This Opinion is not a
Precedent of the TTAB

Mailed: June 10, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Adam J. Myers

Serial No. 97532760

Shane M. Popp of LOSMP,
for Adam J. Myers.

Shana McNamara, Trademark Examining Attorney, Law Office 125,
Robin Mittler, Managing Attorney.

Before Heasley, Lebow, and Lavache,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Applicant, Adam J. Myers, seeks registration on the Principal Register of the mark THE HAUNTED ESTATE (in standard characters) for "entertainment services in the nature of development, creation, production and post-production of multimedia entertainment content," in International Class 41.[1]

[1] Application Serial No. 97532760 was filed on August 3, 2022 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant's claim of first use anywhere and in commerce since at least as early as January 31, 2021.

Citations to the prosecution file refer to the USPTO's Trademark Status & Document Retrieval ("TSDR") system and identify the documents by title, date, and page in the

The Trademark Examining Attorney finds that Applicant's specimens show use of his mark on podcasts, but not on "entertainment services in the nature of development, creation, production and post-production of multimedia entertainment content." The Examining Attorney has accordingly refused registration under Sections 1(a) and 45 of the Trademark Act, 15 U.S.C. §§ 1051(a) and 1127, on the ground that the specimens do not evince use of the mark on the identified services.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal proceeded, and Applicant filed his main brief. 6 TTABVUE.

The Examining Attorney then sought and obtained a remand of the application to address another potential basis for refusal: that the activities identified in the application, "entertainment services in the nature of development, creation, production and post-production of multimedia entertainment content," are ancillary to Applicant's primary service of producing podcasts, and are therefore for Applicant's benefit, not the benefit of others. For this reason, the Examining Attorney concluded, the activities recited in the Application are not registrable services under Sections 1, 3 and 45 of the Trademark Act. 15 U.S.C. §§ 1051, 1053, 1127. In light of this second ground for refusal, which was subsequently made final, Applicant was permitted to file a supplemental brief. 12 TTABVUE. The Examining Attorney then filed her brief in support of the refusals. 14 TTABVUE.

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downloadable .pdf version. References to the briefs and other materials in the appeal record refer to the Board's TTABVUE online docketing system.

I. Evidentiary Issue

Applicant attached as exhibits to his main brief copies of five specimens of use he submitted over the course of prosecuting his Application.[2] His briefs, both main and supplemental, cite to those exhibits, rather than to the record.

The Examining Attorney objects that these specimens were already made of record during prosecution of the Application, and should not have been attached to the brief.[3] The objection is sustained. *In re Black Card LLC*, 2023 WL 8110301, *2 (TTAB 2023) (evidence "made of record during prosecution … should not have been refiled with the brief; the Board discourages the practice") (citations omitted); 37 C.F.R. § 2.142(d) ("Evidence should not be filed with the Board after the filing of a notice of appeal"). We base our decision on the specimens as they appear in the record.

II. Applicable Law

"The Lanham Act provides for registration of a mark based on use of the mark in commerce." *In re Siny Corp.*, 920 F.3d 1331, 1335 (Fed. Cir. 2019), *quoted in In re Weiss,* 2024 WL 3617597, *2 (TTAB 2024). "According to Section 45 of the Trademark Act, 15 U.S.C. § 1127, a service mark is used in commerce 'when it is used or displayed in the sale or advertising of services and the services are rendered in commerce.' See also 37 C.F.R. § 2.56(b)(2)." *In re The Cardio Group, LLC,* 2019 WL 2560630, *2 (TTAB 2019).[4]

[2] Applicant's main brief, 6 TTABVUE 12-21.

[3] Examining Attorney's brief, 14 TTABVUE 3-4.

