

This Opinion is Not a
Precedent of the TTAB

Mailed: July 26, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Hits From the Bong, Inc.

v.

Javen Mitchell

Opposition No. 91224802

James D. Weinberger and Emily Weiss of Fross Zelnick Lehrman & Zissu PC for
Hits From the Bong, Inc.

Javen Mitchell, *pro se*.

Before Bergsman, Hightower, and Larkin,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Javen Mitchell (“Applicant”), appearing *pro se*, seeks registration of the mark shown below on the Principal Register for “Entertainment services by a musical artist and producer, namely, musical composition for others and production of musical sound recordings; Entertainment services in the nature of recording, production and post-production services in the field of music; Entertainment services in the nature of live music performances; Entertainment, namely, live music concerts;

Entertainment, namely, live performances by musical bands; Music production services,” in International Class 41.¹



Hits From the Bong, Inc. (“Opposer”) has opposed registration on the basis of claims of priority and likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based upon Registration No. 4662290 of the mark DR. GREENTHUMB in standard characters for “musical sound recordings; downloadable musical sound recordings; audiovisual recordings featuring music and musical performances; downloadable audiovisual recordings featuring music and musical performances,” in International Class 9,² and alleged common law use of that mark and related marks; and a false suggestion of a connection with Applicant under Section 2(a) of the Trademark Act, 15 U.S.C. § 1052(a).

¹ Application Serial No. 86514008 was filed on January 26, 2015 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), on the basis of Applicant’s claim of first use and first use of the mark in commerce on January 1, 2012. The mark is described in the application as “consist[ing] of a design that depicts a skull wearing a crown. Directly below is the wording ‘Greene Thumb’ in stylized font.”

² Opposer’s pleaded registration issued on December 30, 2014.

Only Opposer submitted evidence and filed a brief.³ We sustain the opposition on the basis of Opposer's claim under Section 2(d), and do not reach Opposer's claim under Section 2(a).⁴

I. Evidentiary Record

The record consists of the pleadings, the file history of Applicant's application, by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), and two Notices of Reliance filed during Opposer's testimony period. 5 TTABVUE; 6 TTABVUE. Opposer also made its pleaded registration of record by attaching as Exhibit A to its Notice of Opposition a printout from the Patent and Trademark Office's Trademark Status & Document Retrieval database showing its current status and title. 1 TTABVUE 8-11. Trademark Rule 2.122(d)(1), 37 C.F.R. § 2.122(d)(1).

Opposer filed its Notice of Opposition on November 1, 2015. 1 TTABVUE. Applicant's Answer, filed on December 14, 2015, 4 TTABVUE, denied most of the material allegations of the Notice of Opposition, but also contained amplifications of certain denials, 4 TTABVUE 3-5 (Answer ¶¶ 14, 16), the purported affirmative

³ Only Opposer was required to do so. *See* Trademark Rule 2.128(a)(1), 37 C.F.R. § 2.128(a)(1). Opposer has the burden of proving that Applicant is not entitled to a registration even in the absence of contrary evidence or argument. *Threshold TV, Inc. v. Metronome Enters., Inc.*, 96 USPQ2d 1031, 1040 (TTAB 2010).

⁴ "Like the federal courts, the Board has generally used its discretion to decide only those claims necessary to enter judgment and dispose of the case. . . . [T]he Board's determination of registrability does not require, in every instance, decision on every pleaded claim." *Multisorb Tech., Inc. v. Pactiv Corp.*, 109 USPQ2d 1170, 1171 (TTAB 2013) (citations omitted). Opposer itself argues that "this opposition should be sustained in its entirety without the need to reach the issue of false suggestion under Section 2(a)." 8 TTABVUE 31.

defenses of laches and unclean hands, 4 TTABVUE 5 (Answer ¶ 20),⁵ and a number of paragraphs that did not admit or deny specific allegations in the Notice of Opposition, but made affirmative statements or indirectly referenced various allegations. 4 TTABVUE 5-6 (Answer ¶¶ 21-28).⁶

Opposer filed two Notices of Reliance during its testimony period. The first made of record the entire file history of Opposer's pleaded Registration No. 4662290, 5 TTABVUE, while the second covered 25 exhibits. The first 15 exhibits are "Internet printouts," which Opposer claims "are relevant to show the biography and history of Opposer's principal and the use, promotion, notoriety, and strength of Opposer's DR GREENTHUMB mark." 6 TTABVUE 2. The next four are "printed publications consisting of online and print articles," which Opposer claims "are relevant to show the use, promotion, notoriety, and strength of Opposer's DR. GREENTHUMB mark." 6 TTABVUE 4. The final six are "Internet printouts from social media websites, which are relevant to show the use, promotion, notoriety, and strength of Opposer's DR. GREENTHUMB mark." 6 TTABVUE 4. We describe this evidence below.

Internet Printouts From Websites

- September 30, 2016 printouts from the website at wikipedia.com pertaining to the performer identified as "B-Real" (Ex. HB2), the song *Dr. Greenthumb* by

⁵ These affirmative defenses are deemed waived because Applicant did not pursue them further after including them in his Answer. *See, e.g., Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1422 (TTAB 2014).

⁶ Where the additional statements refer to facts pleaded by Opposer and do not dispute them, or where they affirmatively assert facts, we deem them to be admissions of those facts by Applicant. We discuss below the evidentiary significance of some of these admissions and Applicant's amplifications of certain denials in our analysis of Opposer's Section 2(d) claim.

the musical group Cypress Hill (Ex. HB3), the Cypress Hill group (Ex. HB4), and the album *Skull & Bones* by Cypress Hill (Ex. HB5), 6 TTABVUE 6-27;

