

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Mr. JERZY SAPIEYEVSKI)
3901 Cathedral Ave. NW)
Washington, DC 20016)
)
Plaintiff,)
)
v.)
)
LIVE NATION ENTERTAINMENT, Inc.)
LIVE NATION WORLDWIDE, Inc.)
HILTON WORLDWIDE HOLDINGS, Inc.)
SPOTIFY USA, Inc.)
)
Defendants,)
)

Case No 1:18-cv-00830 - TJK

JURY DEMAND

PLAINTIFF’S SECOND AMENDED COMPLAINT

1. Plaintiff Mr. JERZY SAPIEYEVSKI, an individual (“Plaintiff”) brings this trademark infringement action against: LIVE NATION ENTERTAINMENT, Inc. (“LYV”) and LIVE NATION WORLDWIDE, Inc. (“LNW”) - (“Defendants” or “Live Nation”); HILTON WORLDWIDE HOLDINGS, Inc. (“Hilton”); SPOTIFY USA, Inc. (“Spotify”); - (all collectively “Defendants”). Plaintiff alleges as follows:

THE PARTIES and AFFILIATED or RELEVANT PARTNERS

2. **JERZY SAPIEYEVSKI** is an American citizen and is a Washington, D.C. resident since 1977. He is an active musician/pianist/composer, educator, professor of music, producer and performer in live concerts, recordings, educational, artistic entertainment, in mostly non-profit area, primarily through contacts, promotion and interaction with the public via own website “MusicHappens.com”; email address “MusicHappens@MusicHappens.com”; YouTube Channel “MusicHappens”; and owns, now incontestable, MUSICHAPPENS (“the Mark”), properly maintained in the Federal Trademark Register.

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Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

3. Defendant **LIVE NATION ENTERTAINMENT, Inc.** (“LYV”) is a publicly traded Delaware corporation having principal office at 9348 Civic Center Drive, Beverly Hills, CA 90210; has dominant presence in the live music industry and is the largest concert promoter in the world.

4. Defendant **LIVE NATION WORLDWIDE, Inc.** (“LNW”) is LIVE NATION ENTERTAINMENT’s wholly-owned subsidiary, under the same office address, identical email domain “LiveNation.com” and commonly used name “Live Nation”, same CEO and Director of both companies and share Chief Financial Officer, among others.

5. Jointly as “Live Nation”, Defendants’ company considers itself to be “the world’s leading live entertainment company comprised of global market leaders: Ticketmaster, Live Nation Concerts, and Live Nation Media & Sponsorship.” Live Nation is famous for packaging, distribution and marketing of music events.

6. Live Nation also operates websites www.livenation.com, www.ticketmaster.com and the infringing domain www.musichappenshere.com

7. Upon information and belief, in various Live Nation’s USPTO (United States Patent and Trademark Office) trademarks filings, Live Nation Worldwide, Inc., (“LNW”) acts as a department/division of Live Nation Entertainment, Inc., responsible for the administration, clearing and management of Live Nation’s trademark assets. The Parent company Live Nation Entertainment, Inc., (“LYV”) has had the control and was the principal initiator and beneficiary of the coordinated business model “Music Happens Here” and approved the exploitation of Plaintiff’s Mark by Defendants, their affiliates, and Partners.

8. **GREENLIGHT** Media & Marketing (“GreenLight”) operates as an agency and production company that produces *branded* content for the music and entertainment industry. It

offers production services in the areas of content, interactive solutions, media, events, communications, product, retail, licensing, and music festivals activation.

9. As of May 4, 2016, GreenLight operates as a subsidiary of Live Nation Entertainment, Inc. "... we specialize in branded content ... Our innovative agency structure combines strategy and creative development ... for their business."- as stated on GreenLight's

<http://www.greenlightmm.com/about>

10. GreenLight was commissioned/assigned by Live Nation to brand and promote Defendants' business initiative "Music Happens Here".

11. **HILTON** Worldwide Holdings, Inc. engages in the provision of hospitality businesses. The Management & Franchise segment manages hotels and timeshare properties, and license its brands to franchisees. The company is headquartered in McLean, VA. "Music Happens Here" is part of Hilton's partnership with Live Nation.

12. **SPOTIFY USA Inc.** operates a platform that enables users to find music for every moment on their phones, computers, tablets, and others. Its platform also provides advertising and music publishing services. Spotify USA Inc. operates as a subsidiary of Spotify Limited. www.spotify.com/us. 45 W. 18th Street, New York, NY 10011.

13. Spotify technology enables on-demand streaming while monetizing licensed content with an ad-supported, free-to-the-user model and a premium, paid model. It provides a marketplace for additional products such as live events and music downloads.

JURISDICTION AND VENUE

14. Plaintiff asserts claims for trademark infringement, trademark confusion, unfair competition and revenues arising under the law. The Court has subject matter jurisdiction over the federal claims.

15. The Court has jurisdiction over Defendants because Defendants activities in Washington, DC are substantial, continuous and systematic. Defendants have been promoting multiple music events in Washington DC, providing information, Internet presence, website interaction on www.LiveNation.com and ticketing for these events through its well-known Ticketmaster service. Defendants' use of Plaintiff's Mark injures Plaintiff in Washington, D.C. and throughout the world.

16. Defendants' website and domain name musichappenshere.com is advertising and offering music events nationwide, music listening and ticketing services to events. Defendants' continuous offerings include multiple concerts and numerous productions in Washington DC, most notably at the Warner Theatre and on the Internet.

STATEMENT OF FACTS and FACTUAL BACKGROUND

17. This case is about willful, without consent, infringement and commercial exploitation of Plaintiff's longtime cultivated property to benefit Defendants' marketplace visibility and competitive advantage.

18. Defendants, Live Nation's subsidiary GreenLight and Partners Spotify, Hilton Hotels all mutually benefited from the exploitation of Plaintiff's Mark.

a. Defendants' Business Strategy of "Horizontal Alliance"

19. The principal goal and purpose of "horizontal alliances" (a well-known structure of diverse businesses integration) provides strengthened presence in the marketplace, larger product footprint and advantage and flexibility in pricing.

