

NOTE: This order is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

**PIANO FACTORY GROUP, INC., SWEET 16
MUSICAL PROPERTIES, INC.,**
Appellants

v.

SCHIEDMAYER CELESTA GMBH,
Appellee

**ANDREW HIRSHFELD, PERFORMING THE
FUNCTIONS AND DUTIES OF THE UNDER
SECRETARY OF COMMERCE FOR
INTELLECTUAL PROPERTY AND DIRECTOR OF
THE UNITED STATES PATENT AND TRADEMARK
OFFICE,**
Intervenor

2020-1196

Appeal from the United States Patent and Trademark
Office, Trademark Trial and Appeal Board in No.
92061215.

ON PETITION FOR PANEL REHEARING

Before PROST, BRYSON, and STOLL, *Circuit Judges*.

2 PIANO FACTORY GROUP, INC. v. SCHIEDMAYER CELESTA GMBH

PER CURIAM.

O R D E R

Appellants Piano Factory Group, Inc., and Sweet 16 Musical Properties, Inc., (collectively, “Piano Factory”) have petitioned for panel rehearing of the September 1, 2021, decision of this court affirming the decision of the Trademark Trial and Appeal Board (“TTAB” or “Board”) in this case.

Piano Factory raises two issues in its petition: (1) it contends that “[s]everal factual findings made in the opinion are not supported by substantial evidence”; and (2) it requests that the court make a finding that appellee Schiedmayer Celesta GmbH lacks any actual trademark rights under the Lanham Act to the mark SCHIEDMAYER for pianos. Pet. 1.

1. Piano Factory first takes issue with the following statement in the court’s opinion, which was based on deposition testimony by Glenn Treibitz, Piano Factory’s principal: “The practice of falsely branding ‘no-name’ pianos is not uncommon in the industry. The falsely branded pianos are referred to as ‘stencil pianos,’ many of which are made in Indonesia or mainland China.” Op. at 4.

Piano Factory does not contend that the quotation of Mr. Treibitz’s testimony is inaccurate, but argues that it was taken out of context and “creates the false impression that Mr. Treibitz testified that stenciling pianos is a *per se* false and deceptive trade practice.” Pet. 1–2. The petition quotes other portions of Mr. Treibitz’s testimony in which he admitted that he was “selling a relatively cheap no-name Chinese piano as a Schiedmayer piano,” and that he touted those pianos as having “German strings,” but denied that he used the references to German strings to imply that the pianos were German and denied that he had selected the Schiedmayer name because it sounded German. Pet. 2–3, quoting J.A. 837. Asked when he would tell a

PIANO FACTORY GROUP, INC. v. SCHIEDMAYER CELESTA GMBH 3

customer that a piano the customer was considering purchasing was made in China rather than in Germany, Mr. Treibitz answered, “when they are looking at it.” J.A. 838.

The petition asserts that the opinion improperly characterized Piano Factory’s sale of Chinese “no-name” pianos under the Schiedmayer label as a deceptive trade practice. The petition also objects to the opinion’s characterization of the act of placing the name Schiedmayer on no-name pianos as “false branding,” and the petition objects to the statement in the opinion that such false branding is not uncommon in the industry.

To begin with, the opinion does not characterize Piano Factory’s conduct as a “deceptive trade practice.” With respect to Piano Factory’s objections to the references to “false branding,” Mr. Treibitz’s testimony supports both of the statements to which Piano Factory objects.

First, Mr. Treibitz agreed that “[a] classic example of stencil pianos is when manufacturers produce a cheap-end piano that has a German sounding name,” that “many buyers are deceived into believing these [stencil] pianos are produced in famous geographical locations that are recognized for their production of quality instruments, most notably Germany,” and that “[s]ome manufacture[rs] have built generic lower quality pianos for retailers with a variety of names stenciled on the front.” J.A. 831–32, 835. Second, Mr. Treibitz admitted that he was “selling a relatively cheap no-name Chinese piano as a Schiedmayer piano.” J.A. 836. The characterization of that practice as “false branding” is therefore well supported by the evidence.¹

¹ The TTAB quoted from a book that provided a similar, but more detailed description of “stencil” pianos: “Not all pianos are what they appear to be. For decades, some manufacturers have built generic, lower-quality pianos for distributors and retailers with a variety of names stenciled

4 PIANO FACTORY GROUP, INC. v. SCHIEDMAYER CELESTA GMBH

2. The petition next takes issue with the court’s statement that “the Board concluded that the evidence justified ‘draw[ing] an inference that [Sweet 16] intend[ed] to create a connection with [appellee.]’” Pet. 5. That statement accurately reflects the Board’s ruling.

Although the petition argues that the Board’s finding of intent was not supported by substantial evidence, Piano Factory did not challenge the Board’s finding on the issue of intent in its original brief. In any event, the evidence was clearly sufficient to support the TTAB’s finding on that issue. Mr. Treibitz testified that he decided to use the SCHIEDMAYER mark because the Kawai company was previously using that mark on their pianos. However, the evidence showed (as the TTAB found) that Ms. Schiedmayer contacted Mr. Treibitz in 2002 to complain about Piano Factory’s registering the domain name “schiedmayer.com.” From at least that point on, Mr. Treibitz was aware of the manufacture and sale of Schiedmayer celestas in the United States. J.A. 627–29, 884. Nonetheless, Piano Factory continued selling pianos under the Schiedmayer mark.

Based on that evidence and the evidence “that SCHIEDMAYER is famous in the United States in connection with keyboard musical instruments,” the Board made its finding that Piano Factory “intend[ed] to create a connection with” the appellant. J.A. 23. Substantial evidence

on the front. These are called *stencil pianos*. Often the stenciled name sounds close to that of a more famous and recognizable brand. . . . Names are usually chosen because they sound American or German, even though the piano may be made in Indonesia or mainland China. . . . Unsuspecting customers see that name on a piano and assume they are getting great value, when in fact, the actual instrument may or may not be at the level of quality that the name implies.” J.A. 12.

PIANO FACTORY GROUP, INC. v. SCHIEDMAYER CELESTA GMBH 5

supports that finding, and we see no basis for the appellant's contention that the Board's findings on that issue and the portion of the court's opinion addressing the intent issue can be "used to endorse a false narrative," as the petition asserts.

3. As a final point, the petition argues that "[t]o avoid creating the false impression that the right to cancel a trademark registration for false association somehow confers trademark rights to the petitioner for the associated goods," the court should revise its opinion to state that no trademark rights to piano fortes can [be] or were obtained in this case through such a successful cancellation." Pet. 10–11.

No such amendment to the opinion is necessary. The opinion does not suggest or hold that the appellant owns any U.S. trademark rights in the SCHIEDMAYER mark, and the TTAB was quite explicit in making clear it was not deciding that issue. The TTAB stated: "We need not find that Petitioner owns United States trademark rights in SCHIEDMAYER in order to find that Respondents' use of SCHIEDMAYER falsely suggests a connection with Petitioner." J.A. 20 n.13.

Accordingly,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

FOR THE COURT

October 19, 2021

Date

/s/ Peter R. Marksteiner

Peter R. Marksteiner
Clerk of Court