

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB

JULY 11, 97

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

NBC Fourth Realty Corp.

v.

Peavey Electronics Corporation

Opposition No. 96,414
to application Serial No. 74/499,536
filed on March 14, 1994

Thomas V. Smurzynski of Lahive & Cockfield for NBC Fourth
Realty Corp.

W. Whitaker Rayner of Watkins Ludlam & Stennis, P.A. for
Peavey Electronics Corporation

Before Sams, Simms and Seeherman, Administrative Trademark
Judges.

Opinion by Seeherman, Administrative Trademark Judge:

NBC Fourth Realty Corp. has opposed the application of
Peavey Electronics Corporation to register the mark T-MAX
for "musical instrument amplifiers."¹

¹ Application Serial No. 74/499,536, filed March 14, 1994, and
asserting first use and first use in commerce on or before
January 20, 1994.

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As grounds for opposition, opposer has alleged that it owns three federal registrations for the mark T.J. MAXX for "retail department store services"²; that it has used the mark T.J. MAXX in connection with such services since at least as early as March, 1977; that applicant's musical instrument amplifiers are intended to be offered through the same channels of commerce and to the same class of purchasers as opposer's services; and that applicant's mark so resembles opposer's marks as to be likely, when applied to applicant's goods, to cause confusion, or to cause mistake, or to deceive.

In its answer, applicant has denied the salient allegations of the notice of opposition.

The record includes the pleadings; the file of the opposed application; the deposition testimony, with exhibits, of opposer's witness Karen Coppola; and the deposition testimony, with exhibits, of applicant's witness Hartley D. Peavey. Opposer has also submitted under notice of reliance its three registrations pleaded in the notice of opposition. Two of the registrations are for marks in stylized form, which are reproduced below:

² Registration No. 1,199,126 for T.J. MAXX (stylized, with design), issued June 22, 1982, and asserting first use and first use in commerce on March 27, 1977; Registration No. 1,495,462 for T.J. MAXX (stylized), issued July 5, 1988, and asserting first use and first use in commerce on February 17, 1985; and Registration No. 1,637,243 for T.J. MAXX, issued March 5, 1991, and asserting first use and first use in commerce in March, 1977.

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Registration No. 1,199,126



Registration No. 1,495,462



Registration No. 1,637,243

T.J. MAXX

Applicant has submitted under notice of reliance its federal registration³ for the mark MAX; the responses of opposer to interrogatory Nos. 3, 5, 6, 7, 8, 10, and 14 of applicant's first set of interrogatories; opposer's responses to applicant's first set of requests for admission; and certain documents from another proceeding before the Board, consisting of a brief and opposer's predecessor's responses to interrogatories.⁴

³ Registration No. 1,454,016, issued August 25, 1987, for bass guitar amplifiers, asserting first use in January, 1983 and first use in commerce in October, 1983.

⁴ The submission of the documents from a prior proceeding was the subject of a Board order of September 16, 1996.

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The parties have fully briefed the case. An oral hearing was not requested.

Applicant describes itself as one of the larger manufacturers of professional musical equipment in the United States. The record shows that applicant manufactures drums, guitars, musical instrument amplifiers, public address systems, microphones, and other goods for use by professional musicians. Applicant has 31 facilities and markets its goods in the United States and 103 foreign countries. The product on which applicant uses the mark T-MAX is a bass amplifier featuring a combination of transistors and vacuum tubes. It is a high-performance component for use by professional musicians. It is marketed separately and, in order to be used, must be combined with a musical instrument and one or more loudspeakers. Applicant's suggested list price for the goods is between \$900 and \$1,000, although the record shows that the goods have also been offered for \$729.99. Applicant markets its amplifiers through specialty music retailers and through distributors specializing in musical products.

Opposer's licensee⁵ uses the its pleaded marks in connection with retail department store services; opposer and its predecessors have used the mark T.J. MAXX in connection with such services since 1977. Opposer now

⁵ The term "opposer" will be used herein to refer to both opposer and its licensee.

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operates a chain of 590 off-price department stores located throughout the United States and characterizes itself as the nation's largest off-price family apparel retailer.⁶ The average selling area of such stores is approximately 25,000 square feet. Most of the goods sold in opposer's stores are offered at prices less than \$100, and opposer has not offered any items at prices higher than \$500. Opposer's annual sales under the marks in the fiscal year ending January, 1995 approached \$3 billion. Opposer advertises its services in media of general circulation, including television, radio, newspapers and magazines such as People, Glamour, Mademoiselle, Elle, New Woman, and Woman's Day; its anticipated marketing expenditures for 1996 were approximately \$42 million.

Priority of use is not in issue, as opposer's three registrations are of record. *King Candy Co. v. Eunice King's Kitchen*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Moreover, the evidence shows that opposer began using its marks prior to applicant's claimed date of first use of January 20, 1994.

With respect to the issue of likelihood of confusion, opposer argues that musical instrument amplifiers are a common electronic product that can be found in department stores, and that the public that frequents opposer's stores

⁶ Opposer defines an "off-price" store as "a store that sells department store items at 20 to 60 percent less than regular department store prices."

