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Sept. 7, 2006

THIS OPINION IS NOT  
CITABLE AS PRECEDENT  
OF THE TTAB

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Oct. 19, 2006

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re John Taddeo

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Serial No. 76508763

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Ronald E. Shapiro of Miles & Stockbridge PC for John Taddeo.

Stacy B. Wahlberg, Trademark Examining Attorney, Law Office 113 (Odette Bonnet, Managing Attorney).

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Before Seeherman, Grendel and Rogers, Administrative Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register of the mark **VOODOO TIKI** (in standard character form) for goods identified in the application as "tequila."<sup>1</sup>

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<sup>1</sup> Serial No. 76508763, filed April 22, 2003. The application is based on use in commerce under Trademark Act Section 1(a), 15 U.S.C. §1051(a), and March 27, 2003 is alleged to be the date of first use of the mark anywhere and the date of first use of the mark in commerce. As originally filed, the application sought registration of the mark VOODO TIKI TEQUILA, with a disclaimer of TEQUILA. During prosecution, the mark was amended first to VOODOO TIKI TEQUILA, and then amended again to VOODOO TIKI.

At issue in this appeal is the Trademark Examining Attorney's final refusal to register applicant's mark on the ground that, as applied to applicant's goods, the mark so resembles each of two previously-registered marks (owned by different owners) as to be likely to cause confusion, to cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. §1052(d).

The first cited registration is Registration No. 2401153 (the '153 registration), which is of the mark **DIXIE CRIMSON VODOO ALE** (in standard character form; CRIMSON and ALE disclaimed) for goods identified as "beer."<sup>2</sup>

The second cited registration is Registration No. 2703243 (the '243 registration), which is of the mark **REDRUM VODOO SPICED RUM** (in standard character form; SPICED RUM disclaimed) for goods identified as "distilled spirits, flavored rum."<sup>3</sup>

Both applicant and the Trademark Examining Attorney submitted evidence, and both filed main appeal briefs. An oral hearing was held. We affirm the refusal to register as to both of the cited registrations.

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<sup>2</sup> Issued November 7, 2000. This registration is owned by Dixie Brewing Company, Inc.

<sup>3</sup> Issued April 1, 2003. This registration is owned by Three-D Spirits, Inc.

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue (the *du Pont* factors). See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We turn initially to the second *du Pont* factor, i.e., the similarity or dissimilarity of the goods. We find that applicant's "tequila" is related and similar to the "beer" identified in the '153 registration, and to the "distilled spirits, flavored rum" identified in the '243 registration. Indeed, applicant's "tequila" is encompassed within, and thus legally identical to, the broadly worded "distilled spirits" identified in the '243 registration. The Trademark Examining Attorney has submitted use-based third-party registrations for marks covering both tequila and beer, and both tequila and rum. Although such registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they

nonetheless have probative value to the extent that they serve to suggest that the goods listed therein are of a kind which may emanate from a single source under a single mark. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988). Also, the Trademark Examining Attorney has submitted excerpts of stories obtained from the NEXIS database and from the Internet showing that both tequila and rum and tequila and beer are complementary goods which can be used together as ingredients in mixed drinks. Finally, we note that the Board and the courts have repeatedly found that different types of alcoholic beverages are related products for purposes of the second *du Pont* factor. See, e.g., *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) (beer and tequila); *In re Majestic Distilling Co.*, *supra* (malt liquor and tequila); and *Somerset Distilling Inc. v. Speymalt Whiskey Distributors Ltd.*, 14 USPQ2d 1539 (TTAB 1989) (scotch whiskey and distilled gin and vodka).

For these reasons, we find that applicant's goods are similar and related to the goods in each of the cited registrations, and that the second *du Pont* factor therefore weighs in favor of a finding of likelihood of confusion in

each instance. We note that applicant has not contended otherwise.

The third *du Pont* factor requires us to determine the similarity or dissimilarity of the trade channels for the respective goods. We find that applicant's "tequila," and the "beer" and "distilled spirits, flavored rum" identified in the respective cited registrations, are or could be marketed in the same trade channels and to the same classes of purchasers. The Trademark Examining Attorney has submitted printouts from the Internet websites of several restaurants and liquor retailers which show that these products are marketed together. Such evidence is probative evidence of likelihood of confusion under the third *du Pont* factor. See *In re Majestic Distilling Co., supra*. We thus find that the third *du Pont* factor weighs in favor of a finding of likelihood of confusion as to each of the cited registrations. Again, applicant has not contended otherwise.