20. As suggested in many public statements "Music Happens Here" was in Defendants' view, the ideal ("thrilling") branding vehicle to encompass this cooperation and benefit from the

synergy between: events and entertainment management (Live Nation); Tourism and Hospitality services (Hilton); and events and artists promotion via Internet streaming application (Spotify).

21. Defendants embraced the business potential of “Music Happens Here” alliance project and bypassed a diligent search and examination of possible conflicts. Defendants heavily and hastily invested in order to lock-in the synergy and suggestive power of imagination in the mark as applied to their business model.

22. Defendants’ use of Plaintiff’s Mark is a distinct commercial activity that encompasses the “horizontal business alliance” with Defendants’ partners to advertise Defendants and the Partners’ services.

23. On May 10, 2016 *Billboard Magazine*, the leading periodical, considered one of the most reputable sources of music industry featured the article about Live Nation’s acquisition of “music branding company” - GreenLight Media & Marketing.

<https://www.billboard.com/biz/articles/7364634/greenlights-dominic-sandifer-on-the-future-of-music-branding-live-nations>

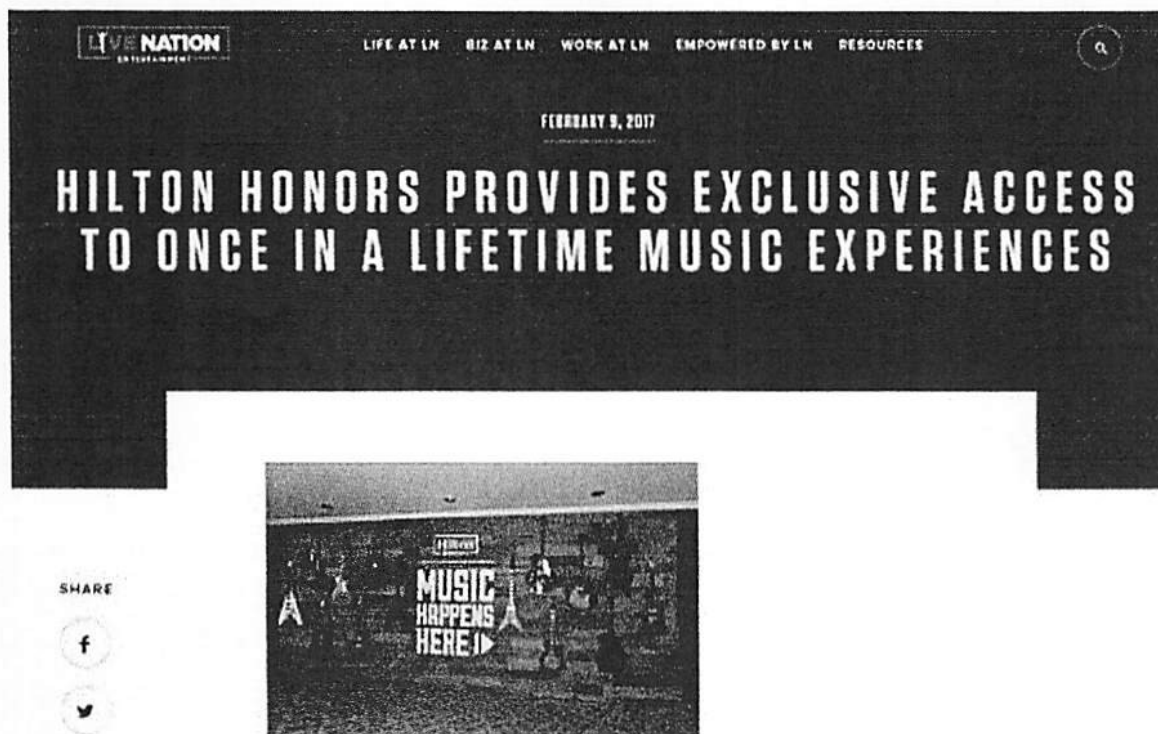
24. On December 6, 2016, “Music Happens Here” domain name “musichappenshere.com” was registered on with Registrar: GoDaddy.com. Even an elementary search of publicly available sources would show the Plaintiff’s trademark.

25. Defendants had a legal obligation and experience for due diligence to seek a clearance for intellectual property rights. Defendants/Registrant circumvented the process calculating that an average person would not be able to stand up to powerful corporations or at worse; it would be just the cost of doing business.

26. Defendants' press releases convey excitement about the project. The synergy and the paradigm of this new business model was much touted by Defendants and Partners in the media and public statements.

27. On Feb. 8, 2017, Live Nation, Hilton and Spotify launch an integrated program "Music Happens Here," as a content creation celebrating travel through music.

28. On February 9, Live Nation published a Press Release describing the project.



The above is a true screenshot of the relevant elements of Defendants' announcement webpage, showing mark used as a distinct, stand-alone poster/logo.

<https://www.livenationentertainment.com/2017/02/hilton-honors-provides-exclusive-access-to-once-in-a-lifetime-music-experiences/>

29. Live Nation's Press Release states:

Mark Weinstein, Hilton's SVP and global head of customer engagement, loyalty and partnerships is quoted: "Music Happens Here honors our legacy of celebrating travel through music and signifies our future... by creating exceptional new experiences for our

Hilton Honors members. I'm thrilled Spotify has joined us and Live Nation on this journey to inspire our guests to travel the world..."

"We are thrilled to have co-created this breakthrough program with Hilton to bring unique music experiences to fans all over the world," said Darin Wolf, EVP Live Nation media & Sponsorship. "Whether fans are seeking out new destinations to follow their favorite artist or adding a live music event to maximize their travel experience, Music Happens Here will help amplify those experiences and create memorable moments."

<https://newsroom.hilton.com/index.cfm/newsroom/detail/31628> Hilton Press release added:

"Hilton Honors members can use their Points to bid on the opportunity to attend any of the events available through Music Happens Here by visiting the Hilton Honors auction platform."

30. Many major media outlets covered the announcement of the business venture, including Forbes, Billboard and Rolling Stone magazines.

