

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.

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

BRIEF OF APPELLEE SCHIEDMAYER CELESTA GMBH

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April 17, 2020

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Piano Factory Group, Inc. v. Schiedmayer Celesta GmbH

Case No. 2020-1196

CERTIFICATE OF INTEREST

Counsel for the:

(petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

Michael J. Striker

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Schiedmayer Celesta GmbH	Schiedmayer Celesta GmbH	NONE

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

NONE

FORM 9. Certificate of Interest

Form 9
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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

Arthrex, Inc. v. Smith & Nephew, Inc., et al., No 18-214 (Fed .Cir. 2019)

Alberto Soler-Somohano v. The Coca-Cola Company, Inc. 2020-1245 (Fed. Cir.)

4/17/2020

Date

/s/ Michael J. Striker

Signature of counsel

Michael J. Striker

Printed name of counsel

Please Note: All questions must be answered

cc: _____

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STATEMENT OF RELATED CASES

In accordance with Fed. Cir. R. 47.5, Appellee, Schiedmayer Celesta GmbH states that:

1. No other appeal in or from this same proceeding before the U.S. Patent and Trademark Office, Trademark Trial and Appeal Board, was previously before this or any other appellate court.
2. Counsel notes that arguments raised herein rely in part upon the decision of *Arthrex, Inc. v. Smith & Nephew, Inc.* No. 18-2140 (Fed. Cir. 2019) and *Alberto Soler-Somohano v. The Coca-Cola Company, Inc.* Fed. Cir. 2020-1245.

Respectfully submitted,

/s/ Michael J. Striker
*Attorney for Appellee Schiedmayer
Celesta GmbH*

STATEMENT OF FACTS

Appellee, Schiedmayer Celesta GmbH, herewith objects and therefore supplements Appellant's Statement of Facts for two reasons:

First, Appellant's Statement recites certain elements as facts which are unsupported by the evidence before the TTAB and second, because the Statement of Facts gives no factual description of either the Appellant, Sweet 16 Musical Properties, Inc., or the Appellee, Schiedmayer Celesta GmbH. (In this Brief, Appellant shall be referred to as Sweet 16 Musical Properties, Inc. "Sweet 16" which is the Assignee of Piano Factory Group LLC and therefore the sole party in interest.)

Appellant's Allegations not Supported by Evidence.

"...Georg Schiedmayer transferred rights to the SCHIEDMAYER trademark for pianos in 1980 to Rud Ibach & Sohn at the same time he sold the piano line to Rud Ibach & Sohn."

-Appellant's Brief Statement of Facts – Page 4

This allegation, and the entire body of the Statement of Facts supporting it, is factually incorrect and totally unsupported by the evidence before the TTAB.

The only evidence which in any way supports a sale having taken place in 1980 relates to two hearsay entries in older books and an Internet printout, both of which incorrectly state that a sale had taken place. As pointed out in the TTAB Decision "...Respondent's [Sweet 16] arguments on this issue appear to be based only on printed publications and internet print outs which are not admissible for the truth of the matters asserted therein. *Ayoub, Inc. v. ACS Iuayoub Carpet Serv.*, 118 USPQ 2d 1392, 1399 n62 (TTAB 2016); *Nat'l Pork Vd. And Nat'l Pork Producers Council v. Supreme Lobster and Seafood Co.*, 96 USPQ 2d 1479, 1483 (TTAB 2010)." Appx20

Appellant, Sweet 16, did not submit any independent admissible evidence regarding this incorrect factual allegation.

The correct facts may be found in the declarations of Elianne Schiedmayer and supporting exhibits. Elianne Schiedmayer is the owner and operator of the Appellee, Schiedmayer Celesta GmbH, and testified with personal

knowledge as to the facts surrounding the events in 1980. At that time she was married to Georg Schiedmayer, since deceased, and stated the following upon her own personal knowledge:

“In 1980, a *joint venture company* has been created with Rud. Ibach GmbH in order to have Schiedmayer pianos manufactured by the firm Ibach in Germany. Very soon this turned out to be impractical and Georg Schiedmayer has completely withdrawn from this commercial relationship.

