

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

Mailed:  
January 12, 2009

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Mercury-2 LTD

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Serial No. 78729582

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Sergei Orel of Law Office of Sergei Orel, Esq. for Mercury-2 LTD.

Christina M. Sobral, Trademark Examining Attorney, Law Office 109 (Dan Vavonese, Managing Attorney).

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Before Seeherman, Hairston and Zervas, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Mercury-2 LTD has appealed from the Examining Attorney's final refusal to register MERCURY in standard character format for vodka.<sup>1</sup> Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles

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<sup>1</sup> Application Serial No. 78729582, filed October 9, 2005, pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. §1051(b) (intent-to-use).

the mark MERCURY in typed form, previously registered for distilled spirits,<sup>2</sup> that if used on applicant's identified goods it is likely to cause confusion or mistake or to deceive.

As a preliminary matter, we note that applicant submitted numerous exhibits with its appeal brief. The Examining Attorney has objected to this material as being untimely filed. Trademark Rule 2.142(d) provides that the record in the application should be complete prior to the filing of the appeal. Accordingly, the Board will not consider the evidence submitted with applicant's appeal brief.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). We limit our discussion herein to those factors on which applicant and the Examining Attorney submitted arguments or evidence.

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<sup>2</sup> Registration No. 2559044, issued April 9, 2002; Sections 8 and 15 affidavits accepted and acknowledged.

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Here the marks are identical, a fact that applicant does not dispute. See response to first Office action, filed October 12, 2006, and request for reconsideration, filed October 20, 2007 (the registration "appears to be identical to the proposed mark"). This du Pont factor weighs heavily in favor of a finding of likelihood of confusion. Applicant's arguments that the differences in trade dress will avoid confusion, because the bottle it uses is different from the bottle registrant uses, is of no avail. We must determine likelihood of confusion based on the applied-for mark and the registered mark, not on what current trade dress may be.

The goods, too, are legally identical. The "distilled spirits" identified in the cited registration encompass the "vodka" identified in applicant's application. The Examining Attorney has submitted evidence showing that vodka is a type of distilled spirit. See definition of

"vodka" in Random House Unabridged Dictionary, © 1997: "an unaged, colorless, distilled spirit, originally made in Russia," as well as excerpts from various websites in which vodka is listed under or classified as a distilled spirit. Applicant has argued that the registrant actually uses its mark for gin, but this argument, too, is of no avail. Section 7(b) of the Statute provides, in part, that a certificate of registration of a mark is prima facie evidence of the registrant's exclusive right to use the mark on the goods specified in the registration. Thus, the question of likelihood of confusion must be determined based on an analysis of the mark as applied to the goods and/or services recited in applicant's application vis-à-vis the goods and/or services recited in the cited registration, rather than what the evidence shows the goods and/or services to be. See *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); *Canadian Imperial Bank of Commerce v. Wells Fargo Bank, N.A.*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Because applicant's goods are legally identical to the registrant's goods, they therefore must be deemed to be sold in the same channels of trade to the same classes of consumers. These du Pont factors, too, favor a finding of likelihood of confusion.

Applicant has argued that the term MERCURY is diluted for alcoholic beverages, but there is no evidence properly of record in support of this claim. Based on the evidence that is of record, MERCURY is an arbitrary and therefore strong mark for distilled spirits.

Based on the foregoing, and particularly because these are identical marks for legally identical goods, we find that applicant's mark MERCURY, if used on vodka, is likely to cause confusion with the registered mark MERCURY for distilled spirits.

Decision: The refusal of registration is affirmed.