- A September 30, 2016 printout of a biography of “B Real” from the website at billboard.com, 6 TTABVUE 28-31 (Ex. HB6);
- A September 30, 2016 printout from the website at azlyrics.com of the lyrics to the song *Dr. Greenthumb*, 6 TTABVUE 32-35 (Ex. HB7);
- September 30, 2016 printouts from the website at musixmatch.com of the lyrics of the songs *Stix & Stones*, *Only When I’m High*, *Mile High*, *Dabs*, *Start a Fire*, and *Money Up on It*, 6 TTABVUE 36-87 (Ex. HB8);
- A September 30, 2016 printout from the website at hotnewhiphop.com, 6 TTABVUE 88-90 (Ex. HB9);
- September 30, 2016 and October 14, 2016 printouts from the website at youtube.com, including from a YouTube channel designated BREALTV, 6 TTABVUE 91-102 (Ex. HB10);
- A September 30, 2016 printout from the website at dubcnn.com, 6 TTABVUE 103-107 (Ex. HB11);
- September 30, 2016 and October 5, 2016 printouts from the website at cypresshil.com, 6 TTABVUE 108-113 (Ex. HB12);
- October 5, 2016 printouts from the website at brealtv.com displaying screenshots from what are described as archived episodes of *The Dr. Greenthumb Show*, 6 TTABVUE 114-249 (Ex. HB13);

- An October 5, 2016 printout from the website at livemixtapes.com, 6 TTABVUE 250-253 (Ex. HB14);
- An October 5, 2016 printout from the website at soundcloud.com listing various songs, 6 TTABVUE 254-256 (Ex. HB15); and
- October 5, 2016 printouts from iTunes containing a biography of the group Cypress Hill, a listing of various songs, and thumbnail photographs from various music videos, 6 TTABVUE 257-263 (Ex. HB16).

Internet Printouts From Social Media Pages

- An October 5, 2016 printout from the website at facebook.com of the B-Real of Cypress Hill page, 6 TTABVUE 279-300 (Ex. HB21);
- October 14, 2016 printouts from the website at facebook.com of the Breal TV page, 6 TTABVUE 301-343 (Ex. HB22);
- An October 5, 2016 printout of the Breal account on the website at instagram.com, 6 TTABVUE 344-346 (Ex. HB23);
- An October 5, 2016 printout of the BREAL.TV account on the website at instagram.com, 6 TTABVUE 347-348 (Ex. HB24);
- An October 5, 2016 printout of the Dr. Greenthumb account on the website at twitter.com, 6 TTABVUE 349-372 (Ex. HB25); and
- An October 5, 2016 printout of the BREAL.TV account on the website at twitter.com, 6 TTABVUE 373-395 (Ex. HB26).

Printed Publications

- An August 25, 2016 article entitled *Dave Grohl Kicks Out the Jams with Prophets of Rage in Toronto: Watch*, from the website at billboard.com, 6 TTABVUE 264-269 (Ex. HB17);
- A May 1, 2016 article entitled *Out Came the Sun, show goes on with a vengeance after weather delays*, from the May 1, 2016 edition of the *Commercial Appeal* of Memphis, Tennessee, 6 TTABVUE 270-272 (Ex. HB18);
- An October 30, 2015 article entitled *Popular 90s band Cypress Hill still hip and hopping*, from *University Wire*, 6 TTABVUE 273-275 (Ex. HB19); and
- An October 29, 1998 article entitled *Cypress Hill Soars Among the Clouds of Ganja-Rap*, from the *Boston Globe*, 6 TTABVUE 276-278 (Ex. HB20).

Probative Value of the Internet Materials and Printed Publications

Before turning to our analysis of Opposer's Section 2(d) claim, we briefly address the limited probative value of the materials made of record under Opposer's Second Notice of Reliance.

Printed Publications

Rule 2.122(e)(1) of the Trademark Rules of Practice provides that "[p]rinted publications, such as books and periodicals, available to the general public in libraries or of general circulation among members of the public or that segment of the public which is relevant in a particular proceeding . . . may be introduced in evidence by filing a notice of reliance on the material being offered in accordance with paragraph (g) of this section. The notice of reliance shall specify the printed publication (including information sufficient to identify the source and the date of the publication)

... and be accompanied by ... the printed publication or a copy of the relevant portion thereof.” 37 C.F.R. § 2.122(e)(1).

Opposer’s Second Notice of Reliance satisfies the authentication requirements of Rule 2.122(e)(1) for admission of the printed publications under notice of reliance, but their probative value is limited. Opposer claims that they “are relevant to show the use, promotion, notoriety, and strength of Opposer’s DR. GREENTHUMB mark,” 6 TTABVUE 4, but they are admissible under notice of reliance only for what they show on their faces, not to prove the truth of the statements contained in them. *See, e.g., Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1117 n.7 (TTAB 2009) (“A printed publication is only admissible for what it shows on its face; unless it falls within an exception to the hearsay rule it will not be considered to prove the truth of any matter stated in the publication.”); *L.C. Licensing Inc. v. Berman*, 86 USPQ2d 1883, 1887 (TTAB 2008) (“a newspaper article is probative only for what it shows on its face, not for the truth of the matters contained therein, unless a competent witness testifies to the truth of such matters.”); *see generally* Trademark Board Manual of Procedure Section 704.08(a), n.6 and cases cited therein. Because the printed publications cannot be used to establish the truth of their contents, they are not competent evidence of “the use, promotion, notoriety, and strength of Opposer’s DR. GREENTHUMB mark.” 6 TTABVUE 4.

Internet Materials

Rule 2.122(e)(2) of the Trademark Rules of Practice provides that “Internet materials may be admitted into evidence under a notice of reliance in accordance with

paragraph (g) of this section, in the same manner as a printed publication in general circulation, so long as the date the internet materials were accessed and their source (e.g., URL) are provided.” 37 C.F.R. § 2.122(e).⁷ Opposer’s second Notice of Reliance provides the required dates and sources for the Internet materials, and thus satisfies the authentication requirements of Rule 2.122(e)(2) for their admission under notice of reliance, but the probative value of these materials is again limited.

“Internet evidence, similar to printed publications, is only admissible for what it shows on its face, and because it does not fall within the exception to the hearsay rule, will not be considered to prove the truth of any matter stated therein.” *Ayoub, Inc. v. ACS Ayoub Carpet Serv.*, 118 USPQ2d 1392, 1399 n.62 (TTAB 2016) (finding that statements made on third-party website claiming use of the subject mark “since 1929” did not establish such use). Opposer’s Internet materials “are admissible only to show what has been printed, not the truth of what has been printed,” and are “probative only for what they show on their face.” *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1467 n.30 (TTAB 2014) (citing *Safer*, 94 USPQ2d at 1040).