I would like to point out that none of the Schiedmayer companies has ever been abandoned. No Schiedmayer company has ever been sold to Rud. Ibach GmbH and that a Schiedmayer company with the name Piano Forte Fabrik GmbH has ever been registered.”

*-Elianne Schiedmayer Declaration Page 3 Appx243
(emphasis supplied)*

See also Exhibit “B” of the Elianne Schiedmayer Declaration entitled “The Heavenly Piano Builders” which bears a copyright notice of 2011 and therefore was written well prior to the institution of the litigation before the TTAB and accordingly is completely objective. The document states in part:

“Cooperation with the Ibach company to produce pianos under the Schiedmayer label turned out to be impractical, and Georg Schiedmayer quickly withdrew from the unrewarding collaboration.”

*-Exhibit "B" to Elianne Schiedmayer Declaration Page
70 Appx260, Appx249*

In her rebuttal Declaration Elianne Schiedmayer states the following:

“Rud. Ibach & Sohn under the terms of the agreement, was to manufacture or have manufactured pianos bearing the Schiedmayer trademark, *in a cooperation with my husband, Georg Schiedmayer.*

*-Elianne Schiedmayer Rebuttal Declaration Page 2
(emphasis supplied)
Appx882*

Rud. Ibach & Sohn never received or obtained any trademark rights to the mark SCHIEDMAYER at any time. See: Declaration of Michael Floymayr, a German attorney who conducted a trademark search and stated, *inter alia*, “I herewith state that according to my search no company bearing the name Ibach ever obtained any rights to the trademark SCHIEDMAYER in Germany, either by original filing, by assignment or any other transfer.”

-Floymayr Declaration Appx893

It will thus be seen that the assertion that Appellee, Schiedmayer Celesta GmbH at any time sold any trademark rights to any company is completely incorrect, factually wrong and should never have been included in Appellant’s Brief. A litigant should not knowingly misrepresent a salient fact in an Appeal Brief.

Background of Appellee, Schiedmayer Celesta GmbH and Appellant, Sweet 16

The Appellant's Brief lacks any description of the parties to this proceeding.

Schiedmayer Celesta GmbH

Appellee, Schiedmayer Celesta GmbH, is a German company owned and operated by Elianne Schiedmayer. The business of Schiedmayer Celesta GmbH is the manufacture and sale throughout the world, including with particularity in the United States, of the Celesta piano instrument. A Celesta is a type of piano, differing only in that in a Celesta, there exists an internal mechanism whereby the felt hammer activated by depressing a key on the keyboard strikes a metal plate rather than a metal wire. In all other respects a Celesta is *de facto* a piano and for this reason there is an identity with regard to the goods involved in this proceeding. Basically, a celesta is a piano.

Schiedmayer Celesta GmbH is the current manufacturer of musical keyboard instruments dating back continuously for a period of almost 300 years. Schiedmayer is believed to be the oldest family owned continuous manufacturer of

keyboard musical instruments in the world, having been manufactured and owned by representatives of the Schiedmayer family continuously since 1735.

Appellee Schiedmayer enjoys a continuum of sales of musical keyboard instruments, namely, pianos and celestas dating back almost 300 years. It will also be seen that the Schiedmayer piano and Schiedmayer keyboard instruments have always been held in the highest regard having won more than 20 gold awards; 6 silver awards and 10 bronze awards throughout the world, including many in the United States Appx247.

In 1957 some 200 years after Balthasar Schiedmayer manufactured his first clavichord, Elianne Schiedmayer's late husband, Georg Schiedmayer, inherited the Schiedmayer family-affiliated business Schiedmayer & Sohne from his father Appx242.

