

This Opinion is not a  
Precedent of the TTAB

Mailed: June 11, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Rabbit Hole Spirits, LLC*  
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Serial No. 86193667  
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Daniel Christopherson of Lehrman Beverage Law, PLLC,  
for Rabbit Hole Spirits, LLC.

Matthew G. Galan, Trademark Examining Attorney, Law Office 113,  
Odette Bonnet, Managing Attorney.

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Before Seeherman, Bergsman and Kuczma,  
Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Rabbit Hole Spirits, LLC has appealed from the final refusal of the Trademark Examining Attorney to register MOONSHINE REDEFINED, in standard characters, and with MOONSHINE disclaimed, for “distilled spirits; liquor; whiskey” in Class 33.<sup>1</sup> Registration was 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 the mark REDEFINING VODKA, registered in standard characters and

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<sup>1</sup> Application Serial No. 86193667, filed February 14, 2014, based on Section 1(b) of the Trademark Act (intent-to-use).

with VODKA disclaimed, for “alcoholic beverages, except beers” in Class 33,<sup>2</sup> that if used in connection with Applicant’s identified goods it is likely to cause confusion or mistake or to deceive.

We affirm the refusal to register.

Before proceeding to the merits of the refusal, we note that in its reply brief Applicant has requested that the Board “take Official Notice” of the “fact” that certain terms, namely “pinot noir,” “bordeaux” and “terroir” are “well-known, government defined” types of wine, and that “an estate wine is a government-defined class of wine.” 12 TTAB 8. We presume that Applicant wishes the Board to take judicial notice of these “facts,” but it has not submitted any documents to show that the government has defined these terms as types or classes of wine. We have reviewed the “Merriam-Webster” online dictionary, [www.merriam-webster.com](http://www.merriam-webster.com), and have found a definition of “pinot noir” as “a dry red wine produced from the same grape as French burgundy” and of “Bordeaux” as “white or red wine of the Bordeaux region of France” and take judicial notice of these definitions. However, there is no support for Applicant’s statement that these are “government defined” types of wine. The same dictionary defines “terroir” as “the combination of factors including soil, climate, and sunlight that gives wine grapes their distinctive character”; this definition does not in any way indicate that this term identifies a type of wine, and this dictionary does not provide any definition whatsoever for “estate wine.”

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<sup>2</sup> Registration No. 3677744, issued September 1, 2009.

Accordingly, we do not take judicial notice that “terroir” and “estate wine” have the meanings asserted by Applicant.

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, 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).

We turn first to the factor of the similarity or dissimilarity of the goods. Applicant has identified its goods as “distilled spirits; liquor; whiskey”; the goods in the cited registration are identified as “alcoholic beverages, except beers.” There is no question that the goods identified in the cited registration encompass the goods identified in Applicant’s application, and Applicant does not argue otherwise.<sup>3</sup> This *du Pont* factor weighs in favor of a finding of likelihood of confusion. Further, because the goods are legally identical, they are deemed to travel in the same channels of trade to the same classes of consumers. *See In re Viterra Inc.*, 671 F.3d

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<sup>3</sup> Although recognizing that the identification in the registration gives the registrant the right to use its mark for all types of alcoholic beverages except beer, and that if Applicant were to obtain a registration it could use its mark for all distilled spirits and liquor, the Examining Attorney also submitted evidence that “moonshine” and “vodka” are related goods that can emanate from a single source. While the Examining Attorney is commended for the additional research, we reiterate that the goods covered by a registration are defined by the identification, and are not limited by the words used in the mark.

1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012), quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002) (when goods are identical, “absent restrictions in the application and registration, goods and services are presumed to travel in the same channels of trade to the same class of purchasers”). This *du Pont* factor also favors a finding of likelihood of confusion.

We next turn to a consideration of the strength of the cited mark, since much of Applicant’s argument goes to this *du Pont* factor, and its effect on the factor of the similarity of the marks. First, we note that Applicant has characterized the cited mark as being “highly descriptive” (“Registrant’s Mark REDEFINING VODKA is highly descriptive with the word REDEFINING being merely laudatory,” 9 TTABVue 9-10). However, because the cited mark is registered on the Principal Register, it is entitled to the presumptions accorded to such a registration, including that the registration is “prima facie evidence of the validity of the registered mark.” See Section 7(b) of the Trademark Act, 15.U.S.C. § 1057(b). Therefore, to the extent that Applicant intended its comments to be an attack on the validity of the registration, we have given them no consideration. Rather, we regard Applicant’s position to be that the registrant’s mark is highly suggestive, and therefore deserves a limited scope of protection.<sup>4</sup>

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<sup>4</sup> Indeed, asserting that the registered mark is merely descriptive would seem to be contrary to Applicant’s interests in claiming that it has a registrable trademark, as it has acknowledged by its disclaimer that MOONSHINE in its mark is generic. The remaining word REDEFINED as used in its mark has a similar laudatory connotation.

