

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Uinta Brewing Company

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Serial No. 86333439

Peter M. de Jonge and Eric E. Westerberg of Thorpe North & Western, LLP for
Uinta Brewing Company.

Margaret Power, Trademark Examining Attorney, Law Office 103 (Michael
Hamilton, Managing Attorney).

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Before Kuhlke, Bergsman, and Masiello, Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

Uinta Brewing Company (“Applicant”) has filed an application to register on the
Principal Register the mark DUO in standard characters for “Beer.”¹

The Trademark Examining Attorney refused registration under § 2(d) of the
Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, as used
in connection with Applicant’s goods, so resembles the registered mark DUO, in

¹ Application Serial No. 86333439, filed July 10, 2014 under Trademark Act § 1(a), 15
U.S.C. § 1051(a), asserting March 19, 2013 as Applicant’s date of first use and May 29, 2013
as Applicant’s date of first use in commerce.

typed form, as to be likely to cause confusion, or to cause mistake, or to deceive. The cited mark is registered for “Wine.”² When the refusal was made final, Applicant brought this appeal. Applicant and the Examining Attorney have filed briefs.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion as set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods at issue. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

1. The marks.

We first consider the similarity or dissimilarity of the marks at issue in terms of appearance, sound, meaning, and overall commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). The marks are identical. Accordingly, the *du Pont* factor of the similarity or dissimilarity of the marks weighs in favor of a finding of likelihood of confusion.

2. The goods.

We next address the similarity or dissimilarity of the goods at issue. “[I]t is not necessary that the products of the parties be similar or even competitive to support

² Registration No. 2255914, issued June 22, 1999; Section 8 affidavit accepted; Section 15 affidavit acknowledged; renewed. Prior to November 2, 2003, “standard character” drawings were known as “typed” drawings. A typed mark is the legal equivalent of a standard character mark. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012).

a finding of likelihood of confusion.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012), citing *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007). Instead, likelihood of confusion can be found “if the respective products are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.” *Id.*

There is no *per se* rule mandating that alcoholic beverages be deemed similar goods. Each case must be decided on its own facts. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). Applicant points out, quoting *Checkpoint Systems Inc. v. Check Point Software Technologies Inc.*, 269 F.3d 270, 60 USPQ2d 1609, 1620 (3d Cir. 2001), that goods “may fall under the same general product category but operate in distinct niches. When two products are part of distinct sectors of a broad product category, the[y] can be sufficiently unrelated that customers are not likely to assume the products originate from the same mark.” [Sic].³

As evidence that the goods are related, the Examining Attorney submitted excerpts of 11 websites showing that beer and wine can emanate from the same source, usually a combination winery/microbrewery.⁴ The record also includes copies

³ Applicant’s brief at 6, 4 TTABVUE 7.

⁴ Office Action of September 10, 2014 at 32-41; Office Action of April 25, 2015 at 10-60. We have not considered the Prickly Moses website, which originates in Australia; or the Village Vintner website, which clearly indicates that the company makes beer, but does not clearly indicate that it makes wine.

of 17 third-party registrations that individually cover both beer and wine.⁵ “Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source.” *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff’d*, 864 F.2d 149 (Fed. Cir. 1988). *See also In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993). Of the 17 registered third-party marks, there is evidence to show actual use of only two, MOTOR CITY BREWING WORKS and SCHILLINGBRIDGE.⁶

In order to counter this evidence, Applicant has submitted the partial results of three searches of the USPTO’s TESS database, indicating that there are on the Register 18,119 subsisting registrations of marks for wine, 8,088 registrations of marks for beer, and only 71 registrations of marks for both wine and beer.⁷

Applicant argues:

[I]t is clear that market participants are active in obtaining federal trademark rights. ...

Of the 8,088 registrations for beer, less than 1% (only 0.87%) are also for wine. Of the 18,119 wine registrations, less than half a percent (only 0.39%) are also for beer. Therefore, ... only the smallest minority of registrations

⁵ Office Action of September 10, 2014 at 6-31; Office Action of April 25, 2015 at 61-76.

⁶ Office Action of September 10, 2014 at 13-15 and 18-19; Office Action of April 25, 2015 at 28-32 and 42-45.

⁷ Applicant’s response of March 13, 2015 at 4-14.

provide any suggestion that wine and beer are related. The majority of registrations – over 99% – suggest the opposite, that consumers are not accustomed to encountering both beer and wine emanating from the same source.⁸

Applicant has also made of record copies of 10 pairs of third-party registrations for identical or nearly identical marks in the names of different owners. In each pair, one of the registrations covers wine and the other covers beer.⁹ Applicant argues:

The presence of so many pairs of identical and nearly identical marks ... is strong evidence that wine and beer are not related goods. Further it is evidence that identical marks for “beer” and “wine” can coexist.¹⁰

We find the Examining Attorney’s evidence sufficient to show that some small wineries and microbreweries offer both beer and wine under a single mark. The existence of third-party registrations covering both beer and wine at least suggests an interest among producers of alcoholic beverages in combining the production of both types of beverages within a single business. The fact that small producers of the type shown by the Examining Attorney’s internet evidence may represent only a small segment of the entire wine or beer market does not, in our view, reduce the potential for trademark confusion from “likelihood” to a mere possibility, especially where the marks at issue are identical and distinctive. Where identical marks are

⁸ Applicant’s brief at 7, 4 TTABVue 8.

⁹ Applicant’s response of March 10, 2015 at 13-46. We have given substantially less probative weight to three other pairs of registrations, either because the paired marks were distinguishable (NAKED and NAKED ED’S; KANGAROO and KANGAROO POINT) or the goods were not clearly relevant (the registration of HONEYMOON for “wine” actually covers mead, “excluding wine made from grapes and fruits and all other non-honey sources ...”).

¹⁰ Applicant’s brief at 11, 4 TTABVue 12.

involved, the degree of similarity between the parties' goods that is required to support a finding of likelihood of confusion declines. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688-1689 (Fed. Cir. 1993) (“even when the goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source”). The fact that some unrelated beer producers and wine producers have registered identical marks does not prove, as Applicant suggests, that the goods are unrelated or that such marks can coexist in the marketplace. We are not privy to the circumstances or the analyses that underlay the issuance of the registrations adduced by Applicant, and such registrations demonstrate nothing as to actual or current marketplace conditions. Accordingly, we find that the *du Pont* factor of the similarity or dissimilarity of the goods favors a finding of likelihood of confusion.

3. Trade channels.

The Examining Attorney has argued that “beer and wine travel through the same channels of trade to the same class of purchasers.”¹¹ The internet evidence discussed above demonstrates that beer and wine are advertised online on the same websites. Moreover, because the goods of Applicant and Registrant are identified without limitation as to channels of trade, we presume that they move in all channels of trade that would be normal for such goods. *See Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1373, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013). Normal trade channels for both beer and wine would include, at a

¹¹ Examining Attorney's brief, 6 TTABVUE 6.

minimum, liquor stores. Accordingly, we find that the *du Pont* factor of trade channels favors a finding of likelihood of confusion.

4. Conclusion.

We have considered all of the arguments and evidence of record, including any not specifically discussed herein, and all relevant *du Pont* factors. As the marks are identical and the goods at issue are related and travel through the same channels of trade, we find that Applicant's mark so resembles Registrant's mark as to be likely to cause confusion, mistake, or deception within the meaning of Section 2(d).

Decision: The refusal of registration under Section 2(d) is affirmed.