[4] As part of an ongoing pilot, this opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the pages on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board,

A use-based application for a service mark must be supported by a specimen showing how the applicant uses the mark in commerce. 15 U.S.C. §§ 1051(a)(1), 1053; 37 C.F.R. § 2.34(a)(1)(iv). "The predecessor of our primary reviewing court has made clear that 'the manner in which an applicant has employed the asserted mark, as evidenced by the specimens of record, must be carefully considered in determining whether the asserted mark has been used as a trademark **with respect to the goods [or services] named in the application.**' *In re Bose Corp.*, 546 F.2d 893, 897 (CCPA 1976) …." *In re Fallon*, 2020 WL 6255423, *4 (TTAB 2020). Trademark Rule 2.56(a), 37 C.F.R. § 2.56(a).

Because a service mark can be used in a wide variety of ways, the types of specimens that may be submitted as evidence of use are equally varied. *In re Metriplex, Inc.*, 1992 WL 169149, *1 (TTAB 1992). The varieties may be generally grouped into two categories: **advertising** specimens, which show the mark displayed in advertising, marketing, and promoting the services, and **rendering** specimens, which show the mark used in the sale or performance of the services. *See generally* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1301.04(f)(ii). Advertising and rendering specimens may differ in their content:

> For specimens showing the mark in advertising the services, in order to create the required direct association, the specimen must not only contain a reference to the service, but also the mark must be used on the specimen to identify the service and its source.
>
> ...

this opinion cites to the Westlaw (WL) legal database and cites only precedential decisions, unless otherwise noted. Practitioners should also adhere to the practice set forth in the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03(a) (2024).

> Specimens showing the mark used in rendering the identified services need not explicitly refer to those services in order to establish the requisite direct association between the mark and the services, but there must be something which creates in the mind of the purchaser an association between the mark and the service activity.

In re WAY Media, Inc., 2016 WL 3566131, *1 (TTAB 2016) (internal punctuation omitted).

Though they may differ in content, both types of specimens have a common purpose: showing that the mark has been used in commerce in a way that creates an association with the identified services in the minds of purchasers. "The specimen must show a direct association between the mark and the services." 37 C.F.R. § 2.56(b)(2). In both cases, "a key consideration is the perception of the user." *In re JobDiva, Inc.*, 843 F.3d 936, 941 (Fed. Cir. 2016).