Eventually, in 1980, Georg Schiedmayer "closed down the production of the Schiedmayer pianos in Stuttgart" and renamed the company Schiedmayer GmbH & Co. KG. (Schiedmayer Dec. Page 3 Appx243)

Georg Schiedmayer died suddenly in 1992 and Elianne Schiedmayer was his sole heir Appx244 (Schiedmayer Dec. Page 4 and Ex. C). She is now the sole owner of Schiedmayer Celesta GmbH, the current name of Schiedmayer & Sohne GmbH founded in 1809 by Johann Lorenz Schiedmayer in Stuttgart, Germany. There is therefore a direct inheritance of the Schiedmayer name up to Schiedmayer Celesta GmbH.

Schiedmayer Celesta GmbH is the only current producer of Celestas that meet the specifications developed by the Celesta's inventor Viktor Mustel in 1886 Appx245, Appx301.

In the Declaration of Ms. Kasimoff, she testified that her Los Angeles piano store, Kasimoff-Blüthner Piano Co. "...imported our first Schiedmayer Celesta in 1967 and since 1967 we have continuously offered for sale and rental Schiedmayer Celestas in the United States." (Kasimoff Dec. p. 1) Appx582

Virtually all orchestras in the United States and symphonies and musical organizations have purchased and are currently using at least one Schiedmayer Celesta, including the New York Philharmonic Orchestra, Boston Symphony Orchestra, Cleveland Orchestra, Los Angeles Philharmonic, San

Francisco Symphony and many others. (Schiedmayer Dec. p. 7 and Ex. E) Appx829

The Wikipedia entry for “Schiedmayer” indicates that it is “...the name of a German instrument manufacturing family. Established in 1735 as a keyboard instrument manufacturer, it is still active today as a family business.” Google searches for Schiedmayer or Schiedmayer Celesta yield results that exclusively refer to Appellee or Appellee’s family or Schiedmayer keyboard instruments. A Google search resulted in 40 pages of entries for the mark Schiedmayer all relating to Schiedmayer Celesta GmbH or its predecessors in interest (Fuchs Dec. p. 1, Ex. B and C) Appx509-513

Ms. Kasimoff testified that she is “aware that the reputation and fame of Schiedmayer musical instruments dates back almost 300 years and that Schiedmayer Celesta GmbH and Elianne Schiedmayer represent the continuum of a history relating to the sale of keyboard musical instruments dating back almost 300 years. (Kasimoff Dec. p. 4) Appx580-582

Schiedmayer celestas have been sold throughout the entire United States.

Appellant Sweet 16

Appellant, Sweet 16, does business as Hollywood Piano.

Hollywood Piano is a small piano store on the side of a highway in Burbank, California. An individual by the name of Glenn Treibitz (Treibitz) operates Hollywood Piano and his Declaration forms the evidence submitted by Appellant before the TTAB. As freely admitted by Treibitz in his Discovery Deposition and Cross-Examination Deposition, Treibitz respectively the Appellant herein, engages in a deceptive practice known as ‘stencil pianos’.

The sale of stencil pianos involves purchasing a cheap inferior “no name piano” from China or Indonesia and then placing thereon the name of a well-known, presumably since abandoned, German piano manufacturer and selling the eventual piano as an authentic German piano at a sharply increased price to the unaware consuming public.

The following extracts from the Cross Examination Deposition of Treibitz are illuminating:

Q. So all of the Schiedmayer pianos that you have ever sold were purchased as no-name pianos from China; correct?

A. Yes

Appx825

Q. A classic example of stencil pianos is when manufacturers produce a cheap-end piano that has a German sounding name. Do you agree with that?

A. Yes

Appx831

Q. ... You are selling a relatively cheap no-name piano as a Schiedmayer piano, are you not?

A. Yes

Appx836

The following extract from the Treibitz Cross-examination deposition is particularly revealing:

Mr. Striker:

“And many buyers are *deceived* into believing that these pianos are produced in famous geographical locations that are recognized for their production of quality instruments, most notably Germany. Do you agree with that?”

* * *

Mr. Stephenson: So what is your answer?

The Witness: *Yes.*

-Appx832

It will thus be seen that Treibitz, respectively the Appellant admits that its use of the Schiedmayer name is deceptive.