Opposer offers the website evidence “to show the biography and history of Opposer’s principal and the use, promotion, notoriety, and strength of Opposer’s DR. GREENTHUMB mark,” 6 TTABVUE 2, and the social media evidence “to show the use, promotion, notoriety, and strength of Opposer’s DR. GREENTHUMB mark.” 6

⁷ Rule 2.122(e)(2) codified the Board’s holding to that effect in *Safer, Inc. v. OMS Invs., Inc.*, 94 USPQ2d 1031, 1036-39 (TTAB 2010).

TTABVUE 4. Because Internet evidence cannot be used to prove the truth of any matter stated within it, the Wikipedia and Billboard biographies of B-Real, Wikipedia entries regarding Dr. Greenthumb, the Cypress Hill group, and the *Skull & Bones* album, and the iTunes biography of Cypress Hill, as well as Opposer's social media pages, are inadmissible "to show the biography and history of Opposer's principal," 6 TTABVUE 2, and, for most part, to show "the use, promotion, notoriety, and strength of Opposer's DR. GREENTHUMB mark." 6 TTABVUE 4.

II. Standing

A threshold issue in every *inter partes* case is the plaintiff's standing to challenge registration. See *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 1401 (2015); *John W. Carson Found. v. Toilets.com Inc.*, 94 USPQ2d 1942, 1945 (TTAB 2010). The plaintiff must show that it possesses a real interest in the proceeding beyond that of a mere intermeddler, and that it has a reasonable basis for its belief of damage resulting from registration of the subject mark. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999).

Because Opposer properly made of record its Registration No. 4662290 of the mark DR. GREENTHUMB for "Musical sound recordings; downloadable musical sound recordings; audiovisual recordings featuring music and musical performances; downloadable audiovisual recordings featuring music and musical performances," Opposer has a real interest in the proceeding and a reasonable belief of damage by registration of Applicant's mark, *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000), and thus has standing to oppose.

III. Opposer's Section 2(d) Claim

Section 2(d) of the Trademark Act prohibits the registration of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1052(d). To prevail on its Section 2(d) claim, Opposer must prove by a preponderance of the evidence that it has priority in its mark and that use of Applicant's mark is likely to cause confusion, mistake, or deception as to the source or sponsorship of Applicant's services. *Cunningham*, 55 USPQ2d at 1848.

A. Priority

Priority may arise from “a prior registration, prior trademark or service mark use, prior use as a trade name, prior use analogous to trademark or service mark use, or any other use sufficient to establish proprietary rights.” *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1378 (Fed. Cir. 2002). The introduction of Opposer's pleaded registration into the record gives Opposer priority here.⁸ *King*

⁸ Opposer's registration is also sufficient to allow Opposer to proceed to trial without other evidence. An “opposition can be predicated solely on a prior registration, and neither testimony need be taken nor further evidence introduced since under § 7 of the Lanham Act, 15 U.S.C. 1057(b), a certificate of registration is ‘prima facie evidence of the validity of the registration, registrant's ownership of the mark, and registrant's exclusive right to use the mark in commerce in connection with the goods or services specified in the certificate’” *Tiffany & Co. v. Columbia Indus., Inc.*, 455 F.2d 582, 173 USPQ 6, 7 (CCPA 1972).

Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974); *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1436 n.7 (TTAB 2012).⁹

B. Likelihood of Confusion

Our determination of the issue of likelihood of confusion under Section 2(d) is based upon an analysis of all probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). Opposer argues that the relevant *du Pont* factors here “are: (i) the close similarity of the parties’ marks; (ii) the identity and/or relatedness of the parties’ goods and services; (iii) the strength of the DR. GREENTHUMB mark; (iv) the overlap of the parties’ trade channels and consumers; and (v) Applicant’s intent,” 8 TTABVUE 18, but “the obligation to consider a factor . . . only arises if there is evidence of record relating to that factor.” *Cunningham*, 55 USPQ2d at 1845.

In every likelihood of confusion analysis, two key factors are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). We turn first to the *du Pont* factor regarding the similarity of the goods and services.

⁹ Because Opposer’s registration gives Opposer priority, we need not address Opposer’s claim that it also proved use of its DR. GREENTHUMB mark from a date prior to Applicant’s constructive use priority filing date of January 26, 2015. 8 TTABVUE 17-18.

1. Similarity of the Goods and Services

This *du Pont* factor assesses the similarity or dissimilarity of the parties' goods and services, which need not be identical or even competitive for confusion to be likely. "[L]ikelihood of confusion can be found 'if the respective goods [and services] are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.'" *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). It is well-established that goods can be related to services, particularly where the services involve the goods in some manner. *See, e.g., Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004-05 (Fed. Cir. 2002).

Our determination of the similarity of the goods and services is based upon the identification of goods in Opposer's registration and the identification of services in Applicant's application. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Likelihood of confusion may be found if it exists with respect to any item in the parties' identifications of goods and services. *Tuxedo Monopoly, Inc. v. General Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981). Extrinsic evidence of relatedness is unnecessary if the degree of similarity of the goods and services may be determined from the identifications alone. *Hewlett-Packard*, 62 USPQ2d at 1004.

The identification of goods in Opposer's registration is

Musical sound recordings; downloadable musical sound recordings; audiovisual recordings featuring music and musical performances; downloadable audiovisual recordings featuring music and musical performances.