III. Discussion

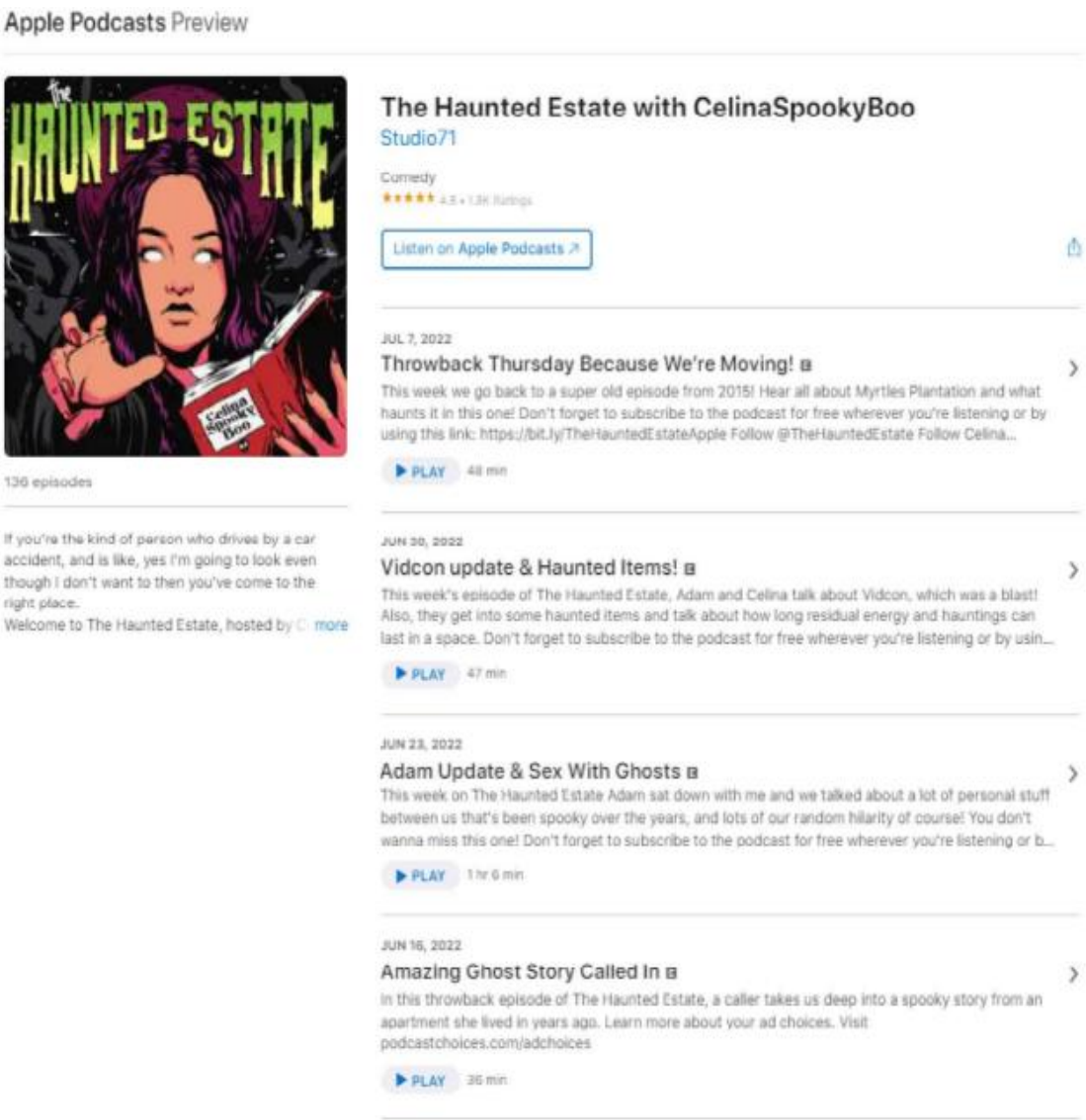
Applicant uses THE HAUNTED ESTATE in connection with an entertainment program series he presents via videos and podcasts. Applicant states that "Applicant's YouTube® channel has approximately 71.9K subscribers and the Applicant's videos have been viewed over 1.975 million times. Applicant has posted over 92 videos on YouTube®…. Additionally, Applicant's podcast can be viewed on Spotify® and Apple Podcasts®."[5]

[5] Applicant's main brief, 6 TTABVUE 3. There is no dispute that THE HAUNTED ESTATE is potentially registrable as the title of an entertainment program series. *See In re MCDM Prods., LLC*, 2022 WL 714785, *2 n.3 (TTAB 2022) (name of a series has a trademark function). Applicant's Supplemental brief, 12 TTABVUE 4 (quoting TMEP §1301.02(d)); Examining Attorney's brief, 14 TTABVUE 11-12.

A. **The Specimens**

Applicant's specimens of use, submitted over the course of prosecution, consist of advertising and rendering specimens. For example:

