

<p>This Opinion is Not a Precedent of the TTAB</p>

Mailed: October 3, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Espinosa Cigars, LLC
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Serial No. 85772938
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Frank Herrera of H New Media Law for Espinosa Cigars, LLC.

Tina Brown, Trademark Examining Attorney, Law Office 118,
Thomas G. Howell, Managing Attorney.

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Before Zervas, Wellington, and Gorowitz,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Espinosa Cigars, LLC (“Applicant”) seeks registration on the Principal Register
of the mark **LA BOMBA** (in standard characters) for “cigars” in International Class

34.¹

¹ Application Serial No. 85772938 was filed on November 6, 2012, based upon Applicant’s allegation of first use anywhere and in commerce on August 31, 2007, under Section 1(a) of the Trademark Act. The application contains a statement that the English definition of “La Bomba” is “the bomb.”

The Trademark Examining Attorney has refused registration of Applicant's mark based on a likelihood of confusion, under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in view of the registered mark:



for "cigars" in International Class 34.²

Applicant has appealed and filed a Request for Reconsideration. The Examining Attorney denied the request. Briefs, including a reply brief from Applicant, have been filed. We affirm the likelihood of confusion refusal.

Evidentiary Objection/Judicial Notice

In its Request for Reconsideration, Applicant listed several registrations to help show a certain meaning of the term LA BAMBA. In denying the request, the Examining Attorney objected and pointed out to Applicant that the mere listing of the registrations does not make them of record and failure to properly introduce them cannot be corrected at that stage.

In its brief, Applicant stated that if the Board agrees that the third-party registrations are not properly of record, then it requests that the Board take judicial notice of "online references from Wikipedia regarding the definition of 'LA BAMBA.'" Brief, p. 5. (Printouts from the website were attached to the brief). Applicant asserts that Wikipedia entry is corroborated by other evidence, including

² Registration No. 2161028 issued May 26, 1998; Section 8 & 15 affidavits have been accepted and it has been renewed.

the International Movie Database (IMDB) and Encyclopedia Britannica websites. (Printouts from these websites were also attached.)

The Examining Attorney has objected to the materials attached to Applicant's brief on the ground that they were not timely submitted in accordance with Rule 2.142(d) which provides that the record must be complete prior to filing of an appeal.

The Board may take judicial notice, at any time in a proceeding, of facts which are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. More specific to this proceeding, we may take judicial notice of dictionary definitions, encyclopedia entries, standard reference works, translation dictionaries and of commonly known facts. See TBMP Section 1208.04 (Judicial Notice). *See also, e.g., In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.24 (TTAB 2013) (judicial notice taken of entry for "tea" from Encyclopedia Britannica). With this in mind, we agree to take judicial notice of the information contained in the printouts from the Encyclopedia Britannica; however, it has not been shown that the IMDB website constitutes a standard reference work or is otherwise an authoritative material upon which facts may be noticed.

With respect to the printouts from the Wikipedia online encyclopedia, the Board previously addressed the admissibility of evidence derived from this website in *In re IP Carrier Consulting Group*, 84 USPQ2d 1028, 1032 (TTAB 2007) and determined that "[t]here are inherent problems regarding the reliability of Wikipedia entries because Wikipedia is a collaborative website that permits anyone to edit the

entries.” Because there is some question regarding the accuracy of information that may be obtained from Wikipedia, it is not a source from which the Board may take judicial notice. Rather, this type of evidence must be offered into the record at a time when the non-offering party will have an opportunity to rebut the evidence. *Id.* at 1032 (“the Board will consider evidence taken from Wikipedia so long as the non-offering party has an opportunity to rebut that evidence by submitting other evidence that may call into question the accuracy of the particular Wikipedia information.”).

In sum, we take judicial notice of the information contained in the Encyclopedia Britannica materials attached to Applicant’s brief. All other materials attached to the brief, namely the Wikipedia and IMDB printouts, constitute untimely submitted evidence and will not be given further consideration.

Likelihood of Confusion

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). In any likelihood of confusion analysis, however, 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 (CCPA 1976). *See also In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Similarity of the Goods Described in the Application and Registration

We turn first to the *du Pont* factors involving the relatedness of the goods and, in this case, note that they are identical. That is, applicant's goods and those identified in the cited registration are "cigars." Accordingly, this factor strongly favors a finding of a likelihood of confusion.

Trade Channels, Care in Purchasing and Classes of Consumers for the Goods

Because the goods of applicant and the registrant are identical, without any limitations on the trade channels or the purchasers to whom they are sold, we must assume that the cigars of both will travel in all of the same, normal channels of trade for cigars and will be offered to the same classes of purchasers. *In re Smith & Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers"). *See also, In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion). We further note that cigars may be priced as little as \$6 for one or approximately \$30 for a "ten sampler."³ Thus, although Applicant argues that the relevant purchasers are "the most discriminating consumers," there is no evidence to support this statement and cigars are not so expensive that we can assume consumers would necessarily exercise a higher level of care in purchasing.