The identification of services in Applicant's application is

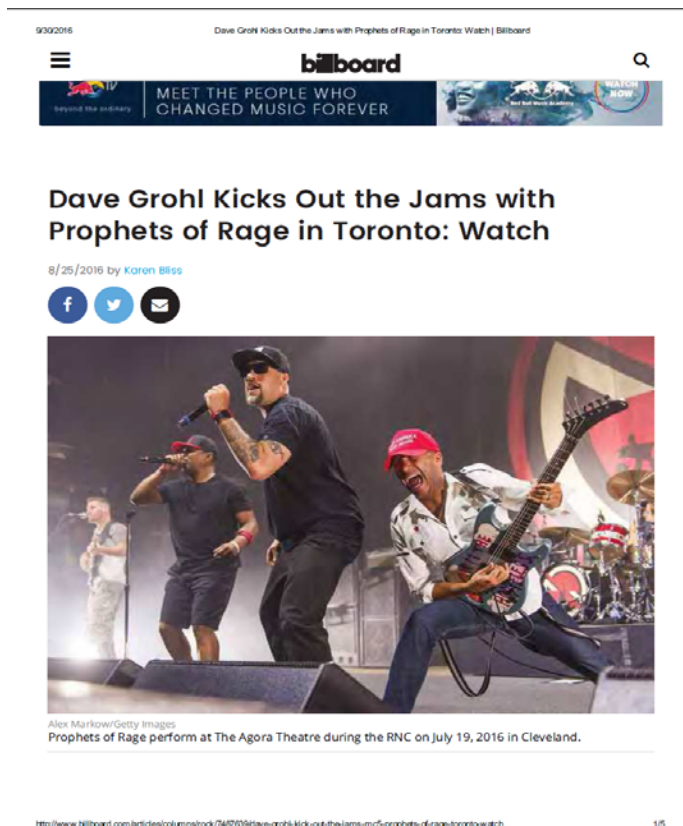
Entertainment services by a musical artist and producer, namely, musical composition for others and production of musical sound recordings; Entertainment services in the nature of recording, production and post-production services in the field of music; Entertainment services in the nature of live music performances; Entertainment, namely, live music concerts; Entertainment, namely, live performances by musical bands; Music production services.

We find that the parties' identified goods and services are very closely related for two reasons.

First, it is self-evident that the rendition of the services identified in the application as the "production of musical sound recordings" yields the "[m]usical sound recordings" and "downloadable musical sound recordings" identified in the registration. Consumers are likely to believe that the same entity both produces and sells sound recordings when the production services and the resulting sound recordings are offered under similar marks. *Hewlett-Packard*, 62 USPQ2d at 1005.

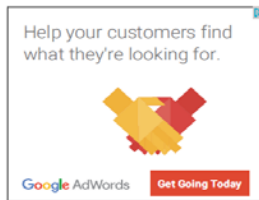
Second, the goods identified in Opposer's registration as "musical sound recordings" and "audiovisual recordings featuring music and musical performances" do not contain any limitations or restrictions as to their nature or type. As a result, they are deemed to include recordings of "live music performances," "live music concerts," and "live performances by musical bands," as well as recordings of studio performances. *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (where an identification of goods is unrestricted, it encompasses all goods of the nature and

type described therein). We take judicial notice under Rule 201(b) of the Federal Rules of Evidence that musical performers commonly record their live performances in sound and audiovisual recordings and make those recordings available to the public. This is shown by the Internet pages in the record and portions of Applicant's specimen of use, which are reproduced below and which reflect the audiovisual and sound recording of live musical performances through the display on their faces of embedded links to those recordings, and the exposure of the recordings to the public.



9/30/2016

Dave Grohl Kicks Out the Jams with Prophets of Rage in Toronto Watch | Billboard

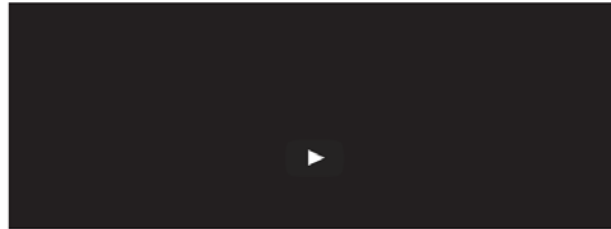


"You're going to flip the f--k out right now," rapper B-Real said at the Toronto stop of the [Prophets of Rage](#) tour on Wednesday night at Molson Amphitheatre before bringing [Foo Fighters](#) singer [Dave Grohl](#) out onstage during the encore.

Prophets of Rage — the politically-conscious supergroup comprised of [Rage Against the Machine](#) guitarist Tom Morello bassist Tim Commerford and drummer Brad Wilk; [Public Enemy](#)'s Chuck D and DJ Lord; and B-Real from [Cypress Hill](#) — is just six dates into their lengthy [Make America Rage Again Tour](#) that ends Oct. 16 in Chula Vista, Calif.

Prophets of Rage: 5 Reasons You Need to See the Exhilarating Supergroup in Concert

The Foo Fighters frontman and former Nirvana drummer stood front and center at the mic, guitar in hand, and launched into the MCS's mighty revolutionary protest anthem "Kick Out the Jams," with B-Real and Chuck D sharing vocal duties and Morello matching Grohl's furious six-string strumming and adding one of his signature ripping solos.



<http://www.billboard.com/articles/columns/rock/7487638/dave-grohl-kick-out-the-jams-mcs-prophets-of-rage-toronto-watch>

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9/30/2016

Dave Grohl Kicks Out the Jams with Prophets of Rage in Toronto Watch | Billboard



The 1969 classic seems to be a favorite for Grohl and his buds. In 2010, at Belgium's Rock Werchter festival, he [joined](#) Pearl Jam on the song, playing a raucous tambourine standing behind the drum kit.

