

2020-1196

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.

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

**PETITION FOR PANEL REHEARING BY APPELLANTS
PIANO FACTORY GROUP, INC. and SWEET 16 MUSICAL
PROPERTIES, INC.**

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**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT****CERTIFICATE OF INTEREST****Case Number** 2020-1196**Short Case Caption** Piano Factory Group, Inc. v. Schiedmayer Celesta GmbH**Filing Party/Entity** Piano Factory Group, Inc. and Sweet 16 Musical Properties, Inc.

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 10/04/2021Signature: /s/ Adam StephensonName: Adam R. Stephenson

<p>1. Represented Entities. Fed. Cir. R. 47.4(a)(1).</p>	<p>2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).</p>	<p>3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).</p>
<p>Provide the full names of all entities represented by undersigned counsel in this case.</p>	<p>Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.</p> <p><input type="checkbox"/> None/Not Applicable</p>	<p>Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.</p> <p><input type="checkbox"/> None/Not Applicable</p>
<p>Piano Factory Group, Inc.</p>	<p>Sweet 16 Musical Properties, Inc.</p>	
<p>Sweet 16 Musical Properties, Inc.</p>		

Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court’s decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

None/Not Applicable Additional pages attached

Soler-Somohano v. Coca-Cola Company, Nos. 19-2414, 20-1406, 20-1688, 20-1245 (Fed Cir. 2020)		

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable Additional pages attached

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INTRODUCTION

This Petition is being filed to request that the panel of this Court revise the decision filed September 1, 2021 to correct certain errors of fact and to clarify that Appellee has actual no trademark rights to the mark SCHIEDMAYER in the United States for piano fortes.

ARGUMENT

The Court's opinion raises two issues:

1. Several factual findings made in the opinion are not supported by substantial evidence and require correction via issuance of a revised opinion;
2. For the avoidance of doubt, the Court's opinion requires a finding that Appellee lacks any actual trademark rights under the Lanham Act to the mark SCHIEDMAYER for piano fortes.

1. Prejudicial statements not supported by substantial evidence require revision of the Court's opinion

On p. 4, the Court stated that "The practice of falsely branding 'no-name' pianos, Mr. Treibitz testified, is not uncommon in the industry. The false branded pianos are referred to as 'stencil pianos.'"¹ The Court then referred to the TTAB's opinion allegedly quoting from the Joint Appendix at Appx0831 in support of this

¹ *Piano Factory Group, Inc. v. Schiedmayer Celesta GMBH*, Slip Opinion, p. 4 (Fed. Cir. 2021)

proposition. This portion of the appendix includes the transcript of Mr. Treibitz's testimonial cross-examination deposition. However, the quotation from the TTAB's decision is 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. Examining the actual colloquy on Appx 830-838 indicates that after agreeing that Mr. Treibitz was Appellee's expert witness on pianos, counsel for Appellee presented to Mr. Treibitz various statements regarding piano stenciling and asked questions regarding the pianos actually sold by Appellant. The questions and answers included the following:

“Q. Yes. The time it becomes really deceptive if somebody tries to present that a piano is something of a German piano by not getting to the fact that it's a Chinese piano by saying that it has, among other things, German strings.

A. No.

Q. You don't agree with that?

A. No.” (Appx0835).

“Q. Let's go back to your advertisement that's Exhibit 12. You are selling a relatively cheap no-name Chinese piano as a Schiedmayer piano, are you not?

A. Yes.

Q. And people who are asked to spend upwards of \$7,000 for a piano are going to want to know the background of the piano that they are buying; would you agree with that?

A. Yes.” (Appx0836).

“Q. What you did say, sir, is it has German strings, didn’t you?

A. Yes.

Q. Aren’t you using German strings to imply that this is a German piano?

A. No.

Q. Didn’t you select the Schiedmayer name because it sounds German?

A. No.” (Appx0837).

“Q. What I’m getting at here is it seems to me that in this ad anybody looking at it will think this is an authentic Schiedmayer piano and that this has been manifested by indicating that it has German strings. When do you tell the purchase that it, in fact, is a Chinese piano?