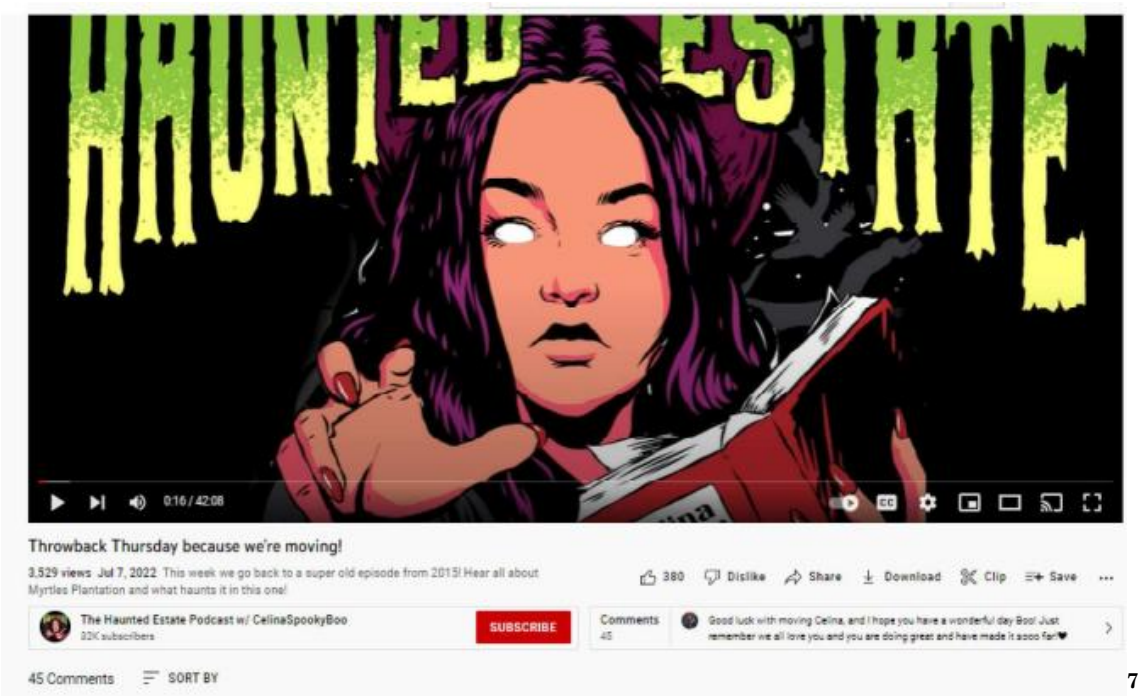
- **Applicant's podcast preview page on Apple.com**



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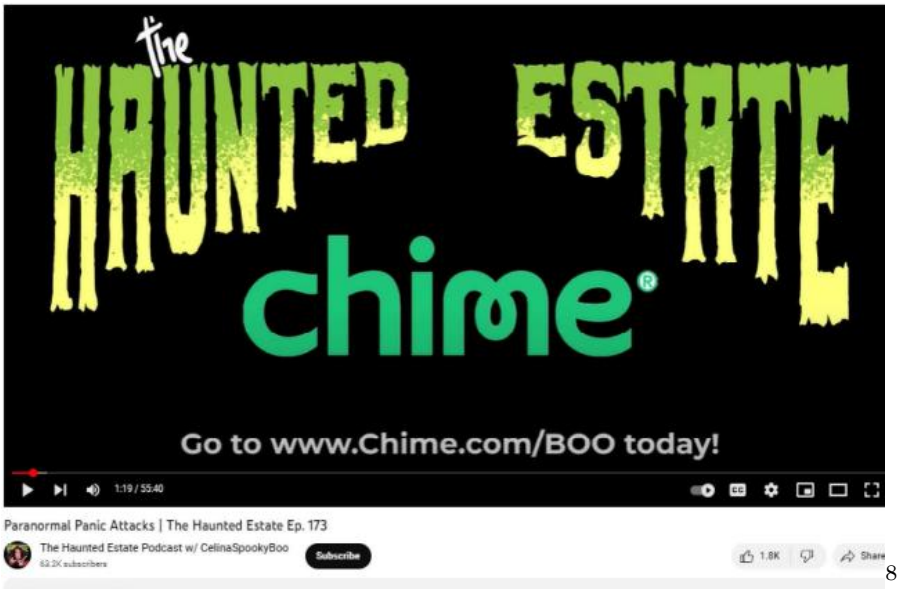
[6] Aug. 3, 2022 Application at 8; Aug. 12, 2024 Response to Office Action at 13.

- **Applicant's launch screen on YouTube**



[7]

- **A screenshot during play of video on YouTube**



[8]

[7] Aug. 3, 2022 Application at 9; Jan. 23, 2024 Response to Office Action at 13.

