

12/18/00

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Paper No. 14
EJS

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Theodore R. Box

Serial No. 75/455,906

Kenneth F. Florek of Hedman, Gibson & Costigan, P.C. for
Theodore R. Box

John Tingley, Trademark Examining Attorney, Law Office 102
(Thomas Shaw, Managing Attorney)

Before Seeherman, Bottorff and Rogers, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Theodore R. Box has appealed from the final refusal of the Trademark Examining Attorney to register SONIC MEDICINE, with the word SONIC disclaimed, as a trademark for "musical sound recordings."¹ Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so

¹ Application Serial No. 75/455,906, filed March 24, 1998, asserting a bona fide intention to use the mark in commerce.

resembles the mark MEDICINE, previously registered for "entertainment services, namely, live musical performances by a musical group,"² as to be likely to cause confusion or mistake or to deceive.

Applicant and the Examining Attorney have filed briefs; an oral hearing was not requested.

Our determination of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in **In re E.I. Pont de Nemours and Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). We have limited our discussion, however, to those factors focused on by applicant and the Examining Attorney.

Turning first to the marks, applicant's mark is SONIC MEDICINE and the registered mark is MEDICINE. Although applicant asserts that the additional word SONIC in his mark distinguishes it from MEDICINE per se, we find that both marks convey very similar commercial impressions. In the same manner in which SONIC MEDICINE suggests the soothing or healing effects of sound, the word MEDICINE, when applied to musical performances, connotes the healing effects of the performances. The descriptive (and disclaimed) word SONIC does not change the basic appearance or pronunciation of the word MEDICINE which it modifies.

² Registration No. 1,892,754, issued May 2, 1995.

It is well settled that when a newcomer has appropriated the entire mark of a registrant, and has added to it a non-distinctive term, the marks are generally considered to be confusingly similar. **In re Denisi**, 225 USPQ 624 (TTAB 1985).

Turning to the goods and services, there is an obvious relationship between musical sound recordings and live musical performances by a musical group in that musical groups often record their performances and sell them through the medium of sound recordings. In addition, the class of purchasers is the same. Consumers who attend live musical performances by groups also purchase audio cassettes and compact discs, i.e., musical sound recordings, featuring those groups.

Moreover, applicant acknowledges that musical groups may also produce musical sound recordings on their own record labels. We note applicant's assertion that in such circumstances the musical groups use a different mark for their performance services and for their record labels. However, as the Examining Attorney has pointed out, the consumers who attend musical performances and purchase sound recordings are the general public, and they include both sophisticated and unsophisticated purchasers. The unsophisticated purchasers, many of whom may be teenagers,

are not likely to be aware of the practices of the recording industry, and specifically the practice that groups use different marks for their live entertainment services and their sound recordings.

It must be remembered that the registrant's mark, MEDICINE, is an arbitrary mark for musical performances, and must therefore be accorded a broad scope of protection. There is no evidence of third parties' having used or registered any marks which contain this term, or any term similar to it. Thus, the uniqueness of registrant's mark weighs strongly in registrant's favor.

Consumers who are familiar with the live musical performances rendered under the arbitrary mark MEDICINE and who encounter the very similar mark SONIC MEDICINE on a record label are likely to be confused into believing that the goods and services are associated with or emanate from the musical group, or vice versa, that the record label is the sponsor of the musical performances.

Moreover, those consumers who are sophisticated enough about the recording industry to know that musical groups use different marks for their performance services and their record labels may well believe that the registrant herein has adopted SONIC MEDICINE for its record label because it is a variant of its performance mark MEDICINE.

Applicant argues that his goods are sold in different channels of trade from live musical performances. Even if we assume that to be the case, the classes of consumers for both the goods and services are the same. If anything, the likelihood of confusion is heightened by the different venues in which the goods and services are offered, since consumers will not have the opportunity to make side-by-side comparisons between the marks. Thus, because of the fallibility of memory, consumers may well not even note the slight differences between applicant's mark SONIC MEDICINE and the registrant's mark MEDICINE. See **Dassler KG v. Roller Derby Skate Corp.**, 206 USPQ 2255 (TTAB 1980).

Applicant also asserts that there is no intent to trade on the registrant's mark "since the music is not related to the label." Brief, p. 5. We assume from this statement that applicant intends to offer a different type of music on his label from that which is performed by registrant. However, because there are no limitations in either applicant's or registrant's identifications, we must assume that the musical group and the record label offer all types of music. In any event, whether applicant adopted his mark in good faith is not the issue; the issue is whether the public is likely to be confused by his use

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of the mark in light of the registrant's use on its services.

For the reasons stated above, we find that confusion is likely to occur if applicant were to use the mark SONIC MEDICINE for musical sound recordings.

Decision: The refusal of registration is affirmed.