A. When they are looking at it [on the showroom floor].” (Appx0838).

From this colloquy, counsel for Appellee strenuously worked to get Mr. Treibitz to state that, in his expert opinion, sales of SCHIEDMAYER branded pianos like those advertised in the document on Appx0871 with German strings would *per se* deceive the public into believing the pianos were manufactured in Germany. However, Mr. Treibitz, as an expert, testified the opposite was true and that the manufacturing origin of the instrument as China was disclosed to potential purchasers on the showroom floor.

Throughout this proceeding, Appellee and its counsel have labored to advance the false narrative that because the pianos sold under the SCHIEDMAYER brand

were less expensive than other pianos, they were also of a quality that did not justify the price (i.e., Mr. Treibitz was also ripping off consumers by getting them to buy lower quality pianos at an unjustifiably high price). The problem with that narrative is that there is no evidence in this record that establishes that any of the pianos sold by Appellant under the SCHIEDMAYER brand were of poor quality. Less expensive does not mean poor quality. Manufacturing in China, with its lower labor costs, permits manufacture of a quality piano at less cost. Paying more for labor does not automatically result in a product that is of higher quality either—it just costs the purchaser more in the end. A review of the record indicates Appellee placed no evidence therein that the pianos sold by Appellant were actually of low quality. Instead, Appellee’s counsel simply tried to argue that because the pianos were not offered at costs in the tens to hundreds of thousands of dollars, they must be of low quality. Such an unsupported argument of counsel, however, is not evidence, and this Court (and the TTAB) should have recognized and rejected it.

Mr. Treibitz testified that the practice of stenciling pianos is not a deceptive trade practice unless practiced by “unscrupulous dealers” (Appx0832). Such dealers are those who would misrepresent the country of origin of the pianos to purchasers when they were inspected on the showroom floor and exact artificially high prices for their stencil pianos as a result. The evidence of record, however, establishes that neither Mr. Treibitz nor Appellant are such dealers. Mr. Treibitz’s

testimony established that 1) purchasers of SCHIEDMAYER branded pianos were informed of the country of manufacture of the piano and 2) the strings on the pianos advertised were actually made in Germany prior to being assembled as part of the piano in China. Including components made in Germany and other countries in pianos manufactured in China (and other countries) is a common practice in piano manufacturing today. Appellee has produced no evidence in this record to rebut its expert's testimony on these points.

The foregoing show that the TTAB's and this Court's statement that stenciling a piano is falsely branding a piano is contrary to and unsupported by substantial evidence. Nor is the statement that falsely branding "no-name" pianos is common in the industry supported by the evidence in this record. These statements must be corrected, as they are contrary to the evidence and unfairly prejudicial to Appellant by misrepresenting its business practices.

The Court also stated without analysis "...the Board concluded that the evidence justified 'draw[ing] an inference that [Sweet 16] intend[ed] to create a connection with [appellee].'" (Slip Opinion, p. 28). The Court's long list of serial case citations following this statement does not provide any discussion of any evidence relied on by the Court to support this conclusion. It appears from the opinion that the Court just accepted this statement of the Board at face value. It is possible this Court agreed at least in part because it already believed Mr. Treibitz

to be a bad actor. However, the Board's decision on this point was in entire contravention of the evidence of record.

The record establishes that, at the time the application that matured into the registration was filed, Mr. Treibitz had no knowledge at all of the existence of Appellee, Ms. Schiedmayer, or that the Schiedmayer mark had been used for pianos by anyone other than Kawai. Mr. Treibitz believed the SCHEIDMAYER mark to have been abandoned by Kawai, making it free for adoption and registration for piano fortes in the United States (Appx0628). Mr. Treibitz' deposition transcript testimony on this point, which Appellee produced no evidence to rebut, states:

“A. Why do I want to own the trademark?

