

OG v. OB-GYN: Dr. Drai Drops the Mic on Dr. Dre

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Stop me if you've heard this one before: an OB-GYN you probably don't know named Dr. Drai applies to register his name as a trademark and ends up in a dispute with famous rapper Dr. Dre because the rapper fears there will be confusion between the names. A three-judge

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administrative panel decides "DR. DRAI" looks and sounds like "DR. DRE," and agrees that Dr. Dre is really famous and that his brand is strong and distinct, but ultimately rules that there's no risk of confusion. This might sound like an elaborate setup to a geeky joke, but on May 3, 2018, the Trademark Trial and Appeal Board decided a case with just those facts, holding that Dr. Drai was entitled to register his trademarks. See Andre Young v. Draion M. Burch DO.

News of the TTAB decision caused some head-scratching on social media, wondering,

what was Dr. Dre thinking? Why did Dre—a famous rapper and headphone mogul—believe that consumers would confuse his brand with that of an OB-GYN?

The answer likely lies in the goods and services covered by Dr. Draï's trademark applications (one for the DR. DRAI word mark and the other for the logo form of his mark). Although Dr. Draï provides obstetrics and gynecological medical services, he's also a motivational speaker, and uses his brand to promote books, make television and radio appearances, conduct Twitter chats, and participate in speaking engagements and online videos, all relating to women's health and transgender health topics. In the broadest sense, this makes Dr. Draï—like Dr. Dre—an entertainer. In fact, the challenged Dr. Draï applications covered Classes 9 (Computers, Software, Electronic instruments, & Scientific appliances) and 41 (Education, Amusement, Entertainment, Reproduction)—two classes in which Dr. Dre's marks are also registered.

So, contrary to some of the biting online commentary that followed the TTAB's decision, Dr. Dre's action was not, on its face, totally surprising.

Dr. Dre opposed the Dr. Draï applications on three grounds: confusion, dilution, and false suggestion of a connection to him as an individual, but the dilution claim was affirmatively waived prior to final hearing. The Board ultimately ruled against Dr. Dre on both the confusion and false connection claims.

Likelihood of Confusion Analysis

What's striking about the TTAB's analysis of the confusion claim is that only one of the 13 *du Pont* factors of likely confusion favored Dr. Draï. In contrast, Dr. Dre prevailed on six factors, with five found neutral and one ignored by the Board. Indeed, the decision is filled with findings favorable to Dr. Dre: (a) Dr. Draï's marks look and sound like Dr. Dre's marks; (b) Dr. Dre's mark is inherently distinctive; (c) Dr. Dre's mark has "achieved a degree of renown" and "is strong"; (d) the parties' trade channels "generally overlap"; (e) some of Dr. Dre's and Dr. Draï's less sophisticated consumers may exercise "less care" in their purchases, making "confusion more likely"; and (f) Dr. Dre's mark is used in connection with "collateral or promotional items," making it more likely that relevant consumers will be confused.

Nonetheless, the TTAB declined to find a likelihood of confusion because the factors favoring Dr. Dre were outweighed by the differences in their respective goods and services. More specifically, the Board found that although both Dr. Dre's and Dr. Draï's services fall under the general category of "entertainment services," Dr. Dre failed to submit evidence showing that Dr. Draï's "motivational and educational" speaker services were sufficiently similar to Dr. Dre's "musical composition and production" services.

Evidentiary issues played a significant role in Dr. Dre's lack of success on the confusion claim. The TTAB found that "many of the facts asserted by [Dr. Dre] in his brief have no evidentiary support." Notably, Dr. Dre provided no evidence of the volume of his sales or advertising expenditures in connection with musical sound recordings or production services. Moreover, the TTAB refused to give weight to much of the evidence submitted

by Dr. Dre, finding that it failed to satisfy any exception to the rule against hearsay.