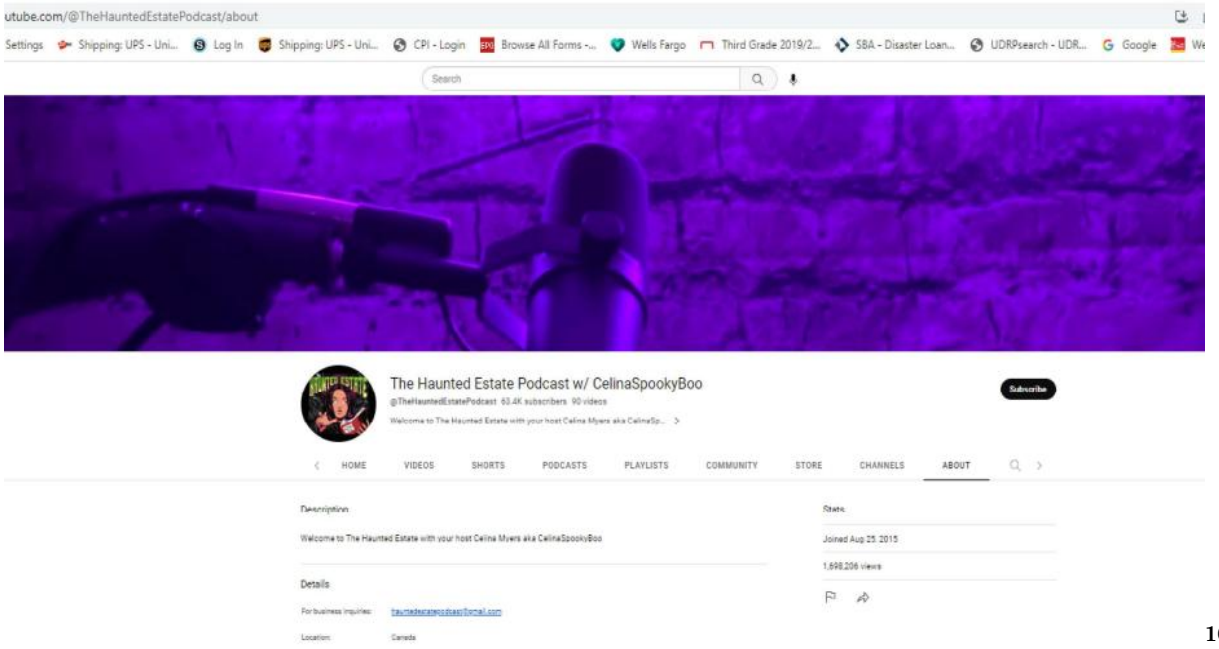
[8] June 24, 2023 Response to Office Action at 12; Aug. 3, 2022 Response to Office Action at 9; Jan. 23, 2024 Response to Office Action at 13.

- **Another screenshot during play of video on YouTube**



[9]

- **Applicant's homepage on YouTube**



[10]

[9] June 24,2023 Response to Office Action at 13; Jan. 23, 2024 Response to Office Action at 14.

[10] June 24, 2023 Response to Office Action at 11; Jan 23, 2024 Response to Office Action at 12; Aug. 12, 2024 Response to Office Action at 12.

The preview page specimens on Apple.com and home page specimens on YouTube may be categorized as advertising specimens, as they show the mark displayed in marketing and promoting services. TMEP § 1301.04(f)(ii). The remaining specimens, consisting of "launch" screens or screenshots taken during a video or podcast, are rendering specimens, as they show the mark used in the performance of services. TMEP § 1301.04(h)(iv)(B) (title or launch screens may be acceptable specimens).

The primary issue, as framed by the Examining Attorney, is whether these specimens evidence use of the mark in connection with the services recited in the Application.