Treibitz even registered other names of German piano manufacturers such as Bernard Shoninger; Kurtzmann and Vose & Sons. (The latter filed but not registered.) Appx639

Appellant, Sweet 16, Has No Sales or Promotional Documents Relating to Schiedmayer

Appellee, Schiedmayer Celesta GmbH, filed four series of Document Requests and Interrogatories upon Sweet 16, during the course of the TTAB proceedings.

Nearly every such discovery request was directed at any documents or information relating to the sale, offering for sale or promotion by Sweet 16, of Schiedmayer marked products. (The only advertisement which was produced related to a sales promotion in 2008, well after institution of the TTAB proceedings. It is obviously a phony ad created to support Appellants TTAB Brief which was filed at the same time.)

Appellant, Sweet 16, failed to produce any documentation relating to sales, offering for sale, or promotion of any kind. Rather, Appellant claimed that a broken computer was to blame- an argument akin to claiming that the dog ate my homework.

The plain fact that may be drawn from the utter failure of Appellant Sweet 16, to produce any documentation relating to promotion and sales is that either none exist or they are so *de minimus* as to effectively not exist.

Thus, it will be seen that the Appellant, Sweet 16, is essentially engaging in a scam whereby purchasers of pianos are deceived into believing that they are purchasing a piano which is a genuine authentic German made Schiedmayer piano when in fact it is nothing more than a cheap, inferior no name piano manufactured in China.

It is indeed remarkable that Appellant should possess the judicial temerity to seek redress from this Honorable Court so it may continue to foist a sinister scam upon the unaware.

SUMMARY OF ARGUMENT

Appellant has Filed a Scattershot Brief of Limited Credibility

It is very difficult to summarize the argument when Appellant, Sweet 16, has assigned 23 errors to the TTAB.

Appellant's Brief assigns the following issues as error by the TTAB:

...The Board's decision is legal error.	P. 2
...The finding defense of laches did not apply is erroneous.	P. 12
...Decision is legal error failed to consider harm.	P. 12
...Decision erroneously treated Appellee as equivalent.	P. 13
...Decision erroneously equated the registered goods.	P. 13
...Decision not supported by substantial evidence.	P. 13
...Decision erroneously concluded identity was sufficient.	P. 14
...Decision not supported relies on present day evidence.	P. 14
...Laches analysis in error, no material prejudice.	P. 15
...Board legally erred in holding false suggestion.	P. 19
...Board incorrectly defined legal entity.	P. 19
...Board incorrectly classified registered goods.	P. 20
...Board failed to support with substantial evidence.	P. 20
...Board erred in defining the goods.	P. 21

- ...All this constitutes error, resemble a piano. P. 21
- ...Board erred in applying four factor test. P. 23
- ...Board’s decision fails entirely, no evidence. P. 26
- ...Board applied a double standard – printed publications. P. 26
- ...Board further erred in assuming other’s use of Schiedmayer. P. 27
- ...Board also erred in assuming present day use. P. 27
- ...Board’s reliance on *Peter S. Herrick, P.A.* is misplaced. P. 27
- ...Board made fundamental legal error - fame. P. 29
- ...Board appears to have failed entirely. P. 29

“The inclusion of a great number of points may suggest to us that none of the points is any good.”

-Hon. Roger J. Miner, Circuit Judge, 2nd Circuit; 25 Do’s. For Appellant Brief Writers 1992

“It gives the impression of weakness and desperation, and it insults the intelligence of the court.”

-7 Ways to Ruin a Perfectly Good Brief, James J. O’Keefe, The Journal of Virginia Trial Lawyers Association, Volume 20 No. 4 2017. (citing Justice Scalia)

“Such a shotgun approach often exhibits desperation and incompetence.”

-10 Mistakes to Avoid at the Federal Circuit, Bradley C. Wright.

“When I read an Appellant’s Brief containing more than six points, a presumption arises that there is no merit in any of them.”