Applicant has submitted 251 third-party registrations<sup>5</sup> for marks that contain the words REDEFINING or REDEFINED or REDEFINE. Third-party registrations are not evidence that the marks shown therein are in use, but they can be used in the manner of dictionary definitions to show that a term has a significance in a particular industry. *See In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010), citing *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (CCPA 1976). In the present case, almost all of the third-party registrations submitted by Applicant are for goods and services very different from the alcoholic beverages at issue herein. Normally, the registrations for such different goods and services would have no probative value in showing that REDEFINED/REDEFINING has a significance in the alcoholic beverage field. However, also of record are dictionary definitions for “redefine” as meaning “define again or differently”<sup>6</sup> which indicate that this meaning would be applicable across a spectrum of goods and activities. Accordingly, we have considered all of the third-party registrations as showing that REDEFINED or REDEFINING has a laudatory significance as applied in general to goods and services. In view thereof, we agree with Applicant that REDEFINING VODKA would not have the same broad scope of protection as an arbitrary mark. However, as the Examining Attorney points out, even suggestive marks are entitled to protection from the use of a confusingly similar mark.

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<sup>5</sup> The submissions also include the cited registration. The registrations are part of the response filed September 30, 2014, pp. 16-267.

<sup>6</sup> Oxford Dictionaries, [www.oxforddictionaries.com/us/definition/american\\_english/redefine](http://www.oxforddictionaries.com/us/definition/american_english/redefine), May 7, 2014 Office action, p. 2. We note that this is the “English (US)” definition.

Applicant has also submitted what it describes as “22 labels approved by the Alcohol and Tobacco Tax and Trade Bureau” as evidence of third-party usage of REDEFINING or REDEFINED in connection with alcohol products. September 30, 2014 response, p. 13, Exhibit B, pp. 268-289. However, the sixth *du Pont* factor concerns “the number and nature of similar marks in use on similar goods.” *In re E.I. du Pont de Nemours & Co.*, 177 USPQ at 567. For the most part, these labels use “redefined” or “redefining” as a word in the general explanatory text; in no way would this term be viewed as a trademark. See, for example, the label for MORIC BLAUFRÄNKISCH. Below the mark, the importer information, and the contents and country of origin of the wine is a paragraph of promotional text:

Winemonger Imports brings you wines that are an honest expression of the land and varietal they come from. Wines that are unique in character. With his Moric wines, vintner Roland Velich has opened a new chapter for Austrian red wine and redefined Blaufränkisch as a grand red varietal.<sup>7</sup>

Applicant claims that not all of the labels use REDEFINE-formative terms within a narrative, contending that the label for Chateau Monestier La Tour for wine shows the phrase REDEFINING BORDEAUX set apart from the text, and in a manner that is consistent with use as a trademark.<sup>8</sup> We accept that REDEFINING BORDEAUX appears in black letters on a white background, while the mark CHATEAU MONESTIER LA TOUR and promotional text appear in white letters on a black background, as a result of which REDEFINING BORDEAUX stands out. However, we do not believe that consumers would view REDEFINING BORDEAUX

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<sup>7</sup> September 30, 2014 response, p. 268.

<sup>8</sup> September 30, 2014 response, p. 271.

as a trademark merely because of this, especially since an asterisk appears next to the phrase and below it is the further information “and the other places where soil still matters.” Applicant also points to the Northwest Distillery label for vodka, stating that the tagline “Luxury, Redefined” is set out apart from other text.<sup>9</sup> Although this phrase appears on the label on a separate line from the promotional narrative, consumers would view LAVISHMINT, which is also set out from the rest of the text, and in all capital and larger letters, as the trademark for the vodka.

Moreover, even if we were to accept that these two examples show REDEFINING or REDEFINED as part of a trademark, we point out that Applicant’s exhibit consists only of the proposed labels submitted by third parties to the Alcohol and Tobacco Tax and Trade Bureau. We cannot treat the mere approval of these labels by this government agency as evidence that the third parties are actually selling beverages using these labels, or if so, that there has been significant exposure of the labels to the public. Simply put, these two very questionable trademark uses of REDEFINING/REDEFINED are not sufficient for us to find that the sixth *du Pont* factor favors Applicant.

