

**THIS OPINION IS NOT A
PRECEDENT OF THE T.T.A.B.**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Constellation Wines U.S., Inc.

Serial No. 78803750

Stephen L. Baker, of Baker and Rannells PA for
Constellation Wines U.S., Inc.

Priscilla Milton, Trademark Examining Attorney, Law Office
110 (Chris A.F. Pedersen, Managing Attorney).

Before Quinn, Walters and Ritchie de Larena, Administrative
Trademark Judges.

Opinion by Ritchie de Larena, Administrative Trademark
Judge:

Constellation Wines U.S., Inc. filed application
Serial No. 78803750 for the mark BRICKSTONE CELLARS in
standard character format for "wine,"¹ in International
Class 33. The trademark examining attorney refused
registration under Section 2(d) of the Trademark Act of
1946, 15 U.S.C. §1052(d), on the ground that applicant's

¹ Application No. 78803750, filed January 31, 2006, based on
Section 1(a) of the Trademark Act of 1946, 15 U.S.C. §1051(a),
alleging first use and first use in commerce on June 1, 2001.
Applicant disclaimed the exclusive right to use CELLARS apart
from the mark as shown.

proposed mark BRICKSTONE CELLARS, when used in connection with "wine," so resembles the registered mark BRICKSTONES, when used in connection with "restaurant services,"² as to be likely to cause confusion.

Upon final refusal of registration, applicant filed a timely appeal. Both applicant and the examining attorney filed briefs. For the reasons discussed herein, the Board affirms the final refusal to register.

Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all of the relevant, probative evidence in the record. *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 or dissimilarities between the marks and the similarities or dissimilarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the

² Registration No. 1702302, issued July 21, 1992, based on first use and first use in commerce October 17, 1990. Section 8 affidavit accepted.

essential characteristics of the goods and differences in the marks").

The similarity or dissimilarity of the marks
in their entirety.

The first *du Pont* factor focuses on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 9 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1988). In comparing the marks, we are mindful that the test 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 so that confusion as to the source of the goods and/or services offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general

rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Both registrant's and applicant's marks contain the identical term "BRICKSTONE" as the dominant portion of the mark. In registrant's mark, the term is set forth in its plural form, BRICKSTONES. In applicant's proposed mark, the term is simply modified by the additional term "CELLARS," for which the examining attorney submitted a dictionary definition: "1. A storage space or room below ground level in a house; 2. A stock of wine."³ Thus, the word CELLARS is merely descriptive for wine, and applicant disclaimed it in response to the first Office action. Descriptive matter is generally viewed as a less dominant or significant feature of a mark. *In re National Data Corp.*, 224 USPQ 749, 750 (Fed. Cir. 1985) ("Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion'").

In sum, applicant's mark incorporates the entire registered mark, absent the plural "s." Even discerning

³ The Compact Oxford English Dictionary of Current English (3rd Ed. 2005).

consumers may easily overlook that minor distinction. Phonetically as well as visually, the absence of the letter "s" is likely to be unnoticed. With such highly similar marks, the resulting commercial impression is also likely to be the same, with potential consumers merely extrapolating that applicant's BRICKSTONE CELLARS is particular to wine.

There is no dictionary definition for the word "BRICKSTONES" in single or plural.⁴ It appears merely to be a composite of the words "brick" and "stone."⁵

⁴ The Board may take judicial notice of dictionary definitions not included in the record. *The University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc.* 213 USPQ 594, 596 (Fed. Cir. 1982). The American Heritage Dictionary has no listing for "BRICKSTONES" in singular or plural, nor does the The Compact Oxford English Dictionary of Current English.