-Hon. Ruggero J. Aldisert, Winning on Appeal, Better Briefs and Oral Arguments, Page 121 1992. (Ct. of Appeals, 3rd cir) Golden Pen Award Recipient

The TTAB did not make 23 errors. The TTAB did not make *any* errors.

ARGUMENT

Since the Appellant has raised a hurricane of issues and has not assigned any one of them to be any more important than the other, Appellee, Schiedmayer, has no choice but to review same in the order as they are presented in Appellant's Brief and to present its comments briefly to highlighted issues presented as follows:

“In total, the record reflects sales of approximately 29 Schiedmayer marked pianos [by Appellant, Sweet 16] since the registration date...”
-Appellant's Brief page 9.

This is incorrect. The recitation of 29 pianos sold during the relevant time period by Appellant is a fiction coming from the memory of Treibitz who simply stated that it was his best “general recollection” Appx820. It is not based upon any books and records nor it is based upon the opinion or records of a

bookkeeper or accountant. A recitation of sales coming from the imagination of a partisan does not establish anything.

In fact, it is more likely that fewer such sales have ever taken place. This is because despite four separate attempts through Interrogatories and document requests, Appellee did not receive one single solitary evidence of any sale whatsoever. Not a contract, not a guarantee not even a sales promotion; no documents whatsoever from which it may be assumed that there were at best very, very few sales. (A few totally irrelevant pages were produced).

It is almost certain that the refusal by Sweet 16 to produce the name of a single purchaser of a Schiedmayer marked no-name piano is because Appellee would have contacted any such purchaser and the Sweet 16 scam would have been exposed.

“As admitted by the appellee, it has never manufactured or sold a piano.”

-Appellant's Brief page 10

This is untrue. As stated numerous times, a Celesta is *de facto* a piano. The differences are completely internal and the piano cannot be discerned visually from a Celesta. The situation is akin to one car having a clutch and another

car having an automatic transmission. They have different internal mechanisms – but they are both cars.

“The Board entirely failed to consider the significant material prejudice from the legal effects of preclusion and collateral estoppel caused by cancelling Appellant’s registration.”

-Appellant’s Brief page 15.

First, issue preclusion relating to prejudice resulting from laches was never raised before the TTAB and therefore cannot and should not be considered at this time:

“...federal appellate courts do not consider issues ‘not passed upon below’ or entertain arguments not presented to the lower tribunal *Golden Bridge Tech. Inc. v. Nokia, Inc.*, 527 F3d, 1318, 1322 (Fed. Cir. 2009)”

-Hylete LLC v. Hybrid Athletics, 931 F3d 1176 (Fed. Cir. 2019)

The argument is in any event specious. At *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S. Ct. 1293 (2015) the Supreme Court held that a materially identical issue raised and decided before an administrative tribunal such as the TTAB may not be relitigated in a district court. Here, the issue that has been litigated before the TTAB is false association but if Appellee were to sue Appellant the issue would not be false association but would be an entirely different issue

such as likelihood of confusion under Section 43(a) of the Lanham Act. This is completely different from false association. Accordingly, issue preclusion does not even exist.

It is noted that Appellant made no other arguments regarding the issue of material prejudice to the Appellant as a result of laches. *This is of particular importance as it constitutes a clear admission that there has been no prejudice as a result of the delay.* Accordingly, it is believed that no further arguments need to be made in connection therewith.

“The Board legally erred in defining the Petitioner...
Ms. Schiedmayer and such persons must be joined
in this action.”
-Appellant’s Brief Page 20

Again, this is an issue which was never raised before the TTAB. Although Appellee recited before the TTAB its complete history dating back over 300 years, Appellant, Sweet 16, never raised the issue of joinder in response thereto and never argued against the position taken by the Appellee, Schiedmayer Celesta GmbH, and eventually the Board. Accordingly, the issue of joinder, having never been raised at the TTAB level, and in any event totally without merit, should not be considered herein.

“These are all very sophisticated buyers. None of the sophisticated music institutions would ever confuse a piano to be the same as a Celesta...”