Defendants and Hilton offered member-visitors packages to places promoted on Spotify videos "Music Happens Here – [*selected destination city*]"

31. Feb. 9, 2017 Billboard Magazine writes:

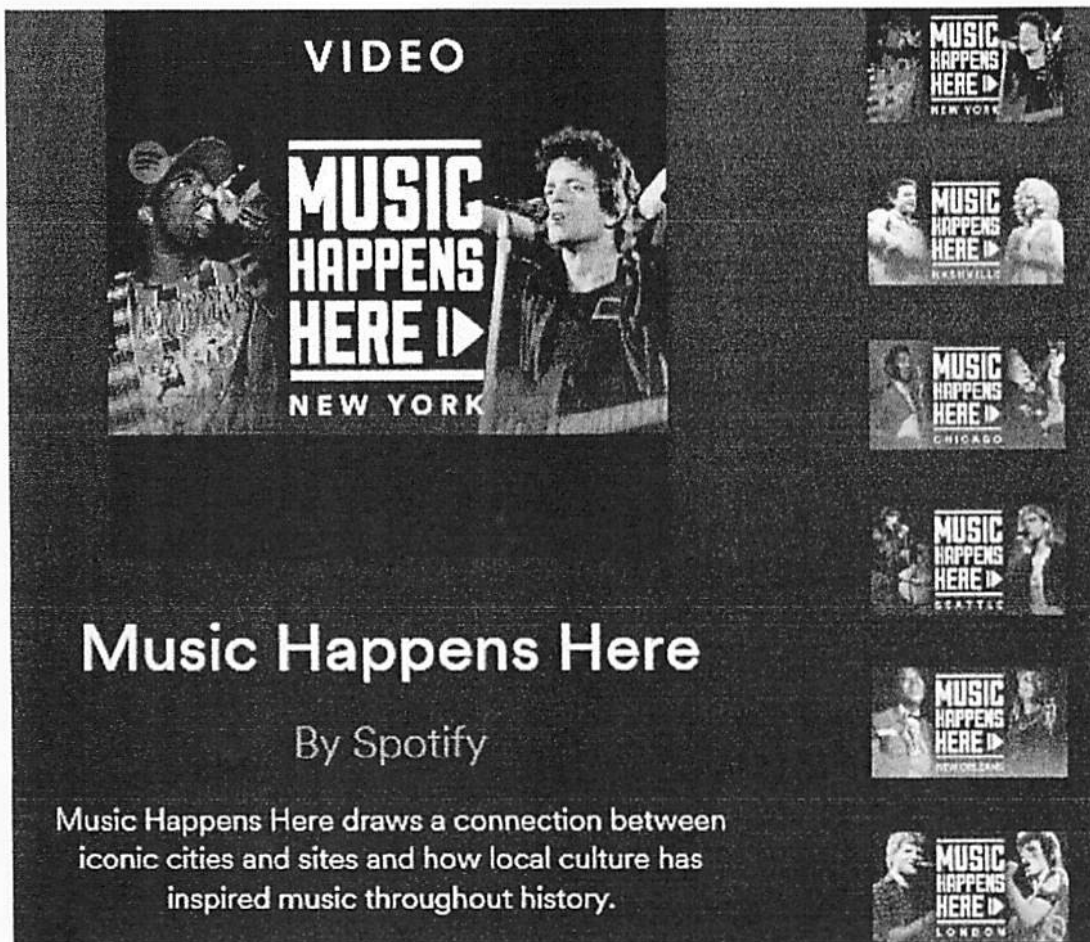
"Now, however, with the addition of Spotify, Music Happens Here has added a new music and travel content dimension. In a first of its kind for the streaming service, Spotify will host and feature content presented by Hilton and produced by Live Nation which will give audiences an insider's guide to iconic music scenes in cities that include L.A., London, New Orleans, San Francisco, Nashville, Seattle and New York."

<https://www.billboard.com/articles/news/7685283/onerepublic-rocks-the-beverly-hills-hilton-roof-in-launch-of-hotels-music>

b. Defendants and Partners' Coordinated Promotion

32. The Spotify videos are a part of the advertising campaign for entertainment and hospitality destinations.

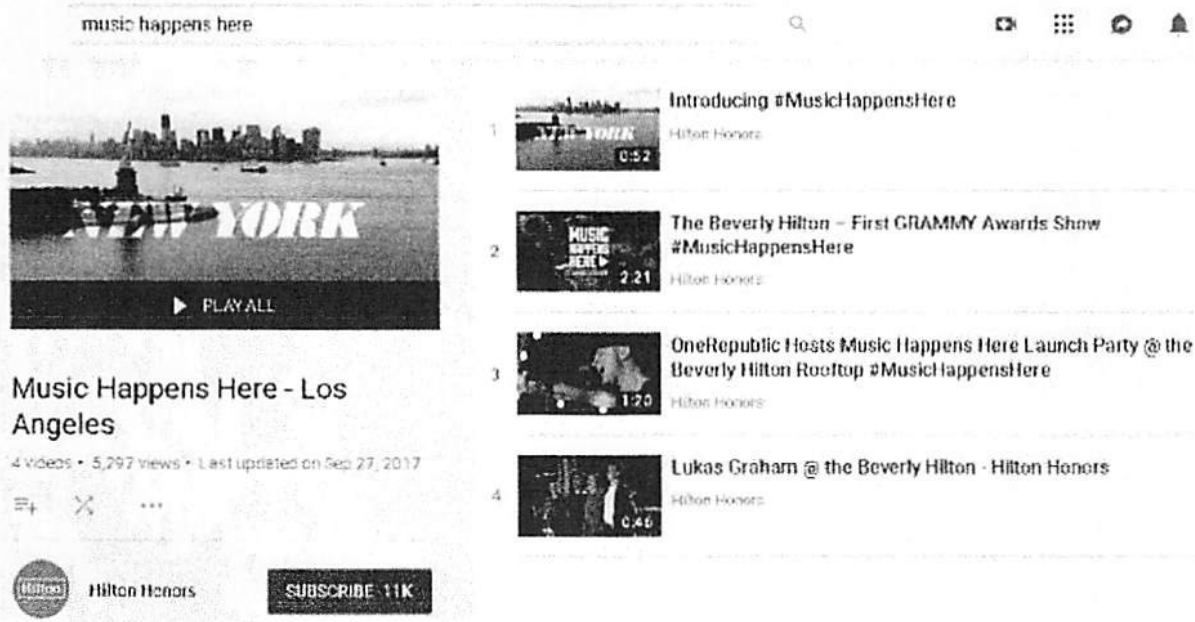
33. Spotify videos use of Plaintiff's mark is not a title of one artistic underlying content in a single video but it serves as a brand for variety of commercial services. Multiple embodiments of same name creates a brand.