Under the fourth *du Pont* factor, we find that the alcoholic beverage products identified in applicant's application and in each of the cited registrations are ordinary consumer goods which are purchased by ordinary consumers without any special care or sophistication. Applicant has not contended otherwise. Therefore, the

fourth *du Pont* factor weighs in favor of a finding of likelihood of confusion as to each of the cited registrations.

The sixth *du Pont* factor requires us to consider the number and nature of similar marks in use on similar goods. Applicant has submitted printouts of approximately fifteen third-party registrations of marks which include the term VOODOO, but the goods and services identified in those registrations are far afield from alcoholic beverages,<sup>4</sup> and they thus are not probative evidence of the weakness of VOODOO as a mark for alcoholic beverages. Moreover, such third-party registrations are not probative evidence of third-party use under the sixth *du Pont* factor. See *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992). Applicant also has submitted Internet evidence showing that there are numerous mixed drinks with the word "voodoo" in their names, such as "Voodoo Sunrise," "Voodoo Doll," "Voodoo Tea," "Voodoo Lady," "Big Bad Voodoo Kooler," "Vampire Voodoo," "Green Voodoo" and "Neon Voodoo." Even if we were to assume that

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<sup>4</sup> Only two of the third-party registrations of VOODOO marks cover goods which are remotely related to the goods at issue in this case. Registration No. 2286729 is of the mark VOODOO RAIN for "non-alcoholic drinks, namely, herbal-enhanced non-carbonated soft drinks." Registration No. 2578196 is of the mark VOODOO QUEEN OLD NEW ORLEANS for "coffee; ready to drink coffee; whole

these drink names are familiar to consumers, however, we find that they are not evidence, under the sixth *du Pont* factor, of third-party trademark use of VOODOO for alcoholic beverage products, per se. On this record, the only VOODOO trademarks associated with alcoholic beverage products are applicant's and those of the cited registrations. We certainly cannot conclude that the use of VOODOO in marks for alcoholic beverages is so widespread that purchasers have become conditioned to distinguish between such marks by looking to their other elements. See *Palm Bay Imports, Inc., supra*. For these reasons, we find that the sixth *du Pont* factor is neutral in this case, or at best weighs only slightly in applicant's favor.

We turn finally to the first *du Pont* factor, which requires us to determine the similarity or dissimilarity of the marks when viewed in their entirety in terms of appearance, sound, connotation and overall commercial impression. *Palm Bay Imports, Inc., supra*. The test, under the first *du Pont* factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression

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coffee beans; medium and dark roasted coffee beans; ground coffee."

that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re Chatam International Inc.*, *supra*; *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

We find, initially, that the word VOODOO is the dominant feature in the commercial impression created by each of the cited registered marks, DIXIE CRIMSON VOODOO ALE and REDRUM VOODOO SPICED RUM. Applicant itself acknowledges that "[i]n the mark DIXIE CRIMSON VOODOO ALE, 'DIXIE' refers to the southern states of the U.S. and 'CRIMSON ALE' describes the color and nature of the goods. In the mark REDRUM VOODOO SPICED RUM, 'REDRUM' describes the color of the goods, and 'SPICED RUM' describes the flavor and nature of the goods." (Applicant's brief at 1.) The words CRIMSON and ALE and SPICED RUM indeed are



descriptive of the respective goods, and they are disclaimed in the registrations.

In contrast, "VOODOO" is an arbitrary term, or at most a slightly suggestive term, as applied to the alcoholic beverage products identified in the respective registrations. Applicant argues to the contrary that VODOO is a "highly suggestive term," noting that the word connotes "black magic, conjuring and witchcraft"<sup>5</sup> and that "when this term is used in connection with alcoholic beverages, it is used to suggest magical properties or effects." (Applicant's brief at 2.) In support of this contention, applicant has submitted a printout from an Internet website advertising the '153 registrant's goods, which refers to registrant's BLACKENED VODOO beer as "dark, mysterious," and to registrant's CRIMSON VODOO beer

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<sup>5</sup> The record includes dictionary definitions of "voodoo." The American Heritage Dictionary of the English Language (4<sup>th</sup> ed. 2000) defines "voodoo" as, inter alia, "a religion syncretized from Roman Catholic ritual elements and the animism and magic of slaves from West Africa, in which a supreme God rules a large pantheon of local and tutelary deities, deified ancestors, and saints, who communicate with believers in dreams, trances, and ritual possessions," and as "a charm, fetish, spell, or curse holding magic power for adherents." Webster's Third New International Dictionary of the English Language (Unabridged) defines "voodoo" as "voodooism," which itself is defined, inter alia, as "a religion originating in Africa as a form of ancestor worship, practiced chiefly by Negroes of Haiti and to some extent other West Indian islands and the U.S., and characterized by propitiatory rites and use of the trance as a means of communicating with animistic deities," and as "the practice of black magic."

as "true to the spirits of New Orleans." Applicant also relies on Internet evidence, discussed previously, showing that there are numerous mixed drinks with the word "voodoo" in their names.

