

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL & APPEAL BOARD

Schiedmayer Celesta GmbH,)
)
 Petitioner,)
)
 -against-)
)
 Piano Factory Group, Inc. and)
 Sweet 16 Musical Properties, Inc.)
)
 Registrants.)
 _____)

Cancellation No. 92/061,215
Reg. No.: 3,340,759
Mark: SCHIEDMAYER

PLAINTIFF'S REPLY BRIEF

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PLAINTIFF'S REPLY BRIEF

In this Reply Brief, it is the intention of the Plaintiff to concisely respond to various of the arguments advanced by the Defendant in its Main Brief:

DEFENDANT'S MAIN BRIEF CONTAINS FUNDAMENTAL EVIDENTIARY ERRORS RESULTING IN DEFENDANT'S ARGUMENTS BECOMING BOTH CONFUSING AND MISLEADING

Defendant's Reliance Upon Printed Publications.

At the outset of its Brief, Defendant states the following:

"In order to evaluate the true history of and relationship of Petitioner to the manufacture of piano forte instruments (pianos), the Respondent has turned to authoritative texts on piano and piano manufacturer history, including, the *Pierce Piano Atlas* (66TTABVUE7) and the volume *Piano: and Encyclopedia* taken from *The Encyclopedia of Keyboard Instruments*. (66TTABVUE8).

Defendant thereafter proceeds, page after page, to extrapolate erroneous facts set forth in the subject publications.

More specifically, these publications purport to state that in or about 1980, Plaintiff sold its piano business to another company called Rud. Ibach & Sohn (Ibach).

These printed publications and others were mentioned in the Testimonial Declaration of Glenn Treibitz, who himself has no personal knowledge whatsoever as to what may or may not have transpired some 40 years ago. (66TTABVUE5)

The problem with Defendant's recitation of facts, based upon these printed publications, is that printed publications are not competent as to the truth of the matters stated therein:

"The article is not admissible to prove the truth of its contents."

- *Seaguard Corp. v Seaward Int'l, Inc.*, 223 USPQ 48, 49 n.4 (TTAB 1984).

"The magazine articles and the article from Barron's are hearsay in nature and thus are probative not for the truth of the matters contained therein..."

- *Logicon, Inc. v Logisticon, Inc.*, 205 USPQ 767, 768 n.6 (TTAB 1980).

"Printed publications are probative not for the truth of the matters contained therein."

- *Guide to TTAB Practice, Handleman* 2013-1 Supplement, 17-70

In fact, for what it is worth, the statements made in the publications cited by Defendant are untrue. The correct facts are to be found in the Declarations of Plaintiff Elianne Schiedmayer in her main Testimonial Declaration (38TTABVUE5) and her Rebuttal Declaration (73TTABVUE1,2), in which Elianne Schiedmayer, having

personal knowledge of the true facts, states that no sale ever took place but rather a short lived joint venture took place during which no rights, including trademark rights, were ever transferred to Ibach.

Defendant's repeated references to the truth of the statements made in printed publications so permeates and infects Defendant's Brief as to render same manifestly confusing and misleading and of limited value.

Defendant's Statement as to Sales and Promotion.

At page 8 of Defendant's Brief, Defendant copies the approximate sales and rental figures by year to the best of Respondent's information and belief (66TTAB VUE10, 70TTABVUE22-23).

However, Defendant's reconciliation of sales is without value and should be stricken as hearsay because it is "approximate" and also based upon "information and belief."

The records are not based upon any books and records of the Defendant, but rather upon the recollection of the declarant.

This does not constitute an exception to Federal Rule of Evidence Sec. 803 indicating exceptions to hearsay.

First, the recitation is approximate. Second, it is based upon information and belief:

DEFINITION: Information and belief "...in which the person making the statement or allegation qualifies it. In effect, he/she says "I am only stating what I have been told and I believe it."

- Law.com Definitions:

This is classic hearsay and is not an exception to the business records exception of the Federal Rules of Evidence.

Accordingly, Defendant's recitation of its sales, if any, should be ignored in all respects. It is further noted that the Defendant did not even attempt to indicate any expenses whatsoever regarding promotion, if any, of the Schiedmayer brand and it can be safely assumed that no such expenses existed.

On the other hand, Plaintiff has submitted of record numerous advertisements and literally hundreds of invoices of sales of Celestas over decades.

(38TTABVUE EX.E,F)

The Date of Filing of Plaintiff's Petition to Cancel.