The above is a true screenshot of the relevant elements of Spotify Series "Music Happens Here"

34. In the context of public statements and declarations by Defendants, Partners and affiliates "Music Happens Here" is a commercial invitation/pitch to visit the promoted entertainment and hospitality destinations.

35. The Videos are posted among others to the Defendants' website as well as on www.youtube.com.



The above is a true screenshot of the relevant elements of YouTube Channel

36. Defendants/Spotify videos, “Music Happens Here – [ABC location]” is a coordinated promotion of travel destinations, venues and artists.

37. The music content Defendants did not create, is packaged together with hospitality destinations and jointly promoted for greater visibility through Internet streaming and video advertising, further enticed by Hilton’s Award programs and other commercial incentives.

38. Defendants use “Music Happens Here” as destination identifier and promotion to draw audiences/tourist to Defendants’ entertainment productions and services not to the video content of the title. i.e. “Music Happens Here – New York”.

39. Spotify marketing videos under the brand “Music Happens Here” are described by Defendants’ marketing unit – GreenLight M&M


www.greenlightmm.com/hilton-music-happens-here

“Hilton came to GreenLight because they were looking for ways to reenergize their Honors program, specifically by engaging with their members within the music space.”
“2018 Clio Music Silver winning entry titled 'Music Happens Here' was entered for Hilton Worldwide by Greenlight Media & Marketing, The piece was submitted to the

medium: Integrated Campaign within the entry type: Music Marketing and the category: Brand and Artist Collaboration Integrated Campaign.”


[https://clios.com/music/winner/integrated-campaign/hilton-worldwide/music-happens-here-](https://clios.com/music/winner/integrated-campaign/hilton-worldwide/music-happens-here-47421)



47421

Hilton Worldwide WEST HOLLYWOOD 2018 

Music Happens Here

Entrant Company: Greenlight Media & Marketing
Medium: Integrated Campaign
Category: Brand and Artist Collaboration Integrated Campaign
Entry Type: Music Marketing



Entrant Company	Greenlight Media & Marketing
Production Company (additional)	Live Nation
President/Partner	Dominic Sandifer

The above is a true screenshot of the relevant elements of Clios.com webpage announcing a 2018 winning entry for Music Marketing – “Music Happens Here”

www.greenlightmm.com/hilton-music-happens-here states:

“Once in the city, Honors members could discover and explore each location using embedded playlists and interactive walking tours as secret musical maps showcasing content that only Hilton could offer. The end result was a compelling campaign that generated excitement among their current members and even inspired non-members to join.”

40. Stylized visual elements to promote separate products (hospitality services, artists roster, tickets and entertainment destinations, etc.) constitutes a mark of commercial advertisement.

41. Defendants coordinated the publicity and promotion of the project. Defendants used mark “Music Happens Here” to attract public attention by repetitively displaying it as a sign/logo in the stylized lettering and prominent placement across various media.

c. Willful and Deliberate Infringement and Exploitation of Plaintiff Property

42. Defendants directed, managed and benefited from the infringement. Defendants and their Partners and affiliates knowingly coordinated and promoted the infringing act with total disregard of the Plaintiff’s legal rights.

43. Live Nation is a legitimate owner of large number of trademarks. They are also used as Liens for Defendants’ commercial borrowing and financing of various activities.

44. Defendants overwhelming presence and capacity should not justify Defendants’ illegal acts. Defendants’ actions have been intentional and willful.

45. In many public statements, Defendants, their Partners and affiliates were “thrilled” by the Mark’s fanciful, suggestive aspect, not used in everyday common language but drawing attention and imagination of an average person.

I. Defendants and their MUSIC HAPPENS HERE Mark:

46. Defendants welcomed the suggestive uniqueness of the mark’s sound and meaning so they jumped to apply for trademark registration in the US Trademark Office (USPTO).

47. Shortly after the announcement of “Music Happens Here” initiative, Applicant Live Nation Worldwide, Inc. applied for “Music Happens Here” trademark registration declaring and certifying of the commercial use of the mark. Defendants’ USPTO trademark application Serial Number: 87418488 (Attached Exhibit 1)

48. Defendants’ April 20, 2017 Application for MUSIC HAPPENS HERE trademark registration used in commerce for goods and services stated:

“Production of audiovisual recordings and multimedia entertainment content featuring music, popular culture, entertainment and social commentary; distribution of audiovisual recordings and multimedia entertainment content featuring music, popular culture, entertainment and social commentary via the internet and mobile applications; Providing non-downloadable pre-recorded audiovisual content featuring music, artistic performances, popular culture, live music entertainment, entertainment news and social commentary via the Internet. FIRST USE: 20170208. FIRST USE IN COMMERCE: 20170208”

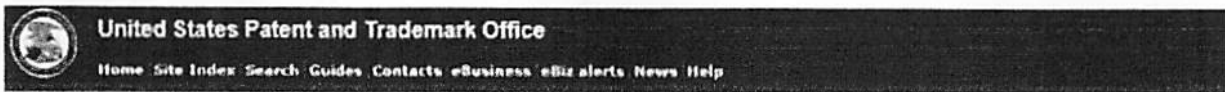
49. Defendants declared and certified by submitting specimens that “Music Happens Here” applied for mark has been used in commerce since “as early as 02/08/2017”

50. In addition, the Official USPTO application record Trademark/Service Mark Application, Principal Register Serial Number: 87418488 Filing Date: 04/20/2017

Defendants/Applicant declare:

“... the mark was first used by the applicant or the applicant's related company or licensee or predecessor in interest at least as early as 02/08/2017, and first used in commerce at least as early as 02/08/2017, and is now in use in such commerce. The applicant is submitting one(or more) specimen(s) showing the mark as used in commerce on or in connection with any item in the class of listed goods/services, consisting of a(n) Screenshot of applicant's website featuring the mark.”