-Appellant’s Brief Page 22

Here again, is an issue never raised before the TTAB. Accordingly, in accordance with the wisdom of *Hylete*, id. this issue should not be considered herein.

Appellee was aware of Appellant's planned use of the SCHIEDMAYER mark as early as 2002 despite Appellee stating during discovery that none of its agents had ever contacted Glenn Treibitz via telephone during the pendency of the application.Appx750

- Appellant’s Brief Page 12

The above statement is completely untrue. The Sweet 16 Interrogatory referred to states the following:

"Interrogatory No 7- Did an agent/person otherwise affiliated with Petitioner contact Glenn Treibitz via telephone during the pendency of the application that matured into the SCHIEDMAYER registration sought to be cancelled to *inquire about the application?*

Response: No"

No application was ever discussed and Elianne Schiedmayer was entirely unaware that any application has been filed. The conversation which took place in 2002 related only to the Schiedmayer domain name which had been filed by Treibitz which interfered with the ability of Schiedmayer Celesta to complete its website. No application was ever discussed, so the answer is correct. See: Elianne Schiedmayer Rebuttel Declaration Appx884

In fact Elianne Schiedmayer, respectively, Schiedmayer Celesta GmbH was entirely unaware of any trademark filing or registration until it was ascertained in connection with the Schiedmayer Celesta GmbH filing of its trademark application for the mark Schiedmayer. Actual Notice never took place in this case.

Appellant has assigned 23 errors by the TTAB. Appellant failed to indicate that any one error is more important than the other.

It can only be considered that those errors set forth in Appellant's Summary of Argument may be perhaps considered as the more salient and pertinent arguments (there are no less than seven alleged errors set forth therein).

Accordingly, Appellee, Schiedmayer Celesta GmbH, will respond to the alleged errors set forth in Appellant's Summary of Argument as follows:

“The decision is legal error because it failed entirely to consider the harm caused by the preclusive effect of a decision to cancel the registration has in subsequent legal proceedings against Appellant by Appellee.”

-Appellant's Brief Page 12

As has been previously indicated, the question of a preclusive issue was never raised before the TTAB and therefore should not be considered by this Honorable Court. See *Hylete id.*

In any event, ‘preclusive issue’ would not apply because the issue on one hand is false association and on the other hand likelihood of confusion, both of which are materially different.

“The entire decision of the Board must be vacated because it was rendered by a panel of three administrative Trademark Judges who were unconstitutionally appointed.”

-Appellant's Brief Page 13

First, Appellant failed to file the required Notification pursuant to FRAP Sec. 44 until some four months after its due date, when Appellant, Sweet

16, was reminded by the Clerk of the Court of this requirement. The result is an inordinate delay with respect to this issue.

Second, Appellants argument in support of its constitutional challenge is limited to one single sentence, in which it is alleged that the issue with respect to the TTAB is the same as with respect to patents, citing *Arthex, Inc. v. Smith & Nephew, Inc.* 941 F.3d 1320 (Fed. Cir. 2019).

This of course is entirely incorrect as the issues involved are entirely different, particularly in view of the provisions relating to the Director of Trademarks in Lanham Act Sec. 15 USC 1068. Also *Arthrex* did not address ‘vacating’ but only ‘remanding’.

Third, the Appellant is apparently unaware of the constitutional challenge with respect to *Alberto Soler-Somohano v. The Coca-Cola Company, Inc.* Fed. Cir. 2020-1245 in which this issue will be fully briefed before this Court, and in which the USPTO has already successfully defeated a Motion for Summary Judgement on this issue.

Fourth: as of this writing the USPTO has been given a thirty day term within which to indicate whether it will file an *amicus* brief. Therefore, either through *Soler-Somohano* id or through an *amicus* brief herein – this issue will be decided.

“...The decision erroneously treated Appellee as equivalent to the entire Schiedmayer family, not as itself, a German legal entity formed in 1995.”
-Appellant’s Brief Page 13

First, this issue was never raised before the TTAB and therefore may not be raised before this Honorable Court. Second, the German legal entity was not formed in 1995. The German legal entity was inherited by Georg Schiedmayer in 1980 from a firm which had already been in existence in 1957 and the lineage of the firm dates all the way back almost 300 years to the first musical keyboard instrument created by Balthazar Schiedmayer in 1735.