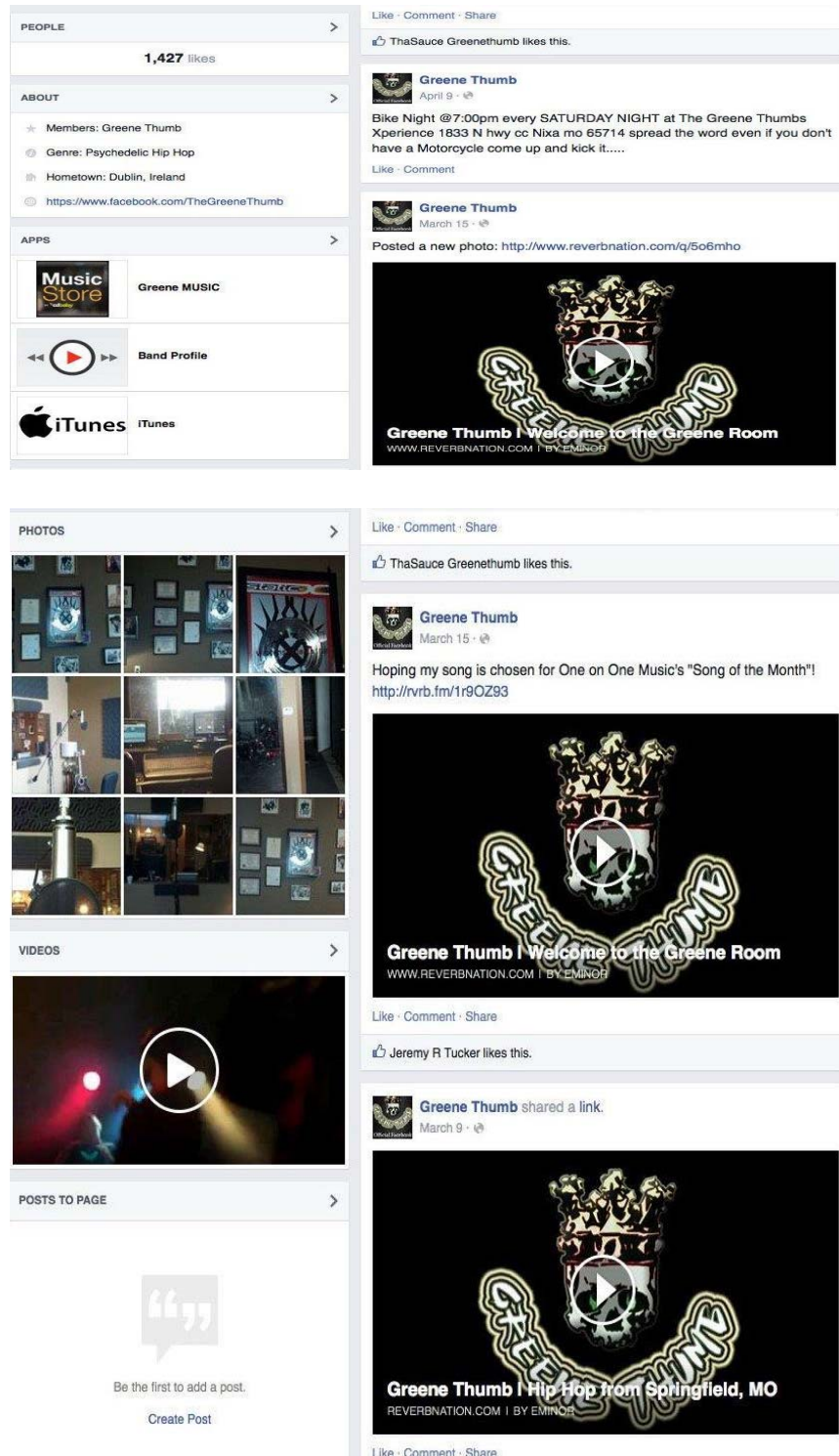
In a tweet after the Molson Amphitheatre show, B-Real (twitter handle Dr. Greenthumb) posted a photo and wrote: "The one and only Dave Grohl rocked one with us tonight in Toronto .. Check it on the prophets of rage Facebook page."



<http://www.billboard.com/articles/columns/rock/7487638/dave-grohl-kick-out-the-jams-mcs-prophets-of-rage-toronto-watch>

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6 TTABVUE 265-267.



We also take judicial notice that music performers offer both live performances and sound and audiovisual recordings of such performances. Consumers are likely to

believe that musical sound recordings and audiovisual recordings consisting of live music performances and concerts emanate from the live performer when they are provided under a mark that is similar to the mark used by the performer when performing.

This *du Pont* factor supports a finding of a likelihood of confusion. We turn now to the *du Pont* factors regarding the similarity of channels of trade and classes of customers.

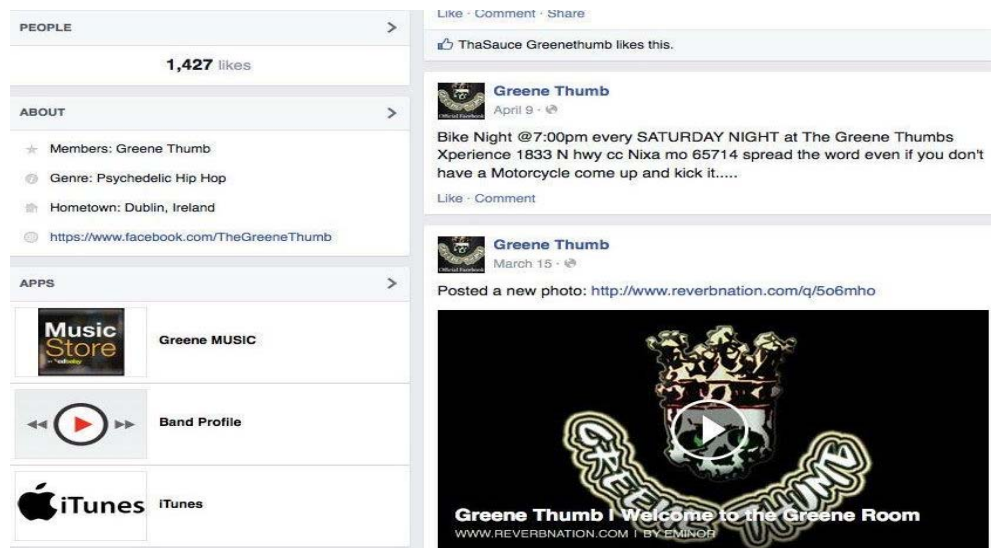
2. Channels of Trade and Classes of Customers

The third *du Pont* factor considers “[t]he similarity or dissimilarity of established, likely-to-continue trade channels,” *Stone Lion*, 110 USPQ2d at 1061, while the fourth *du Pont* factor considers the classes of customers to whom the goods and services are sold. *Coach*, 101 USPQ2d at 1722-23. Neither Opposer’s registration nor Applicant’s application contains any restrictions or limitations, and their respective goods and services are thus presumed to travel through all normal channels of trade for the identified goods and services and to be sold and provided to all normal classes of customers for the identified goods and services. *See, e.g., In re Thor Tech Inc.*, 90 USPQ 1634, 1639 (TTAB 2009).

We may infer the general channels of trade and classes of customers from the identifications of goods and services in the registration and application. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). It is self-evident that “[m]usical sound recordings,” “downloadable musical sound recordings,” “audiovisual recordings featuring music and musical performances,” and “downloadable

audiovisual recordings featuring music and musical performances” are marketed to consumers of “[e]ntertainment services in the nature of live music performances,” “live music concerts,” and “live performances by musical bands,” and vice versa.