51. Not awaiting USPTO decision, on July 5, 2017, Defendants assigned the applied for mark to JPMorgan Chase Bank as collateral.



Assignments on the Web > Trademark Query

Trademark Assignment Abstract of Title

Total Assignments: 1

Serial #: 87418488

Filing Dt: 04/20/2017

Reg #: NONE

Applicant: Live Nation Worldwide, Inc.

Mark: MUSIC HAPPENS HERE

Assignment: 1

Reel/Frame: 6105/0217

Recorded: 07/14/2017

Conveyance: SECURITY AGREEMENT

Assignors: LIVE NATION ENTERTAINMENT, INC.

LIVE NATION WORLDWIDE, INC.

HQB ENTERTAINMENT, LLC

Assignee: JPMORGAN CHASE BANK, N.A., AS COLLATERAL AGENT

MAIL CODE NY1-C413, 4 CMC
BROOKLYN, NEW YORK 11245-0001

Correspondent: MICHAEL VIOLET

4400 EASTON COMMONS WAY
SUITE 125
COLUMBUS, OH 43219

Exec Dt: 07/05/2017

Entity Type: CORPORATION

Citizenship: DELAWARE

Exec Dt: 07/05/2017

Entity Type: CORPORATION

Citizenship: DELAWARE

Exec Dt: 07/05/2017

Entity Type: LIMITED LIABILITY COMPANY

Citizenship: VIRGINIA

Entity Type: ASSOCIATION

Citizenship: UNITED STATES

USPTO listed assignment ----the above is a true screenshot of the relevant elements of Lien Assignment USPTO abstract.

52. Defendants' trademark application was refused by the USPTO Office Action dated Sept. 28, 2017 citing REFUSAL UNDER SECTION 2(d) – LIKELIHOOD OF CONFUSION: Similarity of the Marks and Relatedness of the Services. The Office Action provided detailed evidence and legal grounds for the refusal.

USPTO Official Action – (Attached is Exhibit 2)

53. The USPTO Refusal Letter became final and irreversible since there was no appeal filed in this case

54. Having substantial experience in trademark prosecution and sophisticated legal training, Defendants knew or should have known of Plaintiff's Mark ownership.

55. Defendants, their Subsidiaries, Partners and affiliates have adopted and used the infringing mark with constructive notice of the Plaintiff's legal rights.

56. Even before, but definitely since USPTO ruling of Sept. 28, 2017, Defendants, their Partners and affiliates had actual knowledge that Plaintiff was the owner of the Mark.

57. To maximize Defendants' exploitation of the mark, on July 5, 2017 Defendants, assigned monetary value to the applied for mark and granted it "to the Collateral Agent" JPMorgan Chase Bank, the trademark value as collateral.

II. Plaintiff and MUSICHAPPENS Mark:

58. Although not a trained attorney, Plaintiff believes it can be shown with clarity that Defendants' use of the mark "Music Happens Here" and domain musichappenshere.com, is damaging, and will be further damaging Plaintiff's activities and would evade Plaintiff's legal rights.

59. Since the late 1999 Plaintiff has continuously used, and is currently using the mark MUSICHAPPENS ("Mark") for various music and music related services. Since 2002 Plaintiff owns an incontestable federal registration number 2643498 for the Mark MUSICHAPPENS in IC 041. US 100 101 107:

Int. Cl.: 41

Prior U.S. Cls.: 100, 101, and 107

United States Patent and Trademark Office

Reg. No. 2,643,498

Registered Oct. 29, 2002

**SERVICE MARK
PRINCIPAL REGISTER**

MUSICHAPPENS

SAPIEYEVSKI, JERZY (UNITED STATES INDIVIDUAL)
3901 CATHEDRAL AVE. NW #313
WASHINGTON, DC 20016

PERFORMANCE; MULTIMEDIA ENTERTAINMENT SOFTWARE PRODUCTION SERVICES, IN CLASS 41 (U.S. CLS. 100, 101 AND 107).

FOR: MUSIC COMPOSITION FOR OTHERS; MUSIC COMPOSITION AND TRANSCRIPTION FOR OTHERS; MUSIC PRODUCTION AND PUBLISHING SERVICES; ENTERTAINMENT SERVICES, NAMELY, MUSIC PRODUCTION; LIVE MUSIC

FIRST USE 11-18-1999; IN COMMERCE 11-18-1999.

SN 75-858,715, FILED 11-26-1999.

INGA ERVIN, EXAMINING ATTORNEY

60. Plaintiff's mark "MusicHappens" is a fanciful mark not used in everyday language. In Plaintiff's use for over 17 years, the Mark is presumed to have acquired acceptance and secondary meaning. Music does not "happen". Music is "heard", "played" and "performed". Defendants knew the meaningful difference.

61. About 20 years ago, Plaintiff creatively coined the Mark that initially had only a derogatory connotation ("*shit happens*") and it is not used in everyday language. Certainly, at the time, it required Plaintiff to treat his mark in a more subtle, elegant manner, not "be in someone's face".

62. Now Plaintiff sees his use is bringing attention and trademark interest but so far, Plaintiff was able to defend his position by the United States Trademark Office refusals of all applications based on "music happens".

Start List At: OR Jump to record: **4 Records(s) found**

Refine Search Submit

Current Search: **S1: (music happens)[COMB]** docs: 4 occ: 8

	Serial Number	Reg. Number	Word Mark	Check Status	Live/Dead
1	87565989		WHERE MUSIC HAPPENS	TSDR	DEAD
2	87418488		MUSIC HAPPENS HERE	TSDR	DEAD
3	87423118		LIVE MUSIC HAPPENS	TSDR	DEAD
4	78260997		MUSIC CHOICE WHERE MUSIC HAPPENS	TSDR	DEAD

TESS HOME NEW USER STRUCTURED FREE FORM Browse Dict SEARCH OG PREV LIST NEXT LIST IMAGE LIST Top

The above is a true screenshot of the relevant elements of USPTO trademark search page for “Music Happens” similar trademarks.

63. For over 17 years, Plaintiff has used the Mark for publications, online music and music related resources and educational materials. Plaintiff regularly and continuously provides information through printed materials, online publications, in-person seminars, classes, lectures, concerts and other public forums.

