

**THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB**

Mailed: September 15, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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In re RKS Guitars, LLC  
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Serial No. 78941662  
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Daniel P. Dooley of Fellers, Snider, Blankenship, Bailey & Tippens for RKS Guitars LLC.

Lindsey H. Rubin<sup>1</sup>, Trademark Examining Attorney, Law Office 108 (Andrew Lawrence, Managing Attorney).

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Before Bucher, Drost and Taylor, Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

RKS Guitars, LLC has filed an application to register on the Principal Register the mark GIG-STAND (in stylized form), shown below,

*gig-stand*

for "electric and electric bass guitar stands" in Class 15.<sup>2</sup>

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<sup>1</sup> The application was assigned to the current examining attorney for writing of the brief.

<sup>2</sup> Application Serial No. 78941662, filed July 31, 2006, and alleging June 7, 2006 as the date of first use of the mark anywhere and in commerce.

The examining attorney refused registration on the ground that applicant's mark, when used in connection with applicant's goods, so resembles the previously registered mark GIG STAND (in typed format) for "music stands"<sup>3</sup> in International Class 20 as to be likely to cause confusion, to cause mistake, or to deceive under Section 2(d) of the Trademark Act.

When the refusal was made final, applicant appealed and requested reconsideration of the final refusal. On February 14, 2008, the examining attorney denied the request for reconsideration and, on March 4, 2008, this appeal was resumed. Briefs were filed by both applicant and the examining attorney. For the reasons discussed below, we affirm the refusal to register.

Before turning to the merits of this case, we must address an evidentiary matter. In its response to the first Office Action (p. 4), applicant made reference to a number of third-party registrations in an effort to contradict the examining attorney's argument regarding the similarity of the marks. Applicant was advised by the examining attorney in the Final Office Action (p. 3) that to make these registrations of record, applicant must submit soft copies or

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<sup>3</sup> Registration No. 1703313, renewed. The term "STAND" has been disclaimed.

their electronic equivalent. Applicant did not do so. The examining attorney now objects to their admission and asks the Board "not to take these third party registrations into account". (Br., unnumbered p. 2). As pointed out by the examining attorney in the Final Office Action, the Board does not take judicial notice of third-party registrations or marks. See *In re Duofold, Inc.*, 184 USPQ 638, 640 (TTAB 1974). See also *Black & Decker Corp. v. Emerson Electric Co.*, 84 USPQ2d 1482, 1485, n.4 (TTAB 2007). Accordingly, applicant's representations about these registrations which are not properly of record and its claims about what they show or do not show, will not be considered.

Turning now to the merits of this appeal, our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA

1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Considering first the similarity of the marks, as applicant correctly points out, we must determine whether applicant's mark and registrant's mark, when compared in their entireties, are similar or dissimilar in terms of sound, appearance, connotation and commercial impression. Applicant's mark is GIG-STAND (stylized) and the registered mark is GIG STAND. The examining attorney maintains that the marks are virtually identical, both sharing the terms "GIG" and "STAND," placed in the same order and spelled in the same way. (Br., unnumbered p. 4). Neither the addition of the hyphen nor the stylized presentation of applicant's mark, the examining attorney contends, will avoid a likelihood of confusion with the cited mark. Applicant conversely maintains that when its mark is considered as a whole, its "design element," [stylized lower case lettering] more than adequately distinguishes its mark apart from the cited mark. In addition, applicant, citing *Pignons S.A. de Mecanique de Precision et al. v. Polaroid Corporation et al.*, 657 F.2d 482, 212 USPQ 246, (1st Cir. 1981), argues that use of its mark with its corporate name (RKS Guitars, LLC), and its logo (RKS in stylized lettering), mitigates a likelihood of confusion in the marketplace.

Contrary to applicant's contention, because the cited mark is registered in typed format, registrant's rights therein are not limited to the depiction thereof in any special form. See *Phillips Petroleum Co. v. C. J. Webb, Inc.*, 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971). As the *Phillips Petroleum* case makes clear, when a word mark is registered in typed form, the Board must consider all reasonable modes of display that could be represented, including the same stylized lettering as that in which applicant's mark appears.<sup>4</sup> The stylized lettering of applicant's mark consequently does not serve to distinguish applicant's mark from the cited mark. Nor do we find the hyphen in applicant's mark sufficient to distinguish the two marks. It merely serves as a break between the terms "GIG" and "STAND" just as the space between the terms "GIG" and "STAND" separates those terms in the cited mark. See *Goodyear Tire & Rubber Co. v. Dayco Corp.*, 201 USPQ 485, 488 n.4 (TTAB 1978) ("[T]he mark 'FAST-FINDER' with a hyphen (which mark is in legal contemplation substantially identical to the mark 'Fast-Finder' without a hyphen....)"). See also *Harvey*