With respect to channels of trade, Applicant’s specimen of use offers information about Applicant’s live performances as well as access, through a link to the iTunes website and otherwise, to “downloadable musical sound recordings featuring music and musical performances.” The pertinent portion of Applicant’s Facebook page specimen is reproduced below.



We find that the channels of trade for Opposer’s goods and Applicant’s services are very similar.

The third and fourth *du Pont* factors support a finding of a likelihood of confusion.

3. Similarity of the Marks.

We compare the parties’ marks, in their entirety, for similarities and dissimilarities in appearance, sound, connotation, and commercial impression. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369,

73 USPQ2d 1689, 1692 (Fed. Cir. 2005). “The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach*, 101 USPQ2d at 1721 (quotation omitted). “The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks.” *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1353 (TTAB 2015).¹⁰ A finding of similarity in any of the several means of comparison of the marks may be sufficient to support a finding that the marks are similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988).

Opposer’s registered mark is DR. GREENTHUMB in standard characters. Applicant’s composite word-and-design mark is reproduced again below.



“[L]ikelihood of confusion cannot be predicated on dissection of a mark, that is, on only part of a mark. On the other hand, in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for

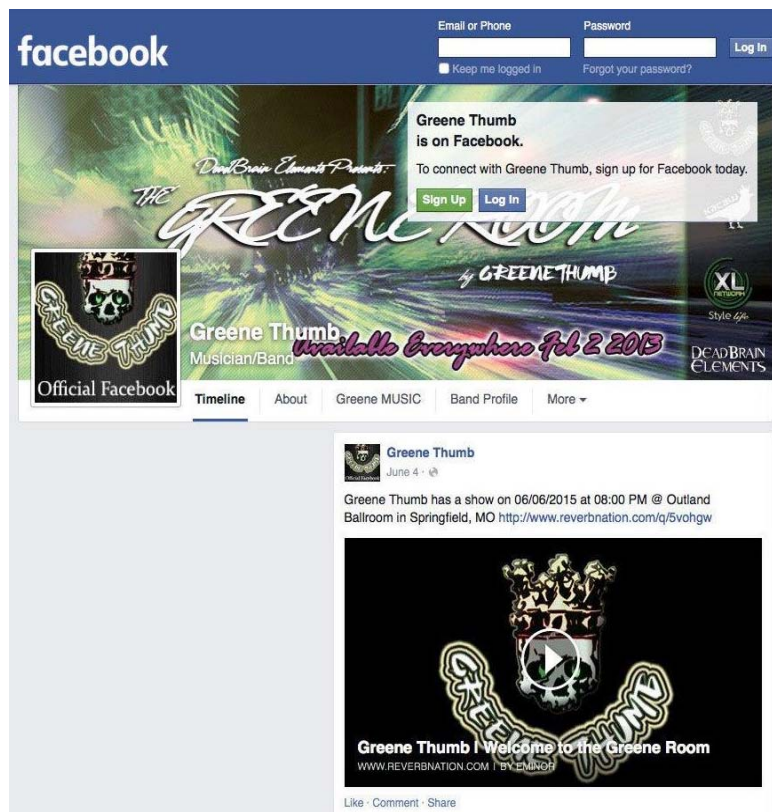
¹⁰ The average purchaser of musical sound recordings and musical entertainment services is an ordinary consumer.

rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety. Indeed, this type of analysis appears to be unavoidable.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). We begin by determining the dominant portions of the parties’ marks.

Turning first to Applicant’s mark, “[i]n the case of a composite mark containing both words and a design, ‘the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed.’” *Viterra*, 101 USPQ2d at 1908 (quoting *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983)). In *Viterra*, the Federal Circuit “cautioned that there is no general rule that the letter portion of the mark will form the dominant portion of the mark” and that marks thus “must be considered on a case-by-case basis,” 101 USPQ2d at 1908, but the record here shows that the words GREENE THUMB are the dominant portion of Applicant’s mark because they “likely will appear alone when used in text and will be spoken when requested by consumers.” *Id.* at 1911.

Applicant averred in his Answer that he “uses the name ‘Greene Thumb’ as an alter ego under which he performs, produces, writes, and records music” and that “he has spent a considerable amount of time and energy performing, recording, and generally developing a music career using the name ‘Greene Thumb.’” 4 TTABVUE 5 (Answer ¶¶ 22, 25). Applicant also used “Greene Thumb” alone to identify himself and his services in multiple places in his substitute specimen of use, which he described as a “web page displaying the applied-for-mark where applicant uses the

applied-for-mark to market applicant's entertainment services.” July 15, 2015 Response to Office Action at 1. We reproduce below an illustrative portion of Applicant’s substitute specimen, which states that “Greene Thumb is on Facebook,” and refers to “The Greene Room by Green Thumb” and “Greene Thumb Musician/Band.”



We find that the words “GREENE THUMB” are the dominant portion of Applicant’s mark.

With respect to Opposer’s standard character mark DR. GREENTHUMB, we find that its dominant portion is the compressed word “GREENTHUMB,” which functions, within the mark as a whole, as the “surname” of the “doctor” identified by the mark. This source-identifying prominence of the GREENTHUMB portion of

Opposer's mark is illustrated by one depiction of Opposer's mark in the record that is reproduced below.



6 TTABVUE 209.¹¹

Having determined that GREENTHUMB and GREENE THUMB are the dominant portions of the respective marks, we turn to the required comparison of the marks in their entireties. Opposer's mark DR. GREENTHUMB and Applicant's composite mark containing the words GREENE THUMB sound very similar when they are verbalized. Although DR. GREENTHUMB has four syllables while the words GREENE THUMB in Applicant's mark have only two, the presence of the abbreviation for "doctor" in Opposer's mark is less significant to the sound of the mark than is the dominant "surname" GREENTHUMB, which is identical in sound to the dominant words GREENE THUMB in Applicant's mark. The record indicates that the letter "e" at the end of the word GREENE in Applicant's mark is silent and is not likely to be sounded when the word is pronounced. Applicant's Facebook page has a

¹¹ As a standard character mark, DR. GREENTHUMB "could be used in any typeface, color, or size, including the same stylization actually used or intended to be used by the other party, or one that minimizes the differences or emphasizes the similarities between the marks." *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1823 (TTAB 2015) (citing *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011)). We thus must assume that DR. GREENTHUMB could be displayed in the stylized font in which the words "GREENE THUMB" appear in Applicant's composite mark, in addition to the manner shown above, which emphasizes the "surname" GREENTHUMB.