We cannot agree that this evidence establishes that VOODOO is "highly suggestive" as applied to alcoholic beverages. Contrary to applicant's contention, beer and rum (and tequila) cannot readily be said to have "magical properties or effects" except in the most fanciful sense. Nor is there any evidence that alcoholic beverages are used in conjunction with the practice of voodoo. We find that the term VOODOO therefore is arbitrary or, at best, only slightly and whimsically suggestive of the goods. The fact that "voodoo" appears in the names of various mixed drinks establishes that it is a popular motif for alcoholic beverage names, but it does not establish that the term is in any way descriptive or highly suggestive as applied to such drinks. Thus, although "voodoo" may have the connotation of "black magic, conjuring or witchcraft" as applicant contends, that connotation is so tenuous as applied to alcoholic beverages that the term can be considered, as stated above, only slightly and whimsically suggestive of such goods. Further, as noted previously, with respect to the two cited marks the element VOODOO is

clearly the dominant element of these marks, and we therefore accord more weight to this term. *See In re Chatam International Inc., supra*, and *In re National Data Corp., supra*.

Giving due weight to the dominance of VOODOO in the commercial impression created by each of the cited registered marks, we find that applicant's mark VOODOO TIKI is similar to each of the cited registered marks because it too includes the arbitrary or slightly suggestive term VOODOO as a prominent if not dominant feature in its commercial impression. The word VOODOO looks the same, sounds the same, and means the same thing in each of the marks. There are obvious points of dissimilarity between applicant's mark and each of the cited registered marks in terms of appearance, sound and meaning, i.e., the presence of the word TIKI in applicant's mark and the presence of the additional words DIXIE, CRIMSON and ALE in the '153 registration and the additional words REDRUM and SPICED ALE in the '243 registration. However, we find that the basic similarity in the respective marks' overall commercial impressions which results from the presence of the term VOODOO in each mark outweighs these points of dissimilarity in the marks. Purchasers who are familiar with beer sold under the mark DIXIE CRIMSON VOODOO ALE are likely to

assume, upon seeing VOODOO TIKI for tequila, that these alcoholic beverages originate from, or are sponsored by, a single source. Similarly, consumers who know of REDRUM VOODOO SPICED RUM for distilled spirits and flavored rum are likely to assume, upon encountering VOODOO TIKI tequila, that the goods emanate from a single source.

We recognize that both of the cited registrations, which issued to separate entities, contain the word VOODOO, and that this is the only word common to all three marks. In fact, applicant argues that the two cited registered marks, DIXIE CRIMSON VOODOO ALE and REDRUM VOODOO SPICED RUM, are more similar to each other than either is to applicant's mark VOODOO TIKI, and that if the two cited marks can coexist on the register, applicant's mark likewise should be registered. We are not persuaded. It is settled that the Board is not bound by prior decisions of examining attorneys, and that each case must be decided on its own merits and on the basis of its own record, in accordance with relevant statutory, regulatory and decisional authority. See, e.g., *In re International Flavors & Fragrances Inc.*, 183 F.3d 1361, 51 USPQ2d 1513 (Fed. Cir. 1999.) More specifically, we are not bound by the decision of the examining attorney who approved registration of the REDRUM VOODOO SPICED RUM mark

notwithstanding the preexistence of the DIXIE CRIMSON VODOO ALE registration. Our mandate is to evaluate the likelihood of confusion between applicant's mark and each of the cited marks, and if we determine that such confusion is likely, we must affirm the refusal of registration. See *In re Thomas*, 79 USPQ2d 1021 (TTAB 2006); *In re Wilson*, 57 USPQ2d 1863 (TTAB 2001); and *In re Perez*, 21 USPQ2d 1075 (TTAB 1991).

We find that applicant's mark is similar to each of the cited registered marks, and that the first *du Pont* factor weighs in favor of a finding of likelihood of confusion in each case.

For the reasons discussed above, and considering all of the evidence of record as it pertains to the *du Pont* factors, we conclude that a likelihood of confusion exists as between applicant's mark and each of the cited registered marks. To the extent that any doubts might exist as to the correctness of this conclusion, we resolve such doubts against applicant. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The refusals to register are affirmed.