64. Since October 2002, Plaintiff owns a federal registration for MUSICHAPPENS (U.S. Registration No. 2643498 –

“Music composition for others; music composition and transcription for others; music production and publishing services; entertainment services, namely, music production; live music performance; multimedia entertainment software production services”

65. Plaintiff’s registration is incontestable under the Lanham Act and conclusive evidence of Plaintiff’s superior and exclusive right to use the Mark. The USPTO (United States Patent and Trademark) Office Action dated 09/28/2017 verifies the issue by *refusing* Defendants’ attempted registration of mark MUSIC HAPPENS HERE. (Other applicants’ attempts to

register similar, derivative variations of Plaintiff's mark were refused by separate and independent USPTO Office Actions.)

66. Plaintiff's Mark MUSICHAPPENS in various formats has acquired significant goodwill and meaning. Plaintiff is considering other opportunities in the future that should not be limited or obscured by Defendants' illegal behavior in the market place.

67. Plaintiff has no legal obligation to share the Mark with anyone. To protect the loss of uniqueness and distinctiveness, even with Plaintiff's limited resources he directly or indirectly caused all USPTO applications to register similar trademarks REFUSED or ABANDONED.

68. As the owner of the Mark, Plaintiff has the outright control how the Mark is used and whether to be affiliated or licensed to anyone and under what conditions.

d. Defendants' total disregard of USPTO Ruling

69. Defendants' actions were purposeful and intentional with no regard to Plaintiff's indisputable rights by assuming that inexperienced Plaintiff would not be able and would not have resources to seek legal remedy.

70. Even after Trademark Office Refusal of Sept. 28, 2017 Defendants and their Partners and affiliates deliberately and willfully continued to use and benefit from commercial exploitation of Plaintiff's property

71. Prior to the filing of this lawsuit on April 11, 2018, and despite the earlier USPTO Registration Refusal, Live Nation did not contact Plaintiff.

72. Not until April 27, 2018 (over a year after announcing "Music Happens Here" project) and *as soon as* Plaintiff filed this lawsuit against Live Nation Worldwide Inc., as listed in USPTO files, Senior VP, Legal Affairs of *parent* company Live Nation *Entertainment*, Inc. contacted Plaintiff.

73. Upon information and belief, Defendants and the Partners continue unlawful use of Plaintiff's Mark and, abusing by their sheer size, they overwhelm the Internet, and other public media - creating and likely to further create direct and reverse confusion and collecting substantial revenues while using Plaintiff's Mark in commerce and as bank collateral.

74. Since 1999 Plaintiff made an effort and investment to promote Plaintiff's music and services, serving the public interest of cultural understanding, education, engagement and social interaction through music.

75. Defendants represents market power and resources to easily stifle Plaintiff's use of the Mark. Already, when searching online for Plaintiff's services one is overwhelmed with similarity and the confusing use of the mark by Defendants.

76. Defendants' and Defendants' partners marketing techniques, the style of publicity and use of technology and market reach were able, just in a few months, to obscure Plaintiff's 17-year-Mark so rapidly that it could be considered a "drowning".

77. The uses of the mark by Defendants are in violation of superior and exclusive Plaintiff's rights.

COUNT I

INFRINGEMENT OF A FEDERALLY REGISTERED MARK

78. Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 77 of this Complaint.

79. Since 2002, Plaintiff is the exclusive owner of the federally registered incontestable, valuable Mark: MUSICHAPPENS (U.S. Registration No. 2643498)

80. Defendants' use of the mark MUSIC HAPPENS HERE, including in the domain name musichappenshere.com, causes or likely to cause confusion, deception and mistake that

Defendants or Defendants' music and services are licensed or approved by or connected with Plaintiff or Plaintiff's Mark MUSICHAPPENS *or vice versa*.

81. Defendants' unmatched market power and commercial visibility is likely to confuse the public into believing that Plaintiff is affiliated with Defendants.

82. Defendants have and have had the control and knowledge of exploitation of Plaintiff's property and deliberately directed the infringement by the affiliates and business Partners.

COUNT II

UNFAIR COMPETITION, FALSE DESIGNATION OF ORIGIN, UNJUST ENRICHMENT

83. Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 82 of this Complaint.

84. Defendants have been engaging in confusing designation of origin and unauthorized use of Plaintiff's Mark

85. Defendants' wrongful acts have caused, and will continue to cause injury and damage to Plaintiff's goodwill, which injury and damage cannot be adequately quantified.

86. Plaintiff's Mark through the long-term use in connection with Plaintiff's music services acquired secondary meaning indicating that the source of origin of music services is Plaintiff.

87. Plaintiff has used the Mark for over 17 years, acquiring strong rights in the Mark.

88. Plaintiff has no control over the nature and quality of the Defendants' services. Defendants acted in bad faith, willfully, intentionally, and/or in malicious disregard of Plaintiff's lawfully protected rights.

89. Defendants and the Partners have benefited in the form of the goodwill and have been unjustly enriched from their unauthorized exploitation of Plaintiff's inventive intellectual property.

90. The actions of Defendants to advertise and market under the mark their music related events, are blurring and obscuring Plaintiff's Mark.

91. The actions of Defendants, if not enjoined, will continue. Plaintiff's diminution in the value of and goodwill associated with the Mark are entitled remedy and relief.

92. Defendants have had the knowledge of, and have directed trademark infringement, unfair competition and deceptive and unfair trade practices.

IN CONCLUSION

93. Defendants unfairly and illegally overwhelmed Plaintiff with their predatory capacity and resources to embezzle Plaintiff's property, injured his potential.

94. The commercial exploitation of Plaintiff's Mark was a willful and sophisticated business model overarching versatile business activities, marketing and the use of Plaintiff's Mark for a lien in Defendants' bank borrowing collateral.