green-colored background and welcomes visitors to the “Greene Room,” which is an obvious play on the term “greenroom,” which is “a room (as in a theater or studio) where performers can relax before or after appearances.” *Merriam-Webster Online Dictionary* (merriam-webster.com, accessed on July 25, 2017).¹² The use of the term “Greene Room” and the color green on Applicant’s Facebook page confirms that the word GREENE in Applicant’s mark is intended to be pronounced, and is very likely to be pronounced, as the color green is pronounced. *Cf. Knorr-Nahrungsmittel Aktiengesellschaft v. Havland Int’l Inc.*, 206 USPQ 827, 836 (TTAB 1980) (silent letter “k” in mark KNORR-SWISS made mark similar in pronunciation to NOR-KING mark).¹³ We find that the marks are very similar in sound.

With respect to meaning, because the marks are dominated by the words GREENTHUMB and GREENE THUMB, respectively, they both connote a “green thumb,” defined as “an unusual ability to make plants grow.” *Merriam-Webster Online Dictionary* (merriam-webster.com, accessed on July 25, 2017). This connotation leads both marks to have the identical commercial impression of fertility. We find that the marks are very similar in connotation and commercial impression.

¹² The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed form or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

¹³ The fact that the words GREENE and THUMB are separated by a space in Applicant’s mark similarly has no impact on the way in which the words will be pronounced or perceived. *See, e.g., Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1025 (TTAB 2009); *Seaguard Corp. v. Seaward Int’l, Inc.*, 223 USPQ 48, 51 (TTAB 1984).

As to appearance, Opposer mark is in standard characters while Applicant's mark contains what he describes in his application as "a design that depicts a skull wearing a crown [appearing] [d]irectly [above] the wording 'Greene Thumb' in stylized font."¹⁴ Opposer argues that the design element is less important to the source-identifying significance of Applicant's mark than are the dominant words GREENE THUMB, but that "to the extent the skull design in Applicant's mark is considered,¹⁵ it only reinforces the connection with [Opposer]" because "Cypress Hill, the band that B-Real, HFTB's president, is associated with, has long used a skull design in connection with its goods and services." 8 TTABVUE 22-23. Opposer relies upon the Wikipedia entries regarding B-Real and the *Skull & Bones* album (6 TTABVUE 6-11, 23-27) and pages from the website at cypresshill.com (6 TTABVUE 108-113), to show Cypress Hill's use of a skull design. 8 TTABVUE 22-23.

A skull design appears on the cover of the *Skull & Bones* album (6 TTABVUE 24) and on pages from the website at cypresshill.com (6 TTABVUE 109-113), but the cited evidence does not prove "long use [of] a skull design in connection with" Opposer's goods because the statements on the Wikipedia pages regarding the *Skulls & Bones* album are hearsay when offered to prove facts regarding the sale and distribution of the album. Applicant admitted in his Answer that Opposer has used a skull design,

¹⁴ As discussed above, we must assume that Opposer's standard character mark could be displayed in the stylized font in which the words "GREENE THUMB" appear in Applicant's mark, but we may not similarly assume that Opposer's mark would be displayed together with the design shown in Applicant's mark. *In re Davia*, 110 USPQ2d 1810, 1814 (TTAB 2014).

¹⁵ It is necessary, of course, when comparing the marks in their entireties, to consider all elements of Applicant's mark, including the design. *Nat'l Data*, 224 USPQ at 750-51.

4 TTABVUE 3 (Answer ¶ 14),¹⁶ but the record does not show use of a skull design together with the DR. GREENTHUMB mark. We find that the DR. GREENTHUMB mark and Applicant's mark differ somewhat in appearance due to the presence of the skull-and-crown design in Applicant's mark.

As discussed above, the marks are very similar aurally and in connotation and commercial impression, the three means of comparison that we find to be the most pertinent to our analysis of similarity given the fact that music fans necessarily refer to their favorite performers by the oral use of the performers' marks and the fact that we must focus "on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks." *C.H. Hanson*, 116 USPQ2d at 1353. We find that the very close similarity of the marks in sound, connotation, and commercial impression outweighs the modest differences between the marks in appearance, and that the marks, considered in their entirety, are very similar. This *du Pont* factor strongly supports a finding of a likelihood of confusion.

4. The Strength of Opposer's DR. GREENTHUMB Mark

Opposer argues that its mark is strong and entitled to a broad scope of protection. 8 TTABVUE 27. A mark's strength has two elements: (1) its inherent strength,

¹⁶ Applicant first "denie[d] the allegations contained in paragraph 14 of the Notice of Opposition," 4 TTABVUE 3 (Answer ¶ 14), which include the allegation that "Applicant's Mark incorporates a skull design that is similar to the skull design long used by Cypress Hill with which Opposer is affiliated." 1 TTABVUE 6 (Not. of Opp. ¶ 14). Applicant then averred that "[t]he skulls used in each mark are distinct and not otherwise similar" and that "Opposer's Mark has a distinctly different skull with no crown." 4 TTABVUE 4 (Answer ¶ 14.a, e). We construe ¶ 14 in Applicant's Answer as containing an admission that Opposer has used a skull design and a denial that the skull design and the skull design in Applicant's mark are similar.

measured by its placement on the spectrum of distinctiveness of marks, and (2) its commercial strength, measured by its marketplace recognition. *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010); *Couch/Braunsdorf*, 110 USPQ2d at 1476.

We agree with Opposer that as it is applied to the goods identified in Opposer's registration, DR. GREENTHUMB "is an arbitrary mark," 8 TTABVUE 27, which is defined by Professor McCarthy as a mark consisting of "words in common linguistic use but which, when used with the goods or services in issue, neither suggest nor describe any ingredient, quality or characteristic of those goods or services." 2 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 11:11 (4th ed. June 2017 Update). As discussed above, DR. GREENTHUMB connotes a special aptitude in growing plants, which has nothing intrinsically to do with sound and audiovisual recordings of music and musical performances.