⁵ "Brick" is defined in noun form as: **1.** A molded rectangular block of clay baked by the sun or in a kiln until hard and used as a building and paving material. **2.** An object shaped like such a block: *a brick of cheese*. **3. Informal** A helpful, reliable person. "Stone" is defined in noun form as: **1a.** Concreted earthy or mineral matter; rock. **b.** Such concreted matter of a particular type. Often used in combination: *sandstone; soapstone*. **2.** A small piece of rock. **3.** Rock or a piece of rock shaped or finished for a particular purpose, especially: **a.** A piece of rock that is used in construction: *a coping stone; a paving stone*. **b.** A gravestone or tombstone. **c.** A grindstone, millstone, or whetstone. **d.** A milestone or boundary. **4.** A gem or precious stone. **5.** Something, such as a hailstone, resembling a stone in shape or hardness. **6. Botany** The hard covering enclosing the seed in certain fruits, such as the cherry, plum, or peach. **7. Pathology** A mineral concretion in an organ, such as the kidney or gallbladder, or other body part; a calculus. **8.** Inflected forms: pl. **stone** abbr. **st.** A unit of weight in Great Britain, 14 pounds (6.4 kilograms). **9. Printing** A table with a smooth surface on which page forms are composed. American Heritage Dictionary (4th ed. 2000).

Accordingly, the BRICKSTONES mark is arbitrary as applied to restaurant services, and therefore inherently strong. *See In re Opus One Inc.*, 60 USPQ2d 1812, 1814 (TTAB 2001). Meanwhile, the relevant, dominant portions of the marks are effectively identical in appearance and sound. Therefore, the first *du Pont* factor weighs heavily in favor of finding a likelihood of confusion.

The similarity or dissimilarity
and nature of the goods and services.

In analyzing the similarity or dissimilarity and relatedness of the goods and/or services, we must keep in mind that there is no rule that certain goods are *per se* related, such that there must be a likelihood of confusion from the use of similar marks in relation thereto. *See, e.g., In re Opus One Inc.*, 60 USPQ2d at 1814 (regarding wine and restaurant services); *Information Resources Inc. v. X*Press Information Services*, 6 USPQ2d 1034, 1038 (TTAB 1988) (regarding computer hardware and software); *Hi-Country Foods Corp. v. Hi Country Beef Jerky*, 4 USPQ2d 1169, 1171 (TTAB 1987) (regarding food products); *In re British Bulldog, Ltd.*, 224 USPQ 854, 855-56 (TTAB 1984) and cases cited therein (regarding clothing).

In particular, our precedent dictates: "To establish likelihood of confusion a party must show something more

than that similar or even identical marks are used for food products and for restaurant services." *Jacobs v. Int'l Multifoods Corp.*, 668 F2d 1234, 212 USPQ 641, 642 (C.C.P.A. 1982). The examining attorney here did provide that requisite "something more." In particular, the examining attorney offered four types of evidence to show the close relationship between registrant's restaurant services on the one hand, and applicant's wine on the other: (1) Third-party registrations for both identifications under the same mark; (2) Internet articles about restaurants offering "private label" wines; (3) Advertisements for customized "private label" wines; and (4) Direct evidence of restaurants that offer "private label" wines under the name and mark of the restaurant.

The examining attorney submitted multiple, use-based third-party registrations covering both "restaurant services" and "wine" under the same mark.⁶ To further show the relatedness of applicant's goods to registrant's services, the examining attorney submitted numerous Internet articles discussing the desirability of restaurants creating their own "private label" wines. To address applicant's

⁶ The examining attorney submitted five registrations with the first Office action, two more (plus a duplicate) with the final Office action, and nine more (plus two duplicates and a few nonprobative registrations) with the denial of reconsideration.

assertion that a "private label" wine may be offered under the name of the winery rather than the restaurant, the examining attorney then submitted advertisements for customized "private label" wines, showing that private labels may be created under anyone's name or mark at their command. Finally, and of high probative value, the examining attorney submitted direct evidence, in the form of Internet printouts, of various instances where restaurants are offering "private label" wines under the name and mark of the restaurant.

