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THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Victor B. Mason

Serial No. 78618173

Daniel P. Dooley of Fellers, Snider, Blankenship, Bailey & Tippens for Victor B. Mason.

John D. Dalier, Trademark Examining Attorney, Law Office 111 (Mary I. Sparrow, Managing Attorney).

Before Grendel, Holtzman and Zervas, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

An application has been filed by Victor B. Mason (applicant) to register the mark MOJAVE (standard character form) for goods ultimately identified as "custom built, made-to-order, amplifiers, namely, vacuum tube musical instrument amplifiers" in Class 9.¹

¹ Serial No. 78618173, filed April 27, 2005, based on an allegation of first use and first use in commerce on July 27, 2001. The original identification of goods, "amplifiers, namely, musical instrument amplifiers," was amended to its current form at applicant's request.

The trademark examining attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to applicant's goods, so resembles the registered mark MOJAVE (typed form) for "guitars" in Class 15, as to be likely to cause confusion.²

When the refusal was made final, applicant appealed. Briefs have been filed.

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 likelihood of confusion issue. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, however, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Applicant's mark MOJAVE is identical to the mark in the cited registration. The fact that the respective marks are identical "weighs heavily against applicant." In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

Applicant argues that the presence of applicant's and registrant's corporate names on packaging for the respective

² Registration No. 2663355; issued December 17, 2001.

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goods serves to mitigate the likelihood of confusion. This argument is not relevant because the corporate names are not part of either mark. It is well established that, in proceedings before the Board, the question of likelihood of confusion must be decided on the basis of the mark "exactly as shown in the application" regardless of how the mark is actually used. *Jim Beam Brands Co. v. Beamish & Crawford, Ltd.*, 937 F.2d 729, 19 USPQ2d 1352, 1356 (2d Cir. 1991) (distinguishing infringement proceedings from Board proceedings). See also *Kimberly-Clark Corp. v. H. Douglas Enterprises*, 774 F.2d 1144, 227 USPQ 541 (Fed. Cir. 1985).

We turn then to the goods. Applicant's goods are "custom built, made-to-order, amplifiers, namely, vacuum tube musical instrument amplifiers," and registrant's goods are "guitars." We note that when marks are identical it is only necessary that there be a viable relationship between the goods in order to support a holding of likelihood of confusion. See *In re Opus One Inc.*, 60 USPQ2d 1812 (TTAB 2001); and *In re Concordia International Forwarding Corp.*, 222 USPQ 355 (TTAB 1983). Here, however, there is more than a viable relationship between the goods. Applicant's identification of goods expressly states that his amplifiers are used for musical instruments, which of course would include guitars. In addition, we take judicial notice of the definition of "amplifier" as meaning "a device that makes

sounds louder, especially one increasing the sound level of musical instruments." Microsoft Encarta College Dictionary (2001); and "a device of this kind combined with a loudspeaker, used to amplify electric guitars and other musical instruments" The New Oxford American Dictionary (2nd ed.).³

Amplifiers are used to make musical instruments, including guitars, more audible. Indeed, an electric guitar requires an amplifier in order to produce sound at all.⁴ It is clear that amplifiers and guitars are by their nature complementary, inherently related goods.⁵ See *Recot Inc. v. M.C. Becton*, 214 F.3d 1332, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (although products may be distinctly different in kind, "the same goods can be related in the mind of the consuming public as to the origin of the goods. It is this sense of relatedness that matters in the likelihood of confusion analysis"). In addition, the

³ From the website credoreference.com. The Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format. See *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1791 n.3 (TTAB 2002). See also *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

⁴ We take judicial notice of the definition of "electric guitar" as "a guitar designed to be played through an electrical amplifier." Chambers 21st Century Dictionary (Chambers Harrap Publishers Limited 2001) from the website credoreference.com.

⁵ A "vacuum-tube amplifier" is simply an amplifier "in which one or more vacuum tubes are used." We take judicial notice of this definition appearing in the Academic Press Dictionary of Science and Technology (1992) from credoreference.com. This is not a limitation on the type of musical instruments with which the amplifier can be used, nor does applicant argue that it is.

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examining attorney has made of record at least two third-party registrations (Registration No. 2988992 for the mark DINOSAURAL (stylized) and Registration No. 3096515 for a design mark) for marks covering both amplifiers and guitars.⁶ Third-party registrations, although not evidence of use of the marks in commerce, serve to suggest that the respective goods are of a type which may emanate from the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993) and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988).

Applicant does not dispute that the goods are related, but instead contends that registrant no longer produces the goods. However, this argument constitutes an impermissible collateral attack on the validity of the registration and cannot be considered. See Section 7(b) of the Trademark Act ("A certificate of registration of a mark upon the principal register ... shall be prima facie evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods..."). See also *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

⁶ The remaining third-party registrations submitted by the examining attorney which are either not based on use in commerce or which do not include both types of goods are not probative.

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Applicant argues that the respective goods move in different channels of trade in that registrant's guitars would be sold through retail outlets, whereas applicant's custom-built products are available only through custom orders placed directly with applicant. However, where the products are closely related, merely because the products in fact would not be sold together would not necessarily prevent consumers, when encountering the products in different outlets, from believing the products come from the same source. See *Freedom Savings and Loan Association v. Fidelity Bankers Life Insurance Company*, 224 USPQ 300, 304 (TTAB 1984) ("It is not necessary that goods be competitive or be sold together or through the same outlets if they can be shown to be related in some manner that would suggest to persons encountering them, even at different locations, sources, or offices a likelihood of common sponsorship"). The respective goods in this case are closely related and the customers for these closely related goods are the same. The individuals who would be the customers for registrant's guitars would also be prospective purchasers of applicant's amplifiers for the guitars. Those consumers who had previously purchased registrant's MOJAVE guitars, upon encountering applicant's amplifiers for guitars, under the identical mark MOJAVE, regardless of where they purchased the guitars, are likely to believe that the respective

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goods come from or are in some way connected with the same company.

It is reasonable to assume, as applicant points out, that the purchasers of guitars and amplifiers for guitars would to some extent be knowledgeable about such products and would exercise some degree of care in their purchasing decisions. However, even knowledgeable and careful purchasers of goods can be confused as to source under circumstances where, as here, identical marks are used on closely related goods. See *In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) citing *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) ("Human memories even of discriminating purchasers...are not infallible.").

In view of the foregoing, and because identical marks are used in connection with closely related goods, we find that confusion is likely.

Decision: The refusal to register under Section 2(d) of the Trademark Act is affirmed.