B. The Refusals

The Examining Attorney's two grounds for refusal dovetail with one another. First, she reasons, because the specimens show use of Applicant's mark, THE HAUNTED ESTATE, on podcasts, they do not show use in connection with "entertainment services in the nature of development, creation, production and post-production of multimedia entertainment content," the activities recited in the Application.[11] She maintains that "the specimens' use of the applied-for mark appears to more closely indicate that applicant provides the **content** of entertainment podcasts to consumers, not development, creation, production, and postproduction services."[12]

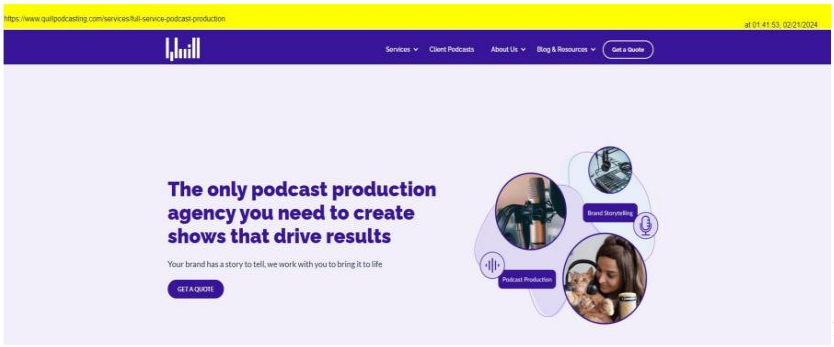
Second, the Examining Attorney reasons, because the activities recited in the

[11] Examining Attorney's brief, 14 TTABVUE 8, 13.

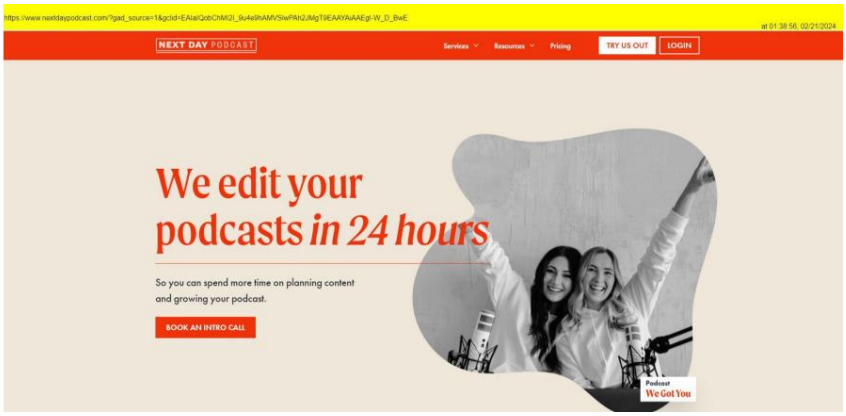
[12] *Id.*, 14 TTABVUE 7 (emphasis added).

Application are ancillary means to producing the end podcasts, they are not separate and independent services; they benefit Applicant, not others.[13] Consequently, she concludes, they are not registrable services.[14]

To illustrate the distinction between providing development, creation, production and post-production services on the one hand, and providing an entertainment service in the nature of a podcast on the other, the Examining Attorney provides the following third-party examples:



[15]



[16]

[13] *Id.*, 14 TTABVUE 9-10, 13.