We now turn to the first *du Pont* factor, the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. In assessing the similarity or dissimilarity of the marks, we keep in mind that when marks would appear on virtually identical goods or services, as they do here, the degree of similarity necessary to support a conclusion of likely

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<sup>9</sup> September 30, 2014 response, p. 283.

confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). It is also a well-established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant has given a detailed analysis of the differences in the marks, going so far as to break down each mark into syllables, and point out the different number of syllables (five vs. six); that they have only two syllables in common (RE and DE); and that the positions of the same syllables are different, with RE and DE being the first two syllables of the cited mark and the third and fourth syllables of Applicant's mark.

We agree with Applicant that there are specific differences in the marks. However, "[t]he proper test is not a side-by-side comparison of the marks, but instead 'whether the marks are sufficiently similar in terms of their commercial impression' such that persons who encounter the marks would be likely to assume a connection between the parties." *Couch Services Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012), quoting *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007). In this case, both marks consist of a variation of the word REDEFINE and the generic term



for an alcoholic beverage. Although there are specific differences between the marks, as Applicant has detailed, overall they convey the same connotation and commercial impression of an alcoholic beverage that is different from the others, i.e., that it has been “redefined.” The difference in tense of the word “redefine” is not likely to be noted by consumers, since the general meaning of “redefine” is the same in both marks. The fact that MOONSHINE and VODKA, the additional terms in the respective marks, are different words does not serve to distinguish the marks since consumers will regard these words as the generic name for the respective goods. Rather, because both marks consist of variations of REDEFINE plus a generic term for an alcoholic beverage, consumers are likely to view the marks as indicating a single source for the goods, with the difference in the generic terms due to the type of beverage with which the respective mark is used.

Further, due to the fact that both marks consist of two words, one of which is a variation of the root word REDEFINE and the second is the generic name of an alcoholic beverage, the marks have a similarity in appearance and pronunciation.

When the marks are compared in their entirety, the similarities far outweigh the differences, and therefore we find that the *du Pont* factor of the similarity of the marks favors a finding of likelihood of confusion. In reaching this conclusion, we have considered the fact that the cited mark has a laudatory suggestiveness. However, as we previously stated, even weak marks are entitled to protection against the use of confusingly similar marks. In this case, the generic terms in Applicant’s and the registrant’s marks, the slight variation in the root word

REDEFINE, and the reversal of the word order, are simply not sufficient to avoid the likelihood of confusion.

Finally, Applicant argues that the fourth *du Pont* factor, “the conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing,” favor Applicant. Applicant’s argument in support of this is as follows:

Consumers of distilled spirits are ordinarily discriminating and sophisticated in the sense that one type of spirit is very different from another. A consumer desiring to purchase Registrant’s vodka would not be led by source confusion to purchase Applicant’s moonshine.

9 TTABVUE 11. As far as we can tell, Applicant is asserting that there would be no confusion because consumers who want to purchase vodka would not buy moonshine. However, the issue is not whether consumers would confuse the goods, but whether they are likely to confuse the source of the goods.<sup>10</sup> There is nothing in the record that shows that the purchasers of alcoholic beverages are particularly sophisticated, or would exercise a greater standard of care than the general public. Thus, purchasers are not likely to distinguish the marks based on the minor differences between them since, as we have previously stated, the test is not whether the marks can be distinguished based on a side-by-side comparison. We also point out that to the extent purchasers are sophisticated and knowledgeable about alcoholic beverages, this would not avoid confusion, since such purchasers would be aware that the same companies sell both moonshine and vodka under a single mark. *See, for example, BLAUM BROS. vodka and BLAUM BROS.*

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<sup>10</sup> For purposes of discussing this factor, we have accepted Applicant’s premise that Applicant’s goods are limited to moonshine and the registrant’s are limited to vodka, but it must be remembered that the goods as identified must be treated as legally identical.

moonshine, FIREFLY vodka and FIREFLY moonshine, GOODTIME vodka and GOODTIME moonshine.<sup>11</sup> We treat this *du Pont* factor as neutral.

These are all of the *du Pont* factors that Applicant and the Examining Attorney have discussed. To the extent that any other factors are relevant, we treat them as neutral. After considering all of the evidence and arguments, we find, because of the similarity of the marks and legal identity of the goods and trade channels, and despite the limited scope of protection to be accorded the cited registration, that Applicant's mark MOONSHINE REDEFINED for "distilled spirits; liquor; whiskey" is likely to cause confusion with REDEFINING VODKA for "alcoholic beverages, except beers."

**Decision:** The refusal to register Applicant's mark MOONSHINE REDEFINED is affirmed.

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<sup>11</sup> See, generally, evidence attached to October 21, 2014 Office action, pp. 2-13.