95. If there were no fair and appropriate legal intervention and remedy, Defendants already monopoly-like operation, would be embolden to prey on "weaker victims" to embezzle their property without any consequence.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff requests that the Court grant the following relief:

- a. Enter judgment in favor of Plaintiff;
- b. Award compensatory and punitive damages against Defendants, in favor of Plaintiff in an amount to be determined at trial;

c. Order an accounting to determine the revenues realized by Defendants unauthorized use of the Plaintiff's Mark, and order Defendants pay such amount determined at trial;

d. Enjoin Defendants, and any of their business Partners, affiliates, representatives, licensees, distributors, assigns and all persons in active participation with Defendants, from directly or indirectly using Plaintiff's Mark and any confusingly similar mark alone or in combination with other words, as a trademark or domain name, which confuse or obscure Plaintiff's true designation;

e. Enjoin Defendants and all those in participation with or having knowledge of this action, from using the mark MUSIC HAPPENS HERE or any other mark that infringes or is confusingly similar or unfairly competes with Plaintiff's Mark MUSICHAPPENS;

f. Ordering Defendants to discontinue using or transfer the domain names and meta-tags, which include "musichappens" as the principal part of their Internet URL, as well as all Music Happens-related presence on the Internet in such media as Facebook, YouTube, Twitter and Spotify; and for Defendants to refrain from using or registering any similar domain names, social media names;

g. Order that Defendants' keyword advertising and sponsored advertisements, which include "music happens" designation, be removed from search engines such as Google and Yahoo; and pay Plaintiff for remedial publicity to counter the negative message, the likelihood of confusion and reverse confusion.

h. That the Court orders Defendants to file a report of timely compliance with the Court order


h. Award Plaintiff the costs and expenses of this litigation;

j. Award such other relief, as this Court deems proper.

JURY DEMAND

Plaintiff requests that a jury hear the issues in this matter.

Respectfully submitted on August 30, 2019,


Mr. Jerzy Sapieyevski, Plaintiff, *pro se*
3901 Cathedral Ave. NW #513
Washington, DC 20016

MusicHappens@MusicHappens.com
Telephone: 202.966.2612

CERTIFICATE OF SERVICE

I, Jerzy Sapieyevski hereby certify that on August 30, 2019 the foregoing SECOND AMENDED COMPLAINT was filed with the Clerk of the US DISTRICT COURT FOR THE DISTRICT OF COLUMBIA and a true copy was emailed to the Attorneys for Defendant LIVE NATION ENTERTAINMENT, Inc.:

Terence P. Ross, Esq.
terence.ross@kattenlaw.com
kristin.lockhart@kattenlaw.com


Jerzy Sapieyevski,
3901 Cathedral Ave. NW
Washington DC 20016
Email: MusicHappens@MusicHappens.com
Phone (202) 966 2612



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TESS was last updated on Wed Aug 8 04:51:03 EDT 2018

TESS HOME **NEW USER** **STRUCTURED** **FREE FORM** **BROWSE DICT** **SEARCH OG** **BOTTOM** **HELP** Please logout when you are done to release system resources allocated for you.**Record 1 out of 1****TSDR** **ASSIGNMENTS** **FILED** (Use the "Back" button of the Internet Browser to return to TESS)**MUSIC HAPPENS HERE**

Word Mark	MUSIC HAPPENS HERE
Goods and Services	(ABANDONED) IC 041. US 100 101 107. G & S: Production of audiovisual recordings and multimedia entertainment content featuring music, popular culture, entertainment and social commentary; distribution of audiovisual recordings and multimedia entertainment content featuring music, popular culture, entertainment and social commentary via the internet and mobile applications; Providing non-downloadable pre-recorded audiovisual content featuring music, artistic performances, popular culture, live music entertainment, entertainment news and social commentary via the Internet. FIRST USE: 20170208. FIRST USE IN COMMERCE: 20170208
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	87418488
Filing Date	April 20, 2017
Current Basis	1A
Original Filing Basis	1A
Published for Opposition	July 25, 2017
Owner	(APPLICANT) Live Nation Worldwide, Inc. CORPORATION DELAWARE 9348 Civic Center Drive Beverly Hills CALIFORNIA 90210
Assignment Recorded	ASSIGNMENT RECORDED
Attorney of Record	Ellie Schwimmer
Type of Mark	SERVICE MARK
Register	PRINCIPAL
Live/Dead Indicator	DEAD

Exhibit 1
cv-00830-TJK

REFERENCE/DOCKET

NO:

MUS-US-00246

**CORRESPONDENT E-
MAIL ADDRESS:**

trademarks@livenation.com

OFFICE ACTION

STRICT DEADLINE TO RESPOND TO THIS LETTER

TO AVOID ABANDONMENT OF APPLICANT'S TRADEMARK APPLICATION, THE USPTO MUST RECEIVE APPLICANT'S COMPLETE RESPONSE TO THIS LETTER WITHIN 6 MONTHS OF THE ISSUE/MAILING DATE BELOW. A RESPONSE TRANSMITTED THROUGH THE TRADEMARK ELECTRONIC APPLICATION SYSTEM (TEAS) MUST BE RECEIVED BEFORE MIDNIGHT EASTERN TIME OF THE LAST DAY OF THE RESPONSE PERIOD.

ISSUE/MAILING DATE: 9/28/2017

Applicant's mark published for opposition on July 25, 2017; however, the Office of the Deputy Commissioner for Trademark Examination Policy has since accepted a Letter of Protest received in connection with this application. Therefore, jurisdiction of the application has been restored to the trademark examining attorney and the evidence presented in the letter has been forwarded to the trademark examining attorney for consideration. See TMEP §§1715, 1715.03(c).

Based upon the evidence presented in the letter, the trademark examining attorney is taking further action, as specified below. See TMEP §1715.03(c).

REFUSAL UNDER SECTION 2(d) – LIKELIHOOD OF CONFUSION

Registration of the applied-for mark, MUSIC HAPPENS HERE in standard character, is refused because of a likelihood of confusion with the mark, MUSICHAPPENS in typed drawing, in U.S. Registration No. 2643498. Trademark Act Section 2(d), 15 U.S.C. §1052(d); see TMEP §§1207.01 *et seq.* See the attached registration.

