

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Mailed:
September 30, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Filini Wine Company, LLC

Serial No. 77843310

Barry Strike of Strike & Techel for Filini Wine Company, LLC.

Andrea R. Hack, Trademark Examining Attorney, Law Office 108
(Andrew Lawrence, Managing Attorney).

Before Cataldo, Mermelstein and Lykos, Administrative Trademark
Judges.

Opinion by Lykos, Administrative Trademark Judge:

Filini Wine Company, LLC ("applicant") filed an application to register the mark FILINI, in standard character format, for "wine" in International Class 33.¹

The Trademark Examining Attorney refused registration of applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark so

¹ Application Serial No. 77843310, filed October 7, 2009, pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a *bona fide* intent to use in commerce, and a statement that "Filini" has no meaning in a foreign language.

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resembles the registered mark FELLINE, also in standard character format, for "wines" in International Class 33,² that when used on or in connection with applicant's identified goods, it is likely to cause confusion or mistake or to deceive.³

Upon final refusal of registration, applicant filed a timely appeal and request for reconsideration. Upon the examining attorney's denial of the request for reconsideration, proceedings herein were resumed. Both applicant and the examining attorney filed briefs. For the reasons discussed below, the Board affirms the refusal to register.

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry

² Registration No. 3088903, issued May 2, 2006 on the Supplemental Register pursuant to Section 44(e) of the Trademark Act, based on Italian foreign registration no. 873892.

³ The examining attorney also initially refused registration on the ground that applicant's mark was primarily merely a surname, but withdrew that refusal upon applicant's request for reconsideration.

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mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks"). We discuss each of the *du Pont* factors as to which applicant or the examining attorney submitted argument or evidence.

First, we consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. The question 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 their entireties that confusion as to the source of the goods or services 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. *In re Jack B. Binion*, 93 USPQ2d 1531 (TTAB 2009); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

The cited registration consists solely of the term FELLINE. Applicant's mark is FILINI. Applicant argues that registrant's mark "suggests a fanciful spelling of the term 'feline' meaning 'of or belonging to the family of Felidae, including lions, tigers, jaguars and wild domestic cats.'" Applicant's brief, unnumbered p. 3, quoting registrant's response to Office Action, dated June 21, 2005, attached to applicant's response to Office

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Action. By contrast, applicant maintains that its mark is a coined term with no other meaning, but to the extent if any that it does have a meaning, it would be perceived as denoting a type of pasta.

While acknowledging the differences in the marks, we find that the visual similarities outweigh these differences. Both begin with the letter "F," have the letter(s) "L" in the middle, and the last consonant is an "N." Both also contain the same vowels - "E" and "I."

More importantly, while there is no correct pronunciation of a trademark, we find that applicant's mark FILINI and registrant's mark FELLINE could, and indeed, are likely to be pronounced in an identical manner. See *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 484 (TTAB 1985); *In re Energy Telecomm. & Elec. Assoc.*, 222 USPQ 350, 351 (TTAB 1983). The first letter "I" in applicant's mark is pronounced almost identically to the first letter "E" in registrant's mark. In addition, the single letter "L" is pronounced identically to the double letters "L." The final letter "I" in applicant's FILINI mark is likely to be pronounced in the same manner as final letter "E" in registrant's mark FELLINE - that of the long vowel "e" sound - "ē." Indeed, applicant acknowledges in its brief that the final letter "I" in its FILINI mark is likely to be pronounced by consumers in this manner. Applicant's brief,

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unnumbered p. 3. Similarity in sound alone may be sufficient to support a finding of likelihood of confusion. See *RE/MAX of Am., Inc. v. Realty Mart, Inc.*, 207 USPQ 960, 964 (TTAB 1980); *Molenaar, Inc. v. Happy Toys Inc.*, 188 USPQ 469, 471 (TTAB 1975).

Applicant contends that the average consumer is likely to believe that the final letter "E" in registrant's mark FELLINE is silent, similar to the words "feline, sure, aware." Applicant's brief, unnumbered p. 3. This argument is not convincing, however, because registrant's mark includes the double consonant letter "L." Clearly, the word "feline" is pronounced with a silent letter "e" because of the single consonant "L." The double consonant letter "L" in registrant's mark makes it more likely that the final letter "E" will be pronounced as a long vowel sound.