Defendant correctly indicates that the Petition to Cancel was filed on April 1, 2015 and Applicant's first of two trademark applications was filed the following day on April 2, 2015. This is because the Plaintiff only learned of the existence of the offending

registration in connection with preparation to file its own trademark application for its own name.

Difference Between a Piano and a Celesta.

Defendant's assertion that there are meaningful differences between a piano and a celesta makes no sense. A person looking at a celesta could not discern it from a piano. The respective instruments look identical and are identical in all respects, except that in a celesta the felt hammer strikes a plate instead of a wire. A celesta is de facto a piano and the goods in this case are virtually identical.

Also, Defendant repeatedly asserts that Plaintiff also manufactures a glockenspiel. Plaintiff only occasionally manufactures a keyboard glockenspiel which is also visually identical to a piano.

PLAINTIFF'S PROOFS AND ARGUMENTS ARE FULLY SUPPORTED BY ITS PLEADINGS

Abandonment.

It is correct that Plaintiff did not plead palming off. There is no requirement that Plaintiff plead palming off. Palming off is not the basis of Plaintiff's claim. Plaintiff asserted in its pleadings that the mark SCHIEDMAYER was not used in commerce by the Defendant. The Defendant then submitted proof which, if it established use at all, established only that Defendant was unlawfully and improperly utilizing the SCHIEDMAYER trademark by palming off the product. Plaintiff then

asserted that Defendant had never proven use in commerce because palming off does not constitute bona fide use in commerce.

Accordingly, Plaintiff's arguments are fully consistent with its pleadings.

False Association.

Defendant does not even argue that Plaintiff's pleadings do not support false association. They certainly do.

Defendant asserts that the mark SCHIEDMAYER does not point uniquely and unmistakably to the Plaintiff.

The best that Defendant can do in response is to refer to the alleged transaction with Ibach which first of all was never proven. At best that transaction, some 40 years ago was a joint venture which failed and in which no rights were ever transferred to Ibach. In any event, the Plaintiff had been selling and promoting the celesta product for many years prior to any such joint venture as can be seen from the dates on the invoices for celestas which date back to 1934. (73TTABVUE EX.A,B)

Defendant argues that Plaintiff has not shown sufficient fame and reputation at the time of registration, 2007, but it is not possible to ascribe much sense to the arguments supporting same.

The fact is that all of the factors presented by the Plaintiff in its Main Brief existed in 2007, except for the Wikipedia and internet proof that was properly submitted, with an explanation.

Intent.

Intent is a very powerful element in support of false association. Defendant's arguments to the contrary make no sense.

The plain fact is that Defendant selected deliberately the Schiedmayer name knowing that it had previously been used in connection with pianos and keyboard musical instruments and knowing full well that it had a history. Intent here is self-evident and is a powerful influence supporting false association.

Likelihood of Confusion.

Likelihood of confusion in this case is a given. The product is, for all practical purposes identical, and the trademark which is an unusual name, is also identical.

In fact, it is still an open question as to whether likelihood of confusion is required, although likelihood of confusion surely does exist in this case:

“Evolving out of the rights of privacy and publicity, the false suggestion of a connection under § 2(a) of the Trademark

Act was intended to preclude registration of a mark which conflicts with another's rights, *even though not founded on the familiar test of likelihood of confusion*. [*Notre Dame*, 217 USPQ @ 509].”

- *BD. of TRS. of Univ. of Ala. v Pitts*, 107 USPQ 2d 2001, 2025 (TTAB 2013). emphasis supplied

In any event likelihood of confusion is so blatant in this case that it should be considered as inevitable.

In this respect, it is noted that if the marks and the goods of parties are so similar that confusion is not only likely but inevitable, laches is not available as a defense. See:

“Ultra-White Co., Inc. v Johnson Chemical Industries, Inc., 175 USPQ 166, 167 (CCPA 1972).

Defendant's Use, if Any, of the Mark SCHIEDMAYER.

The Defendant admits that its use of the mark SCHIEDMAYER, if any, is “repugnant.” (73TTABVUE27)

What is significant in Defendant's arguments in this respect is that Defendant carefully avoids a flat denial of palming off. That is, nowhere does Defendant ever flatly deny that it sells a cheap no-name piano manufactured in some town in China, as a genuine, German made Schiedmayer piano which has a history of some 300 years of fine piano making.