Q. Schiedmayer for pianos.

A. Because they were being sold by a company named Kawai.

Q. When you say ‘they,’ what does that—what does it mean?

A. The Schiedmayer trademark was used on pianos made by the Kawai piano company. We were a dealer for the Kawai piano company, and we sold some of the Schiedmayer-branded pianos which we purchased from them.

Q. Did you know at that time anything about the history of Schiedmayer?

A. No.

Q. When did you find out?

A. It was long after the purchase of the—of the trademark, your client, Elaine Schiedmayer, called me—and this was about ten years ago. And she was interested in Schiedmayer.com, and she asked me why I had it. And she was interested in it. I told her that we owned the name and make pianos under that name.

Q. I'm not asking—is that how you found out that---

A. Yea---

Q. --she—

A. --when she—when she contacted me, then I researched it a bit. And that was really my first—my first knowledge of who she was and what the company was.” (App0627-0628).

“Q. And you found out that it was, in fact, the name of a historical piano name only when Ms. Schiedmayer telephoned you. Is that your testimony?

A. Correct.” (Appx0629-0630).

Ms. Schiedmayer eventually admitted that this telephone call did take place and alleged it happened in 2002 (Appx0884).

It is contrary to the evidence of record to find, as the TTAB did, that Mr. Treibitz adopted the SCHEIDMAYER mark with the intent to profit from the long history of alleged greatness of SCHIEDMAYER branded pianos. Mr. Treibitz had no idea that any of that history existed when he selected the mark. Nor did Mr. Treibitz know that a member of the Schiedmayer family still existed until 2002, the

year the trademark application for SCHIEDMAYER was filed. Nor did he know until April 2015, 13 years after selecting an adopting the mark, that Ms. Schiedmayer objected to his use of the mark SCHIEDMAYER for pianos.

It is unfair in view of this evidence for this Court to uphold the TTAB's finding of an intent to adopt the mark to trade on the reputation of the Appellee. The Court's statements in its opinion agreeing with the TTAB only operate to create unfair prejudice against Mr. Treibitz and Appellant and require correction.² These statements indicate that this Court is endorsing, as the TTAB did, the provably false narrative consistently advanced by the Appellee and its counsel in this case that Mr. Treibitz and Appellant are engaged in a scheme to steal the SCHIEDMAYER brand to use it on totally inferior pianos sold to unsuspecting consumers through intentional misrepresentations about country of origin made during the sales process.

Given the undisputed evidence of record that shows Mr. Treibitz had no idea Appellee existed until at least 2002 and had no idea Appellee had any historical connection to pianos until Ms. Schiedmayer's telephone call, it is unjust to ascribe

² "...a fair characterization of what has gone on in this case is that Sweet 16 has falsely labeled its pianos with a German-sounding name to suggest that its pianos are high-quality European instruments, rather than lower quality instruments made elsewhere...The inference is inescapable that Sweet 16 is attempting to take advantage of the reputation of Schiedmayer products by suggesting that its Schiedmayer-branded pianos were made by a Schiedmayer company and can therefore be assumed to be of high quality." *Piano Factory Group, Inc. v. Schiedmayer Celesta GMBH*, Slip Opinion, p. 29-30 (Fed. Cir. 2021).

such evil intent to Mr. Treibitz or Appellant. Mr. Treibitz did not select the mark to rob the Ms. Schiedmayer of her family name so as to better cheat the purchasing public by selling them fake German pianos.³ Unfortunately, this is what Appellee and its counsel have used this proceeding to promote and what this Court and the TTAB have said in their opinion—a conclusion unsupported by substantial evidence in the record.

