

On July 12, 2019, the USPTO refused to register the Hellion trademark for Austin Arthur (the Applicant) because a likelihood of confusion existed with U.S. Registration Numbers 4916432 and 4489936. This is the Applicant's response.

As an initial matter, the Applicant withdraws the application as it pertains to International Class 025.

However, the Applicant seeks a trademark for International Classes 009 and 041. A likelihood of confusion does not exist between the Applicant's mark and U.S. Registration Numbers 4916432 and 4489936.

The Applicant is known as Hellion. He is a Los Angeles based rap recording artist, performer, and producer. He has produced numerous works for hip hop and rap artists throughout Southern California and has gained a reputation as a respected rap producer and artist. He has also released music as the principle composer and author of Love in Future Times. His music has been streamed over 2 million times on iTunes and Spotify. The Applicant's royalties are paid to him by ASCAP under his performance name Hellion. The Applicant, under his stage persona of Hellion, has over 10,000 Instagram followers. See <https://www.instagram.com/hellion/>. The overwhelming majority of the Applicant's followers are under 24 years of age and female. See *Appendix*. The Hellion logo is block lettering with pastel pink coloring. See *Appendix*.

By contrast, Midnite Hellion (Registration Number 4916432) is a traditional heavy metal and thrash metal trio that is based in Trenton, New Jersey. See <https://www.midnitehellion.com>. Their logo is comprised of cob-webbed style lettering. The band has approximately 844 followers on Instagram. See <https://www.instagram.com/midnitehellion/>. The band plays sporadic shows throughout the New Jersey area.

Hellion (Registration Number 4489936) is a clothing company. An internet search reveals several clothing companies that sell t-shirts and other apparel under the Hellion brand. These manufacturers sell clothing that emphasizes leading the "Hellion lifestyle" and/or occult imagery.

The Ninth Circuit uses the following eight factors to determine the likelihood of confusion: (1) the strength of the mark; (2) the proximity of the goods; (3) the similarity of the marks; (4) evidence of actual confusion; (5) the marketing channels used; (6) the type of goods and the degree of care likely to be exercised by the purchaser; (7) the defendant's intent in selecting the mark; and, (8) the

likelihood of expansion of the product lines. *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir.1979).

#### A. Likelihood of Confusion with Midnite Hellion

With regard to the strength of the Hellion mark, the word Hellion is suggestive of the quality of the Applicant's rap music, and its commercial strength has been demonstrated through recognition via social media and online streaming services. The Applicant's music has been streamed over 2 million times on iTunes and Spotify. See <https://open.spotify.com/artist/0D1NQXgNuNp1YUyZhx8bFn> and <https://music.apple.com/us/artist/l-i-f-t/1342443600>.

The Applicant has successfully marketed his music via the internet and national tours. Midnite Hellion plays sporadic shows in the New Jersey area. Additionally, the Applicant and Midnite Hellion are providing different products. The Applicant is a solo rap performer that is providing music to a rap and hip-hop audience that is predominately female and young. Midnite Hellion is a heavy metal trio that is providing heavy metal music to a heavy metal audience that is predominately male and older than the Applicant's audience.

Hellion and Midnite Hellion are dissimilar marks. The use of the word "midnite" emphasizes the gothic nature of Midnite Hellion's heavy metal music. The Applicant's mark, Hellion, simply suggests that the Applicant's rap music is wild and breaks the mold of typical rap music.

There is no evidence of actual confusion between Hellion and Midnite Hellion. Furthermore, music consumers know which types of music they prefer. Heavy metal audiences and rap audiences generally do not overlap. The probability that a Midnite Hellion fan will buy a track from Hellion is very low.

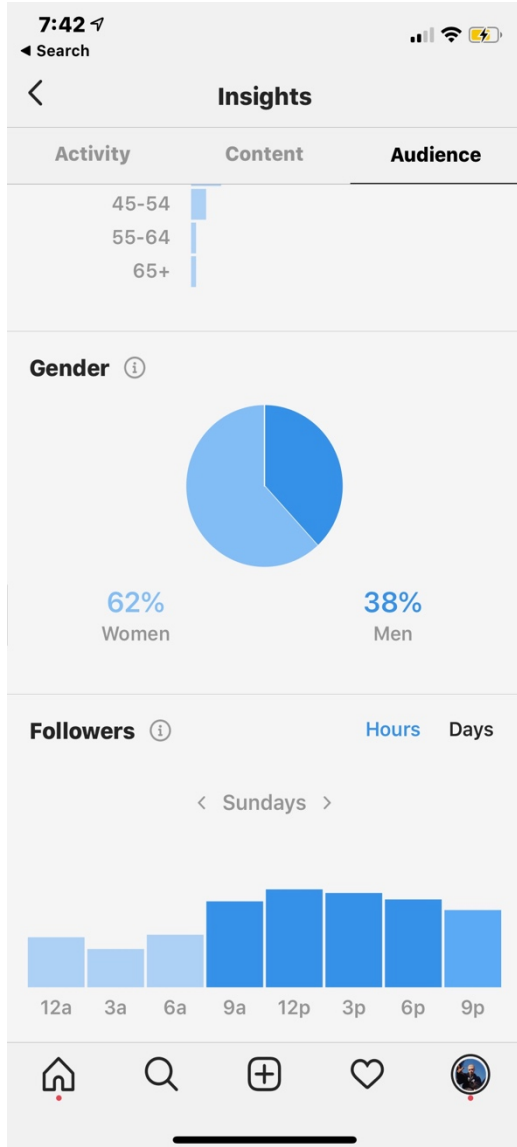
In conclusion, the Applicant respectfully points to *Kibler v. Hall*, 843 F.3d 1068 (6<sup>th</sup> Cir. 2016) as dispositive precedent in this case. The Sixth Circuit found that DJ Logic and Logic were both entitled to trademark protection and that a likelihood of confusion did not exist between the marks. The Applicant's case is analogous because the audiences, musical styles, musical presentation, and logos of the relevant parties are so dissimilar that there is a very low probability that there will be a likelihood of confusion between Hellion and Midnite Hellion.

## B. Likelihood of Confusion with Hellion Apparel

With regard to a likelihood of confusion between the Applicant's mark and Hellion apparel, there is no likelihood of confusion because the goods and services are unrelated. Hellion Apparel only produces and markets clothing. Hellion apparel is not in the music business. The Applicant markets his music through Spotify and touring. His goods are digital downloads and live performances. Finally, the Applicant has withdrawn his application to make apparel with the Hellion mark. Therefore, a likelihood of confusion does not exist with Hellion apparel.

# Appendix

## Instagram Statistics for Hellion



Hellion Logos

