

THIS DISPOSITION IS NOT
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OF THE TTAB

Mailed:
August 11, 2006

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Queen Productions Limited

v.

Andrew Walker

Opposition No. 91162010 to application Serial No. 78234110
filed on April 4, 2003

Lori Krafte of Greenebaum Doll & McDonald PLLC for Queen
Productions Limited.

Mark Dinos of Morse & Bolduc for Andrew Walker.

Before Grendel, Holtzman and Zervas, Administrative
Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Applicant, Andrew Walker, seeks registration on the
Principal Register of the following mark¹ for “[m]usical
compositions, recordings and performances; [e]ntertainment
namely, live performances by a musical band; [e]ntertainment
services in the nature of a musical group featuring live

¹ Application Serial No. 78234110, filed April 4, 2003.

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performances of musical compositions; [s]ong writing services" in International Class 41:



Queen Productions Limited ("opposer") filed a notice of opposition to registration of applicant's mark. In the notice of opposition, opposer pleaded ownership of Registration No. 2271397² for the mark QUEEN (in typed or standard character form) for:

video and sound recordings; pre-recorded compact discs featuring music; cassettes and compact discs in International Class 9;

tour programs featuring a musical group; goods made from paper or cardboard, namely, decalcomanias, posters, and sheet music, all featuring or pertaining to a musical group; stationery, pens, both featuring or pertaining to a musical group; mounted and unmounted photographs featuring or pertaining to a musical group in International Class 16;

articles of outer clothing featuring or pertaining to a musical group, sold at concerts and record stores, namely, T-shirts; caps; jackets; trousers; footwear; and headwear in International Class 25;

entertainment in the nature of live musical concerts; radio program production and television show production; production of records and audio and video tapes, discs and cassettes; entertainment services, namely, production of plays, musicals, live theatrical performances; publication of books and publication of concert

² Section 8 affidavit accepted; section 15 affidavit acknowledged.

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programs, musical tour programs and musical score books in International Class 41.

Opposer further alleges that opposer is using the mark QUEEN in commerce and has used the mark in commerce in the United States since at least as early as 1975; that the QUEEN mark is famous, and has been famous in the United States since the late 1970s; and that applicant's mark so resembles opposer's previously used and registered mark as to be likely to cause confusion, to cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. §1052(d).

Additionally, opposer alleges that applicant's mark is likely to cause dilution of opposer's mark. Trademark Act Section 43(c), 15 U.S.C. §1125(c).

Applicant has answered the notice of opposition by denying the salient allegations thereof. Applicant also stated that "Queen is an extremely well known band that has released numerous musical compositions for sale since 1975"; that "Queen, is very well respected and looked upon as a legendary classic rock act in the music industry"; that "Opposer's mark is so well known and distinctive"; and that there are "millions of Queen fans in the United States and Europe."³ Answer at unnumbered pp. 2-3.

³ Much of applicant's answer reads like a brief, which asserts various arguments in opposition to the allegations made in the notice of opposition.

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The record consists of the pleadings; the file of the involved application; and, pursuant to applicant's three notices of reliance, a status and title copy of opposer's pleaded Registration No. 2271397, a certified copy of application Serial No. 78485482 for the mark QUEEN, opposer's First Set of Requests for Admissions, which applicant did not respond to, two *New York Times* articles taken from the Nexis database at lexis.com, and one excerpt from *The Rolling Stone Encyclopedia of Rock & Roll*, 3d ed. (2001).

Opposer has filed its main brief. Applicant did not submit any trial testimony or other evidence during his testimony period and has not filed a main brief.

Priority

Opposer has entered into evidence a status and title copy of Registration No. 2271397 for the mark QUEEN, showing opposer as the owner of the registration. In view thereof, opposer has established priority, and Section 2(d) priority of use is not an issue in this case. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of likelihood of

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confusion. *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 considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

In this case, applicant has admitted pursuant to Fed. R. Civ. P. 36(a) that applicant's mark "is confusingly similar to Opposer's mark QUEEN." See Request for Admission No. 8, to which applicant did not respond. Further, opposer's and applicant's services are legally identical in part, with both including live musical performances,⁴ and many of opposer's goods and services closely related to applicant's services. See, for example, "video and sound recordings; pre-recorded compact discs featuring music"; "tour programs featuring a musical group"; "production of records and audio and video tapes, discs and cassettes"; and "entertainment services, namely, production of plays,

⁴ Applicant's "live performances by a musical band" and "entertainment services in the nature of a musical group featuring live performances of musical compositions" are legally identical to opposer's "entertainment in the nature of live musical concerts."

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musicals, live theatrical performances," which are listed in opposer's registration. Given the absence of any restrictions or limitations in the parties' respective identifications of goods and services in the application and the registration, the parties' musical performance services are deemed to be marketed in the same trade channels and to the same classes of purchasers, i.e. the general public. *Kangol Ltd. v. KangaROOS U.S.A. Inc.*, 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992). Additionally, applicant has acknowledged in its answer that opposer's mark is well-known, is "legendary," and that there are "millions of Queen fans in the United States and Europe." Answer at unnumbered pp. 2-3. Thus, at a minimum, opposer's mark is an extremely strong mark.

Further, the marks are similar in appearance and commercial impression.⁵ Applicant has included all of opposer's one-word mark in its mark. QUEEN appears in the center of applicant's mark and is the only wording in applicant's mark appearing horizontally, so that when the mark is first perceived, QUEEN is likely to be read first. (DRAMA and DIE appear above and below QUEEN, forming a circle around QUEEN.) While there may be some differences

⁵ We must determine whether the marks are similar in sound, appearance, meaning, and commercial impression. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005).

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in the sound, appearance and meaning of the marks due to the inclusion of additional wording in applicant's mark, the overall similarities in sound, appearance and commercial impression due to the inclusion of QUEEN outweigh such differences.⁶ Because a "[s]ide by side comparison is not the test," *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973), the focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks, *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975), and "[w]hen marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines," *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992), we find that the marks are more similar than dissimilar.

Thus, in view of the similarities between the marks, the legal identity and/or relationship between the services, and the goods and services, the overlapping trade channels, and applicant's admission that opposer's mark is a very strong mark and that confusion is likely, we conclude that

⁶ Because opposer's mark is in typed or standard character form, opposer is not limited to depicting its mark in any special form and opposer could alter the presentation of the lettering of its mark at any time, including to that used in applicant's mark. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 1307, 55 USPQ2d 1842 (Fed. Cir. 2000).

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applicant's mark, when use in connection with the services recited in applicant's application, is likely to cause confusion with opposer's mark QUEEN, for, among other things, "entertainment in the nature of live musical concerts."⁷

Dilution

Opposer has not addressed its dilution claim in its brief. Accordingly, and in view of our determination that applicant's and registrant's marks are likely to be confused, we need not reach opposer's dilution claim.

DECISION: The opposition is sustained on the basis of likelihood of confusion under Section 2(d) and registration to applicant is refused.

⁷ Opposer contends that it uses its mark on a wide variety of goods and services, citing both to its registration and an application for QUEEN. Because applicant has not introduced any evidence of actual use of the mark, and because the application is only evidence that an applicant has filed for registration of a mark, see *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047 (TTAB 2002), there is no evidence on which we may rely to conclude that applicant has used its mark on a variety of goods and services.