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely a potential consumer would be confused, mistaken, or deceived as to the source of the services of the applicant and registrant. See 15 U.S.C. §1052(d). A determination of likelihood of confusion under Section 2(d) is made on a case-by case basis and the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973) aid in this determination. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1349, 98 USPQ2d 1253, 1256 (Fed. Cir. 2011) (citing *On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1085, 56 USPQ2d 1471, 1474 (Fed. Cir. 2000)). Not all the *du Pont* factors, however, are necessarily relevant or of equal weight, and any one of the factors may control in a given case, depending upon the evidence of record. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d at 1355, 98 USPQ2d at 1260; *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); see *In re E. I. du Pont de Nemours & Co.*, 476 F.2d at 1361-62, 177 USPQ at 567.

In this case, the following factors are the most relevant: similarity of the marks, similarity and nature of the services, and similarity of the trade channels of the services. See *In re Viterra Inc.*, 671 F.3d 1358, 1361-62, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1595-96 (TTAB 1999); TMEP §§1207.01 *et seq.*

Similarity of the Marks

Marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)); TMEP §1207.01(b)-(b)(v). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Davta*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007)); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); TMEP §1207.01(b).

In the present case, applicant's applied-for mark, MUSIC HAPPENS HERE is confusingly similar to the mark MUSICHAPPENS in U.S. Registration No. 2643498. Specifically, the wording MUSIC HAPPENS in applicant's mark is identical in sound and conveys the same meaning as the entirety of registrant's mark. Namely, that "[t]he art of arranging sounds in time so as to produce a continuous, unified, and evocative composition, as through melody, harmony, rhythm, and timbre" has "... come about as a consequence; result". See attached dictionary entries from *The American Heritage Dictionary*.

The additional word HERE in applicant's applied-for mark does not sufficiently distinguish the marks from one another as adding a term to a registered mark generally does not obviate the similarity between the compared marks, as in the present case, nor does it overcome a likelihood

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of confusion under Section 2(d). See *Coca-Cola Bottling Co. v. Jos. E. Seagram & Sons, Inc.*, 526 F.2d 556, 557, 188 USPQ 105, 106 (C.C.P.A. 1975) (finding BENGAL and BENGAL LANCER and design confusingly similar); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1269 (TTAB 2009) (finding TITAN and VANTAGE TITAN confusingly similar); *In re El Torito Rests., Inc.*, 9 USPQ2d 2002, 2004 (TTAB 1988) (finding MACHO and MACHO COMBOS confusingly similar); TMEP §1207.01(b)(iii). Here, the marks are identical in part.

Moreover, consumers are generally more inclined to focus on the first word, prefix, or syllable in any trademark or service mark. See *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F. 3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered” when making purchasing decisions). Thus, purchasers will focus on the initial wording MUSIC HAPPENS in applicant’s applied-for mark and mistakenly believe the mark identifies the same source as MUSICHAPPENS.

Further to note, the slight difference in appearance between registrant’s mark, which appears as a compound word with no space separating the words, that is, MUSICHAPPENS; and the identical wording in applicant’s mark, which appears as multiple words with space separating the words, that is, MUSIC HAPPENS, is inconsequential. See, e.g., *Seaguard Corp. v. Seaward Int’l, Inc.*, 223 USPQ 48, 51 (TTAB 1984) (“[T]he marks ‘SEAGUARD’ and ‘SEA GUARD’ are, in contemplation of law, identical [internal citation omitted].”); *In re Best W. Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) (“There can be little doubt that the marks [BEEFMASTER and BEEF MASTER] are practically identical”); *Stock Pot, Inc., v. Stockpot Rest., Inc.*, 220 USPQ 52, 52 (TTAB 1983), *aff’d* 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) (“There is no question that the marks of the parties [STOCKPOT and STOCK POT] are confusingly similar. The word marks are phonetically identical and visually almost identical.”).

As such, the marks are partially identical in sound, appearance, overall commercial impression, and are thus confusingly similar for the purposes of determining likelihood of confusion.

Relatedness of the Services

With respect to applicant’s and registrant’s services, the question of likelihood of confusion is determined based on the description of the services stated in the application and registration at issue, not on extrinsic evidence of actual use. See *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1323, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys. Inc. v. Hous. Computers Servs. Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)).

The applicant’s identified services are: “Production of audiovisual recordings and multimedia entertainment content featuring music, popular culture, entertainment and social commentary; distribution of audiovisual recordings and multimedia entertainment content featuring music, popular culture, entertainment and social commentary via the internet and mobile applications; Providing non-downloadable pre-recorded audiovisual content featuring music, artistic performances, popular culture, live music entertainment, entertainment news and social commentary via the Internet” in International Class 041. Registrant’s identified services are: “Music composition for others; music composition and transcription for others; music production and publishing services; entertainment services, namely, music production; live music performance; multimedia entertainment software production services” also in International Class 041. Applicant’s identified services are highly related to registrant’s identified entertainment services.

The services of the parties need not be identical or even competitive to find a likelihood of confusion. See *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods.”); TMEP §1207.01(a)(i).

The respective services need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); TMEP §1207.01(a)(i).

The attached Internet evidence from <http://bluewatermusic.com/>, <http://www.morainemusic.com>, <https://www.sonyatv.com>, <http://razorandtiemusicpublishing.com>, <https://www.paramountsong.com>, and <http://aegworldwide.com> establishes that the relevant services are sold or provided through the same trade channels and used by the same classes of consumers in the same fields of use. Moreover, per registrant’s website <http://www.musicshappens.com> attached hereto, registrant provides non-downloadable audiovisual content featuring music, artistic performances etc. via the Internet. Vice versa, applicant provides registrant’s identified “live music performance” services (see attached website screenshot). Therefore, applicant’s and registrant’s services are considered related for likelihood of confusion purposes. See, e.g., *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009).

Evidence obtained from the Internet may be used to support a determination under Section 2(d) that services are related. See, e.g., *In re G.B.I. Tile & Stone, Inc.*, 92 USPQ2d 1366, 1371 (TTAB 2009); *In re Paper Doll Promotions, Inc.*, 84 USPQ2d 1660, 1668 (TTAB 2007).

As such, upon encountering MUSIC HAPPENS HERE and MUSICHAPPENS, both used on the respective identified services, consumers are likely to be confused and mistakenly believe that they emanate from a common source. As such, registration must be refused under Trademark Act Section 2(d).

Although applicant’s mark has been refused registration, applicant may respond to the refusal by submitting evidence and arguments in support of registration.

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