LACHES

In its Main Brief, Plaintiff cited case after case for the proposition that laches is a two-pronged equitable defense. Apart from showing that the delay was unreasonable, it is incumbent upon the party seeking to prove laches to also prove detriment to the Defendant as a result of the delay.

Nowhere does Defendant assert any detriment whatsoever.

Defendant cites *Clamp Mfg. Co. v Enco Mfg. Co.*, 870 F.2d 512, 55 (Nth. Cir. 1989).

However, at *Clamp*, although the Plaintiff did engage in substantial sales, the Ninth Circuit upheld the District Court's rejection of the Laches defense precisely because there was no sufficient detriment shown to the party asserting laches.

The only decision cited by the Defendant as to prejudice as a result of the delay is *Christian Broadcasting Network Inc. v ABS-CBN International*, 84 USPQ 2d 1560,1573, TTAB 2007.

However, at *Christian*, in addition to unreasonable delay, the Respondent's total number of subscribers grew to 200,000 and their satellite subscribers grew to 80,000. In addition, the Respondent's satellite distribution network grew from 300 dealers to 70,000 dealers.

Christian is therefore irrelevant because at *Christian* the Respondent engaged in very, very substantial growth of its trade over an extended period of time.

Here, we do not know whether in fact the Defendant ever sold a single Schiedmayer piano as we have only approximate limited sales. Additionally, the Defendant admitted in its Testimonial Declaration that basically all it ever did was buy a no name piano, slap on a SCHIEDMAYER trademark and sell it as a German made Schiedmayer piano. This is not the stuff of which Laches is made.

Schiedmayer is a Surname and This Factor Mitigates in Favor of False Association.

Defendant argues that false association should not exist because the mark involved, SCHIEDMAYER, is a surname. However, this argument belies a complete ignorance of the fundamental theory supporting false association as follows:

Although not articulated as such, it appears that the drafters sought by § 2(a) to embrace concepts of the right to privacy...it is a right of this nature, *a right to control the use of ones identity*, which the university also asserts under § 2(a).

- *University of Notre Dame du Lac v J.C. Gourmet Food Imports Co. Inc.*, 703 F.2d 1372, 1375, 217 USPQ 505, 508 (Fed. Cir. 1983). emphasis supplied

Indeed, the name Schiedmayer, is the *identity* of the Plaintiff and the *identity* of the President of the Plaintiff, Elianne Schiedmayer, and has been the *identity* of the Plaintiff for the past 300 years.

Plaintiff's Response to Interrogatory No. 7 was Complete and Correct.

Defendant asserts that Plaintiff's Response to Interrogatory 7 (65TTABVUE3) was somehow incorrect. The Interrogatory and the response are set forth below:

INTERROGATORY NO. 7 – Did an agent/Person otherwise affiliated with the Petitioner contact Glenn Treibitz via telephone during the pendency of the application which matured into the SCHIEDMAYER registration sought to be cancelled to ***inquire about the application?*** (emphasis supplied)

ANSWER: No

The answer is 100% correct. There was never any inquiry made as to the application, since Elianne Schiedmayer was entirely unaware of the existence of the application, and therefore never made any inquiry with respect thereto.

Defendant should be more careful before impugning the integrity of the Plaintiff.

Summary

The facts of this case make it plainly clear that Defendant appropriated Plaintiff's mark SCHIEDMAYER for the sole purpose of trading upon the goodwill and reputation of Plaintiff's name and valued trademark, having originated some 300 years ago.

Even the USPTO Trademark Examiner prosecuting Defendant's application immediately understood that false association exists. Had the Applicant honestly replied, no registration would ever have issued.

Additionally, Defendant has avoided a flat denial that it is and has been engaging in palming off of Plaintiff's reputation. Any such use plainly does not rise to the level of Bona Fide Use in Commerce and therefore the Registration should be considered abandoned as well.

Finally, Defendant has not submitted one scintilla of evidence with respect to detriment resulting from any delay in bringing this proceeding. On the contrary, Defendant has not submitted any evidence as to promotional activities and its sales figure, which are meager to start with, do not support any form of detriment and are in any event inadmissible.

For all of the above reasons, the subject registration should be cancelled forthwith.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Michael J. Striker', with a long horizontal flourish extending to the right.

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CERTIFICATE OF SERVICE

It is hereby certified that a true and complete copy of the attached document was served upon counsel for the Respondents at his email address of record:

adam@iptech.law

This 25 day of January, 2019.

/Michael J. Striker/

Michael J. Striker