Opposer further argues that the "DR. GREENTHUMB mark also possesses marketplace strength." 8 TTABVUE 28. Opposer claims that

the evidence shows that HFTB's DR. GREENTHUMB mark has been used since 1998 when Cypress Hill released the hit single "Dr. Greenthumb." (Exs. HB3, HB4 (noting that the Cypress Hill album *IV* went gold in the United States in part due to the success of the "Dr. Greenthumb" song.) "Dr. Greenthumb" was one of Cypress Hill's most popular songs, as noted by several press articles. (Exs. HB18, HB19.) Several different versions of the song have been released over the years, and "Dr. Greenthumb" is still listened to today, having garnered more than 14 million views on Cypress Hill's Vevo YouTube channel in the last seven years. (Exs. HB3, HB10, HB16, HB19.) In addition, B-Real continues to use the DR. GREENTHUMB mark, including as the name of an online talk show that airs on

the Breal.tv website and in the lyrics of songs on his *The Prescription* mixtape. (Exs. HB2, HB8, HB13.) Consumers are further exposed to DR. GREENTHUMB due to B-Real's use of the DR. GREENTHUMB name as his alter ego. As set forth above, B-Real uses the name DR. GREENTHUMB on his Twitter, Instagram, and Facebook accounts. (Exs. HB21, HB23, HB25.) B-Real's Instagram account has over half a million followers and his Facebook page is liked by nearly a million users. (Exs. HB21, HB23.) Moreover, six of the eleven songs on *The Prescription* mixtape were credited to DR. GREENTHUMB. (Exs. HB9-HB12, HB14-HB15.) As stated by one blogger, B-Real's DR. GREENTHUMB alter ego "has become an icon within the marijuana and hip-hop communities." (Ex. HB11.)

8 TTABVUE 28-29.

The record does not support Opposer's claim that the DR. GREENTHUMB mark has marketplace strength based upon consumer recognition. Because we cannot consider the Internet materials and the printed publications in the record for the truth of the matters stated therein, we cannot find, on the basis of that evidence, that the "DR. GREENTHUMB mark has been used since 1998;" that "the Cypress Hill album *IV* went gold in the United States in part due to the success of the 'Dr. Greenthumb' song;" that "'Dr. Greenthumb' was one of Cypress Hill's most popular songs, as noted by several press articles;" that "'Dr. Greenthumb' is still listened to today, having garnered more than 14 million views on Cypress Hill's Vevo YouTube channel in the last seven years;" that "B-Real's Instagram account has over half a million followers and his Facebook page is liked by nearly a million users;"¹⁷ or that

¹⁷ "[T]he mere introduction of a webpage does not tell us how many people have viewed that webpage. 'A party may increase the weight we will give such website evidence by submitting testimony and proof of the extent to which a particular website has been viewed.'" *Couch/Braunsdorf*, 110 USPQ2d at 1467 n.30 (quoting *Safer*, 94 USPQ2d at 1040). The cited social media pages bear figures purporting to show the exposure of these pages to the public,

“B-Real’s DR. GREENTHUMB alter ego ‘has become an icon within the marijuana and hip-hop communities.’”

The Internet materials do show on their faces that “B-Real continues to use the DR. GREENTHUMB mark, including as the name of an online talk show that airs on the Breal.tv website and in the lyrics of songs on his *The Prescription* mixtape;” that “B-Real uses the name DR. GREENTHUMB on his Twitter, Instagram, and Facebook accounts;” that “[c]onsumers are further exposed to DR. GREENTHUMB due to B-Real’s use of the DR. GREENTHUMB name as his alter ego;” and that “six of the eleven songs on *The Prescription* mixtape were credited to DR. GREENTHUMB,” but these facts are insufficient to establish “the length of use and the degree of public recognition and renown” of the DR. GREENTHUMB mark, or otherwise to show its commercial strength. 8 TTABVue 28. *See Bose Corp. v. QSC Audio Prods, Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305-06 (Fed. Cir. 2002).

Although Opposer’s mark is arbitrary and thus conceptually strong, and the record is devoid of evidence of third-party uses or registrations of marks for entertainment-related goods or services that consist of or contain the words “green thumb,” the absence of admissible evidence of the commercial strength of Opposer’s mark makes this *du Pont* factor neutral in our analysis of likelihood of confusion.

but those figures are hearsay when offered for their truth. In the absence of corroborating “testimony and proof of the extent to which a particular website has been viewed,” *id.*, we cannot consider them as evidence of the commercial strength of Opposer’s mark.

5. Applicant's Intent

Opposer argues that “Applicant’s bad faith further establishes a likelihood of confusion between the parties’ marks” because “Applicant’s Mark is a combination of two elements that call to mind Cypress Hill, the band associated with B-Real, HFTB’s president—GREENE THUMB, which is virtually identical to the name of one of Cypress Hill’s most popular songs, and a skull design, which is a design that has long been used by Cypress Hill.” 8 TTABVUE 30-31. Opposer asks the Board to infer bad faith because “Applicant has not come forth with any explanation as to why he adopted a mark that consists of terms and a design that unmistakably refers to Cypress Hill.” 8 TTABVUE 31. We decline to do so because, as discussed above, the foundational facts from which we are asked to infer Applicant’s intent have not been established by admissible evidence, and there is no direct evidence of bad faith intent. *Cf. L.C. Licensing Inc. v. Berman*, 86 USPQ2d 1883, 1891 (TTAB 2008) (applicant’s testimony regarding the adoption of its mark “strain[ed] credulity” and supported a finding of bad faith and an inference of applicant’s intention to trade off of opposer’s mark). This thirteenth *du Pont* factor is neutral in our analysis of likelihood of confusion.

Conclusion

In balancing the *du Pont* factors on the record here, we find that the marks, the goods and services, the classes of customers, and the channels of trade, are similar, and that the other *duPont* factors on which Opposer presented evidence or argument are neutral. We thus find that Opposer proved by a preponderance of the evidence that Applicant’s use of its mark in connection with production of musical sound

recordings, live music performances, live music concerts, and live performances by musical bands, is likely to cause consumers of those services to believe mistakenly that they originate with or are sponsored or authorized by Opposer, the owner of the registered DR. GREENTHUMB mark.

Decision: The opposition is sustained on the basis of Opposer's claim under Section 2(d) of the Trademark Act.