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<sup>4</sup> As regards applicant's claim that such use would constitute "trademark or copyright infringement," the Board has no jurisdiction to determine issues of trademark or copyright infringement. In any case, we reiterate that under prevailing Trademark law, we must assume that a mark in typed or standard character form may be displayed in all reasonable manners. *Phillips Petroleum Co. v. C. J. Webb, Inc.*, *supra*.

Hubbell, Inc. v. Red Rope Industries, Inc., 191 USPQ 119, 123 (TTAB 1976) ("[T]he marks 'DATALOK' and 'DATA LOK', although used by the parties in different graphic presentations, create the same general commercial impression and are, for all purposes herein, legally identical"). Simply put, the hyphen in applicant's mark is of such minor significance that it is unlikely that it will be remembered when the marks are viewed apart from each other at different times. We thus find that applicant's mark is virtually identical to the cited mark in terms of appearance, sound, connotation and commercial impression.

Further, we find unavailing applicant's argument that use of its corporate name and logo with its involved GIG-  
STAND (stylized) mark mitigates a finding of likelihood of confusion. The issue of likelihood of confusion must be decided based upon a comparison of applicant's mark as set forth in the application and the cited registration, and not upon a comparison of applicant's mark as it may appear on applicant's product labels. That is, the Board is not permitted to consider the trade dress of the products or any additional wording that may appear on the products, other than to the extent that these elements may show possible bad faith adoption on the part of the applicant. Ultracashmere House Ltd. v. Spring Mills Inc., 828 F.2d 1580, 4 USPQ2d

1252, 1254 (Fed. Cir. 1987). This is so because the issue before the Board in this proceeding is registrability and not use.<sup>5</sup> It is therefore irrelevant whether applicant uses its trade name and logo in conjunction with its applied-for mark on its products. Moreover, where marks are otherwise virtually the same, the addition of a house mark is more likely to add to the likelihood of confusion than to distinguish the marks. *Key West Fragrance & Cosmetic Factory, Inc. v. Mennen Co.*, 216 USPQ 168 (TTAB 1982). See also *In re Dennison Mfg. Co.*, 229 USPQ 141,144 (TTAB 1986), citing *Menendez v. Holt*, 128 U.S. 514, 521 (1888) ("It is a general rule that the addition of extra matter such as a house mark or trade name to one of two otherwise confusingly similar marks will not serve to avoid a likelihood of confusion between them."). In short, because the marks are virtually identical, the *du Pont* factor of similarity of the marks favors a finding of likelihood of confusion.

We next consider whether applicant's electric and electric bass guitar stands and registrant's music stands are related. Here, we keep in mind that the greater the degree of similarity between the marks, the lesser the degree of relatedness between applicant's and registrant's goods is

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<sup>5</sup> For this reason, the *Pignons* decision is readily distinguishable.

required to support a finding of likelihood of confusion. In re Opus One, Inc., 60 USPQ2d 1812, 1815 (TTAB 2001); and In re Concordia International Forwarding Corp., 222 USPQ 355, 356 (TTAB 1983). If the marks are the same, or almost the same, as in this case, it is only necessary that there be a viable relationship between the goods and services to support a finding of likelihood of confusion. In re Engine Supply, Inc., 225 USPQ 216, 217; and In re Concordia International Forwarding Corp., *supra*. Moreover, it is not necessary that the goods or services of applicant and the registrant be similar or competitive to support a holding of likelihood of confusion. It is sufficient if the respective goods and services are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used in connection therewith, give rise to the mistaken belief that they originate from or are associated with a single source. In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785 (TTAB 1993); In re International Telephone and Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

In urging that the refusal be reversed, applicant contends that its goods differ in functionality from registrant's goods; its goods are used to hold guitars

whereas the registrant's goods are used to hold sheet music. In addition, while recognizing that both applicant's and registrant's goods might be sold in the same stores, applicant's contends that the respective goods serve different markets. Applicant particularly argues that its goods are used by and specifically marketed to rock bands, who use the stand when the guitar is not in use, while registrant's goods are used by orchestras and solo performers during active performances or practice sessions. These differences, applicant maintains, preclude any likelihood of confusion of source.