Therefore, we find that the similarities outweigh the differences of the marks as to their sight, sound, connotation, and commercial impression, and this *du Pont* factor weighs in favor of finding a likelihood of consumer confusion.⁴

⁴ In her brief, the examining attorney has requested that the Board take judicial notice of the pronunciation of the word "linguine" from the online dictionary "YourDictionary.com" and the surnames "Filarete" and "Bramente" from the online references "The Free Dictionary" and "Dictionary.com" to show that the pronunciation of the final letter "e" in Italian surnames is not silent. In this instance, the Board declines to exercise its discretion to take judicial notice inasmuch as it is unclear whether these online dictionaries are available in

Next, we consider the goods and channels of trade. In the absence of specific limitations in the registration or application, we must presume that applicant's and registrant's goods will travel in all normal and usual channels of trade and methods of distribution. *Squirtco v. Tomy Corporation*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983). See also *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992) (because there are no limitations as to channels of trade or classes of purchasers in either the application or the cited registration, it is presumed that the services in the registration and the application move in all channels of trade normal for those services, and that the services are available to all classes of purchasers for the listed services). Accordingly, the *du Pont* factors of the similarity of the services and the channels of trade favor a finding of likelihood of confusion as to the cited registrations.

Applicant does not dispute that the goods are identical and could occupy the same trade channels, but instead points to cases where confusion was not found even where the goods were identical. The cases relied upon by applicant are unpersuasive because in each instance, the Board found dispositive differences in the commercial impressions of the marks. For

print format. In any event, this evidence is not dispositive of the case.

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example, in *Jack Poust & Co. v. John Gross & Co.*, 460 F.2d 1076, 174 USPQ 149 (CCPA 1972), both goods were identical (wine); yet the Board's finding of no likelihood of confusion between CHERRY JULEP and CHERRY JUBILEE was affirmed on appeal on the basis that the words "julep" and "jubilee" were "distinctly different in meaning, significance and sound." *Id.* at 150. In addition, even in the case of *In re Sydel Lingerie Co., Inc.*, 197 USPQ 629 (TTAB 1977), where the marks at issue were identical, the Board found no confusion based on the dissimilarity in commercial impression when the marks were considered in relation to the goods. *Id.* at 630 (consumers will associate the mark "BOTTOMS UP" as applied to men's suits, coats and trousers with the drinking phrase, "drink up!" in contrast to the connotation that "BOTTOMS UP" would generate as applied to ladies' and children's underwear).

Applicant contends that registrant's mark is entitled to a narrower scope of protection because it is registered on the Supplemental Register, and therefore is not inherently distinctive. Applicant's argument is belied by the case law. It is well established that even marks deemed "weak" are still entitled to protection against the registration by a subsequent user of a similar mark for closely related goods and/or services. *In re Colonial Stores, Inc.*, 216 USPQ 793, 795 (TTAB 1982). *See also King Candy Co. v. Eunice King's Kitchen, Inc.*,

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496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974) ("Confusion is confusion. The likelihood thereof is to be avoided, as much between "weak" marks as between "strong" marks, or as between a "weak" and a "strong" mark."). This protection extends to marks, such as the registrant's mark here, that are registered on the Supplemental Register. See, e.g., *In re Clorox Co.*, 578 F.2d 305, 198 USPQ 337, 340 (CCPA 1978); *In re Hunke & Jochheim*, 185 USPQ 188 (TTAB 1975). In addition, the registrant's mark may over time acquire distinctiveness and be eligible for registration on the Principal Register.

Lastly, applicant argues that the Office is treating its application inconsistently because other applications for the mark FILINI and FILINI coupled with a design element, filed subsequent to applicant's mark, were approved for publication.⁵ We disagree. Prior decisions and actions of other trademark examining attorneys in registering different marks have little evidentiary value and are not binding upon the Office. *In re Sunmarks, Inc.*, 32 USPQ2d 1470, 1472 (TTAB 1994).

After considering applicant's arguments and evidence and the relevant *du Pont* factors, we find that because the marks are similar, the goods are identical, and the channels of trade and consumers are presumed to overlap, confusion is likely between

⁵ Application Serial Nos. 77952018 and 77952032, both for "restaurant and bar services" in International Class 43.

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applicant's FILINI and registrant's FELLINE mark. In that regard, we observe that, "[w]hen marks would appear on virtually identical ... [goods], the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines." See *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992), cert. denied, 506 U.S. 1034 (1994). See also *ECI Division of E-Systems, Inc. v. Environmental Communications Inc.*, 207 USPQ 443, 449 (TTAB 1980). To the extent there is any doubt, we resolve it, as we must, in registrant's favor. In *re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988).

Decision: The refusal to register is affirmed.