This Court has determined that Appellee has the right to cancel Appellant's registration despite its unreasonably delayed filing of a petition to cancel. Appellant has no further interest in selling pianos using the SCHIEDMAYER brand name and has already discontinued doing so. However, it and Mr. Treibitz have a real interest in this Court not perpetuating the false allegations made by Appellee and its counsel about Mr. Treibitz's and Appellant's character and business practices, the purpose of which was to gain the sympathy of this Court to find for Appellee in this proceeding. Regardless of whether the Court chooses to uphold the TTAB's findings on the element of intent, the Appellant simply asks the Court to revise its opinion in a way to keep it from being used to endorse the false narrative and statements made by Appellee and its counsel about Mr. Treibitz and Appellant.

³ Nor have Mr. Treibitz and Appellant defended this litigation for a nefarious purpose as they believed that the parties could continue to coexist as they had for over 8 years prior to the filing of the cancellation without any evidence of or likelihood of consumer confusion.

The Appellant will respect the judgment of this Court on the cancellation of its registration. However, Appellant will not silently stand by and let this Court and the TTAB find as facts the Appellee's false representations about Mr. Treibitz and Appellant which are contrary to the evidence on this record.

Adapting Iago's statement in Shakespeare's *Othello*:⁴

“Who steals my [trademark] steals trash; ‘tis something, nothing;

‘Twas mine, ‘tis his, and has been slave to thousands:

But he that filches from me my good name

Robs me of that which not enriches him

And makes me poor indeed.”

2. For the avoidance of doubt, a finding that Appellee does not have trademark rights under the Lanham Act to the mark SCHIEDMAYER for pianos is in order.

This Court has found that Appellee has the right to cancel Appellant's trademark registration as falsely suggesting a connection under section 2(a) of the Lanham Act.⁵ However, the evidence of record consistently states that Appellee, as a legal entity, does not and has never manufactured or sold pianos, specifically piano fortes, in the United States, only celestas and glockenspiels. To avoid creating the false impression that the right to cancel a trademark registration for

⁴ William Shakespeare, *Othello*, Act III, Scene III, p. 836, *William Shakespeare The Complete Works*, Barnes and Noble, (1994).

⁵ 15 U.S.C. § 1052(a).

false association somehow confers trademark rights to the petitioner for the associated goods, the Appellant simply requests that the Court revise its opinion to state that no trademark rights to piano fortes can or were obtained in this case through such a successful cancellation. As trademark rights in the United States are obtained through use, and not merely through historical reputation,⁶ it is important that the opinion reflect that the Court's judgment does not give or confer any trademark rights for pianos under the Lanham Act upon Appellee. The evidence of record, admitted by Appellee, shows no use by Appellee of the SCHIEDMAYER mark for pianos since at least sometime in 1980 in the United States.⁷ (Appx0295-0296). It would be appropriate to state in a revised opinion that no part of the Court's decision is based on Appellee having any actual trademark rights to use SCHIEDMAYER for pianos (piano fortes) in order to ensure that the Court's opinion is not misinterpreted in the future.

⁶ 15 U.S.C. § 1127.

⁷ A statutory presumption of abandonment with no intent to resume use "...may be inferred from circumstances. Nonuse for 3 consecutive years shall be prima facie evidence of abandonment." 15 U.S.C. § 1127.

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests that the Court issue a revised opinion correcting the identified statements to reflect the actual evidence of record and to include a finding that Appellee does not have trademark rights under the Lanham Act to use the mark SCHEIDMAYER for piano fortes.

Oct 4, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This corrected brief complies with the type-volume limitations of Fed. R. App. P. 32(a) because this brief contains 2802 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Local Rule 32(b).

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because this updated brief has been prepared in proportionally spaced typeface using Microsoft Word® 2016 in 14-point Times New Roman font.

October 4, 2021

/s/ Adam Stephenson

*Attorney for Appellant Sweet 16 Musical
Properties, Inc. and Piano Factory Group*

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 4th day of October, 2021, as required by Federal Rule of Appellate Procedure 25(c)(2) and the Court's May 17, 2012 Administrative Order Regarding Electronic Case Filing, the foregoing Petition for Panel Rehearing was served on all counsel of record via the Court's electronic filing system.

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