similar due to their phonetic identity and very similar connotations, such that their use on in-part extremely related and otherwise substantially related services would cause confusion.

The factor of the similarity of the marks thus favors a finding of likelihood of confusion.

C. Conclusion

Having considered all of the arguments and evidence of record as they pertain to the relevant *du Pont* likelihood of confusion factors, even if not specifically discussed in this opinion, and for the reasons discussed above, we conclude that a likelihood of

confusion exists between Applicant's mark MYCAH for “entertainment, namely, live music concerts; production of music; [and p]roviding on-line music, not downloadable,” and the cited mark MIKA for “entertainment services, namely, live performances by a musical entertainer; providing a web site featuring information about entertainment, music concerts, recording artists and popular culture, and sound and video recordings.”

Decision: The refusal to register Applicant’s mark MYCAH under Section 2(d) of the Act is affirmed.