³ 5 TTABVue p. 12; online cigar retail website printouts submitted with Applicant's Request for Reconsideration.

Accordingly, the *du pont* factors involving trade channels for cigars and classes of consumers to whom they are sold also favor finding a likelihood of confusion. With respect to the consumers' degree of care in making their purchasing decisions, we find this factor neutral; however, again, cigars may be relatively inexpensive and, in that case, consumers may exercise less care than they would for more expensive items.

Similarity of the Marks

In comparing the marks, we must consider them in their entirety as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). We also keep in mind that the test, under the first *du Pont* factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison; “[i]nstead, it is the similarity of the general overall commercial impression engendered by the marks which must determine, due to the fallibility of memory and the consequent lack of perfect recall, whether confusion as to source or sponsorship is likely.” *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991); see also, *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). That is, 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).

Here, we find the marks are extremely similar in sound and appearance with the only real difference being the second letter in the second term of each mark – LA BOMBA versus LA BAMBA. Visually, the difference in that letter can be lost on consumers. The stylization of the letters in the registered mark has little, if any, significance as we must assume the applied-for mark may be depicted in the same stylization given Applicant seeks registration of its mark in standard characters. *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011).

As to how each mark will be pronounced, it is also settled that there is no correct pronunciation of trademarks that not easily recognizable English words, and these two marks may well be verbalized in a very similar manner by consumers. *See In re Viterra Inc.*, 671 F.3d 1358, 1367, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012); *Cf. In re Teradata Corp.*, 223 USPQ 361, 362 (TTAB 1984) (“as we have said many times, there is no “correct” pronunciation of a trademark”). Indeed, the Examining Attorney has submitted evidence showing that the “short a” and “short o” sounds are similar and, in the context of the present marks, we find it very likely that the marks will be spoken with little perceptible difference.

Applicant, however, argues that the two marks may be distinguished based on the difference of their respective translated meanings from Spanish and the resulting different connotations or commercial impressions. There is no dispute that

LA BOMBA is the Spanish wording meaning “the bomb.” With respect to the cited mark, LA BAMBA (stylized), we can discern from the Encyclopedia Britannica evidence is that it was “rock-and-roll reworking of a traditional Mexican wedding song” performed by American musician Ritchie Valens and became his “best remembered recording.”⁴ Applicant argues that “there is no similarity between ‘the bomb’ and ‘a Mexican folk song/ dance’” and the “differences in the meaning of the marks are the most significant factor that there is no likelihood of confusion between the marks.” Brief at 13.

Although Spanish is commonly spoken language in the United States, this does not mean that cigar purchasers, or even a substantial composite of the consuming public, will understand the difference and distinguish the two marks based on their translated meanings. We keep in mind that the spellings of the two marks do not differ greatly and it is thus possible that a purchaser, who is unfamiliar with their Spanish meanings or who inadvertently does not notice the “O/A” letter difference, may mistakenly believe that Applicant’s mark is a reference to the Mexican folk song (or rock-and-roll song). Again, we must consider the possibility of word of mouth referrals such that, given the faint, if any, aural difference in the marks’

⁴ The Encyclopedia Britannica evidence, in substance, is limited to the following entry:

The topic **La Bamba** is discussed in the following articles:
discussed in biography

TITLE: Ritchie Valens (American musician)

...Star Studios that resulted in Valens’s hits. His first hit, “Come On, Let’s Go” (1958), was followed later that year by “Donna,” a ballad written for an ex-girlfriend, and “La Bamba,” Valens’s best-remembered recording, a rock-and-roll reworking of a traditional Mexican wedding song, sung in Spanish (though Valens hardly spoke the language). He performed...

pronunciations, there may be confusion even if the connotations of the actual marks are different.

Finally, Applicant argues that the difference in connotation is enhanced by its use of trade dress or the configuration of its actual cigars that invokes a bomb (“Applicant’s cigars all have a ‘pig tail’ which are designed to resemble a ‘bomb’ with a fuse.” Brief p. 13). Inasmuch as Applicant’s applied-for mark is not limited to any certain trade dress and the identification of goods is simply “cigars,” as is the Registrant’s, we cannot make any determination regarding a likelihood of confusion based on any differences in the actual packaging and appearance of the respective goods.

The similarity of the marks is a *du Pont* factor that weighs in favor of a finding of likelihood of confusion.

Conclusion

In sum, because the goods are identical and they will be offered to the same classes of purchasers in the same trade channels, we find that Applicant’s mark LA BOMBA is sufficiently similar to the registered mark LA BAMBA (stylized) to cause a likelihood of confusion.

Decision: The likelihood of confusion refusal to register Applicant’s mark is affirmed.