Applicant argues that restaurants do not generally offer their own "private label" wines under the name of the restaurant. In support of that assertion, applicant submitted five declarations, one from the president of a large wine retailer, one from the managing director of an inn, and three from individuals who assert that they consume large amounts of wine. The thrust of each of the declarations is that none of the declarants has heard of a restaurant that sells "private label" wine under its own mark, except that one of the individual declarants apparently has.

However, applicant's arguments and the corresponding assertions of the declarations are controverted by the direct evidence offered by the examining attorney (and by

one of the individual declarants). Certainly, an expert's lack of knowledge about restaurants' private label wines does not indicate the absence of their existence, especially when the record shows us otherwise.

Applicant further relies on the findings of a recent Federal Circuit case to support its argument that wine and restaurant services are not sufficiently related as to bar applicant's registration. See *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059 (Fed. Cir. 2003). In the *Coors* case, the Federal Circuit held that although applicant's proposed mark for beer contained the same words as registrant's mark for restaurant services, applicant's registration should be allowed. The court based its decision on the facts of that case, including the significant design differences between the marks; the widespread third-party use of the same mark for similar services; and the lack of a very clear connection on the record between beer and restaurant services.

Applicant argues that if beer and restaurant services are not sufficiently related, then wine and restaurant services are even less so. To support that assertion, applicant submitted the first page of results of hit lists for Internet searches for variations alternating "beer"/"brewery"/etc. with "wine"/"winery"/etc. paired with

"restaurant." This highly unscientific and unsubstantiated submission of evidence is not at all persuasive to the Board. Among other things, applicant did not submit all of the results, but only the first page, apparently to show simply the number of hits. Of course our analysis is qualitative though, and cannot be based on pure number of hits out of context of their usage. See *In re Fitch IBCA, Inc.*, 64 USPQ2d 1058, 1060 (TTAB 2002); *In re Remacle*, 66 USPQ2d 1222, 1223, n2 (TTAB 2002).

Moreover, the *Coors* decision did not say that beer and restaurant services are *per se* not related, and certainly did not say that wine and restaurant services are not either. The *Coors* decision merely clarifies and reiterates the "something more" required by *Jacobs* as well as the basic tenet that each case must be decided on its own merits. In *re Nett Designs Inc.*, 236 F.3d 1339 57 USPQ2d 1564, 1566 (TTAB 2001). In the case of *In re Opus One Inc.*, 60 USPQ2d at 1815, the Board ruled on similar facts that an applicant for restaurant services using the proposed OPUS ONE mark was barred from registration by the existence of the same arbitrary and distinctive mark used on wine. The Board found the "something more" in the strong, arbitrary nature of registrant's mark; coupled with the striking similarity of applicant's proposed mark; and the nature of the

commercial relationship between wine and restaurant services.

In the present case, the Board finds the "something more" in the strong, arbitrary nature of registrant's mark; the high degree of similarity between applicant's proposed BRICKSTONE CELLARS mark and registrant's BRICKSTONES mark; and the solid evidence on the record showing the close relatedness of wine to restaurant services, including via "private label" wines offered by some restaurants under their own marks. Accordingly, the second *du Pont* factor weighs in favor of finding a likelihood of confusion.

The similarity or dissimilarity of established,
likely-to continue channels of trade and
classes of consumers

Because there are no restrictions as to trade channels and classes of consumers in either the application or the cited registration, we presume that the goods and services move in all normal trade channels and to all normal classes of purchasers. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Both parties accept that restaurants commonly sell wine. In addition, the above-noted printed web pages submitted by the examining attorney demonstrate that some restaurants sell "private label" wine under the restaurants' own mark. Accordingly, we find that the channels of trade and classes of consumers are likely to be

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the same or substantially similar, and the third and fourth *du Pont* factors weigh in favor of finding a likelihood of confusion.

Balancing the factors

In summary we have carefully considered all of the evidence of record pertaining to the *du Pont* likelihood of confusion factors, as well as applicant's arguments with respect thereto.

Decision: The refusal to register is affirmed.