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would not be surprised to find musical instrument amplifiers offered there. We are not persuaded by this argument. Opposer itself has never carried musical instruments or amplifiers for musical instruments. In fact, the goods offered in opposer's stores⁷ are substantially different in nature from applicant's goods. Opposer's goods are primarily for adornment of the person or for use in the home.⁸ Applicant's goods are for use only with musical instruments and are for professional, avvocational or recreational use, most likely outside the home. Applicant's goods are also expensive relative to opposer's goods.⁹

Opposer urges the Board to interpret the meaning of "retail department store services" to encompass more and

⁷ A list of approximately 125 kinds of goods, described by opposer's vice president of marketing as an accurate representative sampling of products sold in opposer's stores, includes goods that may be categorized as clothing, clothing accessories, jewelry, leather goods, luggage, carrying bags, stationery, footwear, eye wear, cosmetics, body and bath accessories, gifts, hair wear, golf novelties, car accessories, games, books, linens, bedding, table accessories, kitchen accessories, glassware, dinnerware, tableware, lamps, clocks, cookware, decor items, paper goods, and furniture. (See deposition of Karen Coppola, p. 41 and Exhibit 37 thereto.) The record indicates that applicant has carried small kitchen appliances, such as blenders and automatic coffee makers. We also note opposer's statement that it carries "consumer electronics," such as watches, electric clocks and computer software, and "big ticket" appliances, such as microwave ovens.

⁸ We acknowledge opposer's statement that it is an "opportunistic" retailer, in that it varies the types of goods carried in its stores in accordance with the supplies discovered by its buyers in the larger marketplace. However, we cannot assume that opposer would carry a type of merchandise that is entirely different in nature from its usual goods.

⁹ We recognize that applicant's identification of goods could encompass less costly amplifiers; however, opposer has submitted no evidence regarding what a less expensive amplifier would cost.

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different types of merchandise than those carried by opposer. It is, of course, well established that, in a proceeding such as this one, the question of likelihood of confusion must be determined on the basis of a comparison of the goods and services set forth in the application and the registrations at issue, rather than on the basis of evidence adduced as to the nature and character of the parties' goods and services. *Octocom Systems Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); see also *Canadian Imperial Bank of Commerce v. Wells Fargo Bank, N.A.*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). However, on the evidence before us, we cannot conclude that musical instrument amplifiers are a type of item that the relevant customers would expect to find in retail department stores. In particular, opposer has not submitted any evidence to show that other department stores might carry musical instrument amplifiers. To the contrary, applicant's witness has testified that its goods are not sold in department stores; that he knows of no such amplifiers being sold through department stores; and that it is typical of applicant's industry to sell such goods only through specialized musical outlets. Inasmuch as musical instrument amplifiers are not offered through department stores but through other channels of trade, we find that opposer has not demonstrated any degree of relatedness between the services identified in its registrations and the goods identified in the applicant's application.

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Turning to the marks themselves, we note that the marks are intended to create different impressions: the record shows that T.J. MAXX was devised to suggest the name of a fictional person; we are not persuaded by opposer's suggestion that the raised periods in its stylized marks are likely to be mistaken for hyphens, thereby defeating the impression of a person's name. By contrast, applicant has testified that the letter "T" in its mark is intended to suggest the word "tube,"¹⁰ and that the relevant customers would recognize this suggestion. Although the marks share some similarities in spelling and pronunciation, and both parties' marks suggest the concept of "maximum," we find that overall the marks look and sound different and create different commercial impressions.

We are also not persuaded by opposer's argument that the very great level of public recognition that its mark has achieved should affect the breadth of protection afforded to it in this case. The record indicates that any fame that attaches to opposer's mark relates to the off-price retailing of clothing and fashion accessories. It has not been shown that prospective purchasers of musical instrument amplifiers would believe that such goods originate with opposer.

Applicant's goods are not likely to be purchased on impulse: they are expensive and their purchase implies a

¹⁰ The T-MAX amplifier differs from applicant's MAX amplifier in that it incorporates vacuum tube technology.

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related investment in other costly equipment, namely a musical instrument and loudspeakers. Applicant's goods, being electronic devices whose purpose is the production of sound, cannot be judged by visual inspection and are likely to provoke a more careful examination prior to purchase.

Upon consideration of the other relevant factors of which we have evidence, in accordance with the guidance of *In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), there is little reason to believe that confusion as to the source of the parties' goods and services would arise.

The two parties' customers differ substantially. Opposer claims the general public as its market, but more specifically describes its target customers as women between the ages of 25 and 50, being fashion conscious and very value driven.¹¹ By contrast, applicant describes its target customers as professional musicians, representing between one and one-half to two percent of the population, who would be likely to seek the advice of knowledgeable sales personnel¹² and even to test the goods before buying them.

The parties' advertising channels and marketing methods also differ. Opposer advertises its stores in media of

¹¹ Opposer's 1994 annual report, p. 34, included as Exhibit 2 to deposition of Karen Coppola.

¹² Applicant testified that it offers training to some of its dealers with respect to the proper utilization of the goods.

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general circulation, such as television, radio, local newspapers, and periodicals such as People, Glamour, Mademoiselle, Elle, New Woman, and Woman's Day. Its advertisements typically refer to many items of merchandise of a wide variety. By contrast, the record shows that applicant's goods are advertised through press releases directed to media specializing in the music industry; print advertisements featuring a single item; an advertising catalogue simulating a magazine, called Peavey Monitor, which includes articles regarding musical equipment and which features only musical sound equipment; brochures featuring only musical sound equipment; and press notices appearing in musical specialty publications.

Our analysis indicates that the parties' marks are distinguishable; that applicant's goods are not offered through department store trade channels; and that the parties' respective goods and services are marketed to largely different classes of customers under circumstances that are unlikely to bring the subject marks into conflict. Accordingly, we cannot find that confusion, mistake or deception is likely to arise from the use of applicant's mark on its goods.

Decision: The opposition is dismissed.

J.D. Sams

R. L. Simms

E. J. Seeherman
Administrative Trademark Judges,
Trademark Trial and Appeal Board