In any event, since this issue was never raised before the TTAB, it cannot and should not be considered now.

“...The decision erroneously equated the registered goods of the Appellant [piano] and the common law goods of the Appellee [Celesta] to be the same by predicating the entire analysis on a description of goods for both Appellant and Appellee of ‘keyboard musical instruments’.”

-Appellant's Brief Page 13

This argument simply makes no sense. As has been mentioned countless times, a Celesta is *de facto* a piano. Both of the products are musical keyboard instruments and there is nothing erroneous in designating the same. This alleged error is not worthy of additional comment.

“...The decision is not supported by substantial evidence inasmuch as it completely disregards the evidence of record which shows that the SCHIEDMAYER mark, as used on pianos, points to other entities besides the Appellee or the Schiedmayer family.”

It is believed that the TTAB decision has dealt with this issue as concisely and correctly as follows:

“There is no evidence that anyone other than Petitioner and Respondents are currently using SCHIEDMAYER for keyboard musical instruments in the United States, and to the extent that others may have used the term in the United States at one time, there is no evidence that this use was unauthorized, that it continues or that it had any effect on the public perception of the SCHIEDMAYER name as referring to Petitioner. Nor does the one-time existence of other Schiedmayer family-affiliated businesses which used

SCHIEDMAYER as a mark detract from the finding that SCHIEDMAYER now points uniquely and unmistakably to Petitioner.”

*-TTAB Decision of September 11, 2019, Pages 19, 20
Appx20-21*

“...the Board failed to determine the fame or reputation of the Appellee at the time of trademark registration.”

Untrue. The Board carefully analyzed and recited the fame and reputation of SCHIEDMAYER at the time of registration, including reference to the numerous awards SCHIEDMAYER received over the years prior to the time of registration, including the Schiedmayer piano on permanent display at the Boston Museum of Fine Arts, the fifth largest museum in the country, including the reputation of having sold Celestas to virtually every symphony and orchestra in the entire United States, including a history dating back almost 300 years, one of the oldest trademarks in the United States at this time, including the Declaration of Helga Kasimoff relating to the fame and reputation of the Schiedmayer Celesta, etcetera.

The TTAB also had access to the entire record of the TTAB proceedings which included numerous other examples relating to the fame and reputation of Schiedmayer, which are too many to list here.

INTENT

Appellant wishes to emphasize the importance of the element of intent with respect to the basic issue of false association.

It is beyond question that Treibitz, the operator of Appellant, Sweet 16, intended to appropriate the Schiedmayer trademark and to use it in furtherance of his stencil piano scam.

Treibitz selected the Schiedmayer name from a book of piano decals of known piano manufacturers. Appx642. Treibitz also testified that he was aware that Schiedmayer had a history at the time of appropriation. Appx640.

Accordingly it is clear that Appellant, Sweet 16 *intended to create a false association.*

The prevailing law here is crystal clear, and has been brilliantly summarized by this Court as follows:

Evidence of such intent would be highly persuasive that the public will make the intended false association. The defense that the result intended was not achieved would be hollow indeed.

-University of Notre Dame du Lac v. J.C. Gourmet Foods Import Co. 703 F.2d 1372 (Fed. Cir. 1983)

Appellant, Sweet 16, should not be heard to allege that the result it intended was not achieved.

CONCLUSION

The trademark SCHIEDMAYER represents the continuum of the manufacture and sale of keyboard musical instruments over a period of some 300 years. Obviously, the only owner for such a trademark should be Schiedmayer Celesta GmbH, which continues the reputation and skill which has existed for almost three centuries.

The TTAB wisely agreed that the subject registration should be cancelled based upon a clear case of false association and it is respectfully submitted that this Honorable Court should affirm that decision in all respects, and cancel the subject registration.

Respectfully submitted,

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April 17, 2020

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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