The examining attorney, on the other hand, maintains that applicant's goods and registrant's goods are highly related and complementary, both being used by musicians for holding music and instruments, at same time and during performances. In addition, the examining attorney, citing *In re Melville Corp.*, 18 USPQ2d 1836 (TTAB 1991), contends that in the absence of limitations to the channels of trade or classes of purchasers in applicant's identification, "it is assumed that any guitar player, not just those in rock bands, have access to the Applicant's goods in the marketplace." (Br., at unnumbered p. 8).

In support of this position, the examining attorney made of record copies of web pages from Internet retailers of

musical instruments, supplies and accessories, namely, www.bizrate.com, www.theguitarcenter.com and www.musiciansfriend.com. The web pages show that guitar stands and other instrument stands are offered by the same source under the same mark. The web pages also demonstrate, in particular, that guitar stands and music stands emanate from the same source. At www.guitarcenter.com (emphasis added), purchasers can purchase (1) Hercules Music Stands (Model Nos. BS415B, BS100B, KB50 and BS405B) and Hercules Single Guitar Stands with Folding Yoke and Hercules Guitar Stands (Model Nos. GS423B, GS422B and GS402B; (2) Proline Music Stands and Proline Guitar Stands; and (3) On-Stage Conductor Stand Without Holes and On-Stage Universal A-frame Guitar Stands. At www.musiciansfriend.com, purchasers can purchase both stands for music and guitars from Musician's Friend. These web pages suggest that consumers are familiar with music stands and guitar and other musical instrument stands emanating from the same source.

Applicant, however, "disagrees" with the examining attorney's assessment that "Musician's Friend" is a brand used on both guitar stands and music stands. In support of this contention, applicant has made of record copies of Registration Nos. 1812560 (MUSICIAN'S FRIEND for "mail order catalog services in the field of musical instruments and

supplies"), 2238700 (MUSICIAN'S FRIEND and design for "mail order catalog services in the field of musical instruments and supplies, and retail outlets featuring musical instruments and supplies"), 2412387 (MUSICIAN'S FRIEND for "online retail services featuring musical instruments and supplies"), and 2492090 (MUSICIAN'S FRIEND.COM and design for "on-line retail services featuring musical instruments and musical accessories"), all owned by Musician's Friend Inc. and none listing either guitar stands and music stands in their identifications. While we agree that these registrations do not cover either guitar stands or music stands, the evidence of record, specifically the web pages from [www.musiciansfriend.com](http://www.musiciansfriend.com) clearly show that MUSICIAN'S FRIEND is the source of both music stands, i.e., Musician's Friend Heavy-Duty Folding Music Stand and Musician's Friend Folding Music Stand, and guitar stands, i.e., Musician's Friend Tubular Guitar Stand and Musician's Friend A-Frame Electric Guitar Stand. Accordingly applicant's objection is unfounded.

Quite simply, the evidence of record convinces us that applicant's guitar stands and registrant's music stands are related and complementary goods. Further, and contrary to applicant's contention, in the absence of any limitations in the identification of goods in the application and the cited

registration as to channels of trade or classes of purchasers, we must presume that both applicant's and registrant's goods will be offered in the normal channels of trade for such goods, such as music stores and the Internet, and will be offered to all normal purchasers of such goods such as musicians, including electric and electric bass guitar players. See *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

One final argument made by applicant must be addressed. Applicant argues that its guitar stand is an innovative and creative product and, because of the unique function and design, consumers will have to inquire as to the nature of its product before deciding to purchase it. During this inquiry, consumers will discover that applicant is the source of the goods and accordingly, the review process precludes any confusion as to the source of the goods. We find this argument unpersuasive. For purposes of our Section 2(d) analysis, we must compare the goods as identified in applicant's application and the cited registration. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). There is nothing in applicant's identification, i.e., electric and electric bass guitar

stands, that warrants further inquiry as to their nature. Thus, based upon a comparison of the goods as they appear in applicant's application and the cited registration, and the evidence of record, as stated above, we find applicant's electric and electric bass guitar stands related and complementary to registrant's music stands. The *du Pont* factors of the similarity of the goods, channels of trade and classes of purchasers thus favor a finding of likelihood of confusion as to the cited registration.

We therefore conclude that prospective purchasers familiar with the registered mark GIG STAND for music stands would be likely to believe, upon encountering applicant's virtually identical mark GIG-STAND (stylized) for electric and electric bass guitar stands, that such goods emanate from, are sponsored by or affiliated with the same source.

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