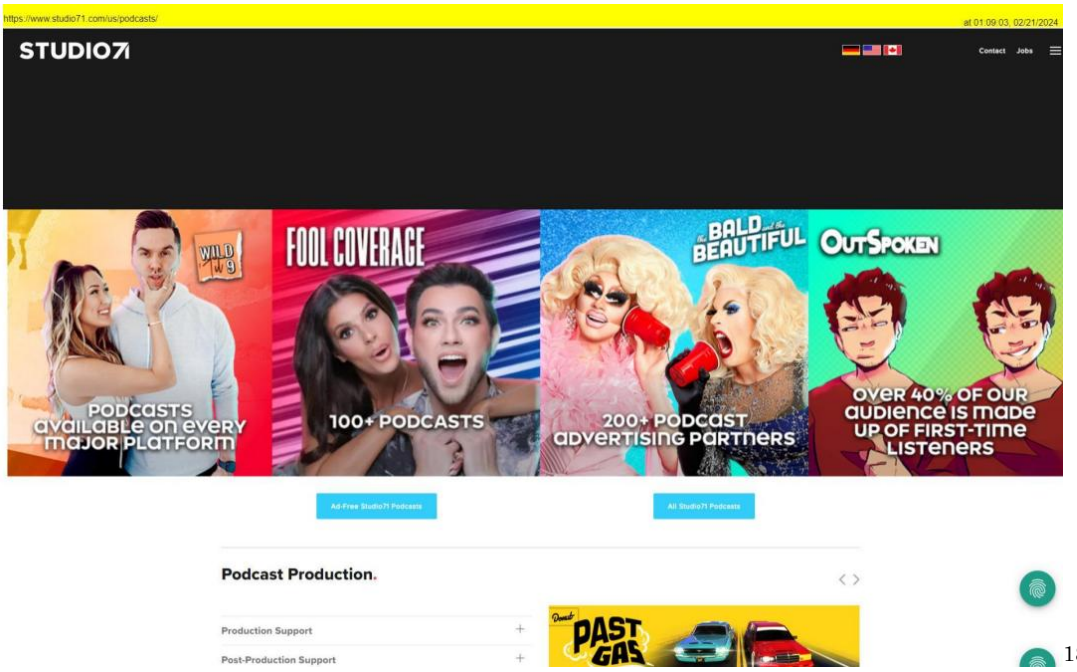
[14] *Id.*, 14 TTABVUE 8-9.

[15] QuillPodcasting.com, Feb. 21, 2024 Office Action (request for reconsideration denied) at 45.

[16] NextDayPodcast.com, Feb. 21, 2024 Office Action (request for reconsideration denied) at 35.



[17]



[18]

C. **Analysis**

The issues, then, are whether the specimens show use of the mark in connection with the activities recited in the Application, and whether those activities are

[17] ContentMonsta.com, Feb. 21, 2024 Office Action (request for reconsideration denied) at 17.

[18] Studio71.com, Feb. 21, 2024 Office Action (request for reconsideration denied) at 5.

registrable services. Because these two issues dovetail with one another, the resolution of the first resolves the second.

We agree with the Examining Attorney that the specimens do not show use of the mark in connection with the activities recited in the Application. Applicant states that he is a content provider, defined as "a person or entity that provides information or entertainment content for use on the internet or electronic media." TMEP § 1402.11(a)(ii). The Examining Attorney agrees.[19] The specimens show that Applicant provides entertainment services in the form of podcasts in his particular field. For example:



[20]

None of the specimens, however, shows Applicant providing production services. Production services are exemplified by the third-party examples set forth above; producers provide the means by which content providers provide their content. In fact, the Examining Attorney notes that one producer, Studio71, appears to have

[19] Applicant's main brief, 6 TTABVUE 7; Examining Attorney's brief, 14 TTABVUE 7.

[20] Aug. 3, 2022 Application at 8; Aug. 12, 2024 Response to Office Action at 13.

provided the production services supporting Applicant's podcasts. Notice that Applicant's podcast preview page on Apple.com credits "Studio71":



[21]

The specimens thus show that Applicant's mark, THE HAUNTED ESTATE, has been used in commerce in a way that would tend to create an association in the minds of purchasers with Applicant's podcasts. 37 C.F.R. § 2.56(b)(2); *JobDiva, Inc.*, 843 F.3d at 941. But they do not show use as a service mark with respect to the services recited in the application, "entertainment services in the nature of development, creation, production and post-production of multimedia entertainment content." *See Bose Corp.*, 546 F.2d at 897; *Fallon*, 2020 WL 6255423, at *4; Trademark Rule 2.56(a), 37 C.F.R. §§ 2.56(a).

IV. Conclusion

On consideration of the applicable law, evidence, and arguments, we find that Applicant's specimens fail to demonstrate use of the mark, THE HAUNTED ESTATE, in connection with Applicant's recited services. Because this first ground

[21] *Id.*

for refusal resolves the appeal, we need not reach the second. *In re Suuberg*, 2021 WL 5944419, *5 (TTAB 2021).

Decision: The refusal to register Applicant's mark is affirmed.