Hearsay exceptions can be quite arcane in application, so it might surprise a lay reader to learn that the TTAB can treat “newspaper story submissions dated 1997 or earlier” as admissible, while refusing to admit more recent—and relevant—stories from popular websites such as grammy.com (Dr. Dre awards list), billboard.com (Dr. Dre chart history) and staticbrain.com (Dr. Dre album sales statistics), [Genius \(genius.com\)](http://genius.com), [IMDB \(IMDB.com\)](http://IMDB.com), [Biography \(biography.com\)](http://biography.com), and [All Music \(allmusic.com\)](http://allmusic.com). As a result, Dr. Dre was unable to establish facts relevant to his receipt of Grammy awards, record sales, and rank on the Billboard Hot 100. Under the circumstances, the TTAB concluded that the evidence of record did not support a finding that the mark DR. DRE had achieved a degree of fame such that it fell on the “very strong” end of the spectrum of commercial strength.

False Connection Analysis

The analysis of the ground of opposition under Section 2(a) of the Lanham Act for false suggestion of a connection also seemed to go well for Dr. Dre, at least initially. The TTAB found that the first three factors in the four factor test favored Dr. Dre: (1) the DR. DRAI marks were found to be a close approximation of Dr. Dre’s name or identity; (2) the evidence showed that Dr. Dre has come to be associated with the name DR. DRE and that name uniquely and unmistakably refers to him; and (3) it is undisputed that Dr. Dre has no connection with the goods and services that Dr. Drai intends to offer under the applied-for marks.

Dr. Dre’s Section 2(a) claim foundered, however, on the fourth factor: whether the fame or reputation of Dr. Dre is such that a connection with Dr. Dre would be presumed when the DR. DRAI marks are used in connection with the goods and services covered by the opposed applications. According to the TTAB, the key inquiry for this factor is whether there is something about the motivational and educational speaking services on the topics of obstetrics, gynecology and health, as identified in the opposed applications, that would cause the DR. DRAI marks to be associated with Dr. Dre. In undertaking this analysis, it was not necessary for Dr. Dre to prove that his name was famous in the health or medical field or that he offer goods or services in these areas. But it was not enough to argue that Dr. Dre’s reputation as a musician and producer is of such a nature that consumers would make that association just because celebrities in general license their name for a wide array of merchandise and services. As the TTAB commented, “Here, there is no evidence that it is commonplace for celebrities to sell or license the sale of goods or services of the type provided by [Dr. Drai].” In contrast, other cases where registration was barred under Section 2(a) included an application to register WESTPOINT for shotguns and rifles, which were goods of a type that customers would associate with a military post and an application to register TWIGGY for clothing, which would be associated with the well-known fashion model.

Further, although intent to trade on the goodwill generated by a famous person’s name is not a required element of a Section 2(a) claim, such evidence can be considered as relevant. But here, Dr. Drai testified that he is a “gay gynecologist” with “a lot of

transgender ... [and] lesbian” patients. He further characterized Dr. Dre as being “known for his misogyny and homophobi[a],” adding that “being an OB-GYN, I cannot be associated with anyone that has any kind of misogynistic speech because it’s a bad reflection on me as a doctor.” The TTAB appears to have credited this testimony, finding that Dr. Draï had no intent to trade on Dr. Dre’s name.

It is unknown why Dr. Dre decided not to pursue a dilution claim, which might have been more successful. Dr. Dre definitely is a famous name among wide swaths of the general public and there would have been no need to show likelihood of confusion or that the goods and services of the parties were related. However, it might have been difficult to establish, through survey evidence or otherwise, that consumers were likely to associate the DR. DRAI marks and services with Dr. Dre in a manner that would impair the distinctiveness of the DR. DRE mark.

Takeaways from the Case

- The fame and renown of a celebrity name may only go so far in a trademark dispute if the goods and services are widely disparate
- It is not always true that a less famous trademark user will want to benefit from the particular reputation of the celebrity
- Being famous and proving that your mark is famous are not always the same things — evidentiary challenges abound