

**This Opinion is Not a  
Precedent of the TTAB**

Mailed: October 1, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Hibernia Distillers Limited*  
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Serial No. 86523391  
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Monique A. Morneault of Sherrer Patent & Trademark Law, PC,  
for Hibernia Distillers Limited.

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Chris A. F. Pedersen, Managing Attorney.

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Before Greenbaum, Hightower and Pologeorgis,  
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

I. Background

Hibernia Distillers Limited (“Applicant”) seeks registration on the Principal

**HYDE**

*No. 1  
President's Cask*

Register of the stylized mark

for

Whiskey; Irish whiskey; single malt whiskey; bourbon whiskey; whiskey cocktails, in International Class 33.<sup>1</sup>

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when applied to Applicant's goods, so resembles the previously registered standard character marks HYDE for "herbal flavored liqueur,"<sup>2</sup> HYDE PARK for "spirits; wines,"<sup>3</sup> and JAMES F.C. HYDE for "spirits and liqueurs"<sup>4</sup> all registered on the Principal Register in International Class 33 and owned by different registrants, as to be likely to cause confusion, mistake or deception.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed and Applicant and the Examining Attorney submitted briefs. On September 12, 2018, the Board issued an order suspending action on this appeal pending a determination as to whether Registration No. 3388863, for the mark HYDE, would be cancelled for failure of the owner of that

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<sup>1</sup> Application Serial No. 86523391 was filed on February 3, 2015, based upon Applicant's allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), and pursuant to Section 44(d) of the Trademark Act, 15 U.S.C. § 1126(d). Ireland Registration No. 252111 was filed and issued on December 9, 2014. The filing bases are now Sections 1(b) and 44(e), 15 U.S.C. § 1126(e).

The application includes the following description of the mark: "The mark consists of the word 'HYDE' in bold block print above the wording 'NO. 1' in stylized print, which is surrounded by a circle, and is above the wording 'PRESIDENTS CASK' in stylized print." Color is not claimed as a feature of the mark. "NO. 1" and "CASK" have been disclaimed.

<sup>2</sup> Registration No. 3388863 issued on February 26, 2008, and was cancelled on September 28, 2018 pursuant to Section 8 of the Trademark Act, 15 U.S.C. § 1058.

<sup>3</sup> Registration No. 4485205 issued on February 18, 2014.

<sup>4</sup> Registration No. 5082752 issued on November 15, 2016.

registration to file a Section 8 affidavit of use and a Section 9 application for renewal. 8 TTABVE. As noted above, Registration No. 3388863 was cancelled on September 28, 2018. Accordingly, proceedings are resumed for a decision on the Section 2(d) refusal as it pertains only to Registration Nos. 4485205 and 5082752. We reverse.

## II. Applicable Law – Likelihood of Confusion

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *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 Co.*, 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 or services. *In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *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 essential characteristics of the goods and differences in the marks.”); *see also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods’”) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)). We have considered each *du Pont* factor that is relevant or for which there is evidence of record. *See M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006) (even within *du Pont* list, only factors that are

“relevant and of record” need be considered); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”).

A. Relatedness of the Goods and Channels of Trade

With regard to the goods and channels of trade, we must make our determinations under these factors based on the goods as they are identified in the application and the cited registrations. *See In re Dixie Rests.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *see also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Computs. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

In this case, the goods identified in the application and registrations are legally identical in part in that both registrations identify “spirits” and the application identifies various types of whisky, which is a type of distilled spirit.<sup>5</sup> Given the identity of the goods in part, and the lack of restrictions in the application and registrations, we presume that the goods travel through the same channels of trade (e.g., liquor stores) and that they are offered to the same potential purchasers (e.g.,

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<sup>5</sup> The Board may take judicial notice of information from encyclopedias. *See B.V.D. Licensing Corp. v. Body Action Design Inc.*, 846 F.2d 727, 6 USPQ2d 1719, 1721 (Fed. Cir. 1988) (“dictionaries and encyclopedias may be consulted”). We take judicial notice of the ENCYCLOPEDIA BRITANNICA ACADEMIC (2018) entry for the term “distilled spirit” from <http://academic.eb.com/levels/collegiate/article/distilled-spirit/106006> accessed October 1, 2019. *See In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.24 (TTAB 2013) (judicial notice taken of entry for “tea” from Encyclopedia Britannica).

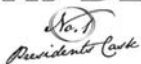
ordinary consumers). *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding the channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion).

The legal identity of the goods and the identity of their channels of trade are factors that weigh in favor of a finding of likelihood of confusion.

B. The similarity or dissimilarity of the marks

Despite the overlap in the identification of goods, we find that confusion is not likely because of the crucial differences between the marks. In comparing the marks, “[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.” *i.am.symbolic*, 123 USPQ2d at 1748 (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)).



Although Applicant’s mark  and each of the cited registered marks, HYDE PARK and JAMES F.C. HYDE, include the word HYDE, the additional elements in each of the marks result in three marks that are different in appearance, sound, meaning and commercial impression. While HYDE is the most visually prominent element in Applicant’s mark and also is separable from the other elements, the same cannot be said for either of the cited marks, in which the term HYDE forms part of a unitary expression. Moreover, the cited mark HYDE PARK connotes a

geographic location, while the cited mark JAMES F.C. HYDE connotes a particular individual. Applicant's mark shares neither connotation.

The authority is legion that "when marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (citing *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992)). However, in this case, Applicant's mark is so different from Registrants' marks that even when used on in-part identical goods, confusion is unlikely. "No mechanical rule determines likelihood of confusion, and each case requires weighing of the facts and circumstances of the particular mark." *Mighty Leaf Tea*, 94 USPQ2d at 1259.

Given the significant differences discussed above, Applicant's mark and Registrants' marks engender very different overall commercial impressions when the marks are considered in their entirety. See *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 750-51 (Fed. Cir. 1985) ("The basic principle in determining confusion between marks is that the marks must be compared in their entirety.... It follows from that principle that likelihood of confusion cannot be predicated on dissection of a mark, that is, on only part of a mark."); see also *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1134-35 (Fed. Cir. 2015).

In view of the substantial differences between Applicant's mark and each of the cited registered marks, this *du Pont* factor weighs heavily against likelihood of

confusion. Moreover, we find this factor to be dispositive, in that even with the other relevant *du Pont* factors weighing in favor of finding likelihood of confusion, this factor of the dissimilarities of the marks simply outweighs the other factors. See *Oakville Hills Cellar, Inc. v. Georgallis Holdings, LLC*, 826 F.3d 1376, 119 USPQ2d 1286, 1290 (Fed. Cir. 2016) (“a single *du Pont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks”); *Odom’s Tenn. Pride Sausage, Inc. v. FF Acquisition, LLC*, 600 F.3d 1343, 93 USPQ2d 2030, 2032 (Fed. Cir. 2010) (“[E]ven if all other relevant *DuPont* factors were considered in [opposer’s] favor, as the board stated, the dissimilarity of the marks was a sufficient basis to conclude that no confusion was likely.”); *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459, 1460 (Fed. Cir. 1998) (“[O]ne *DuPont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the mark.”); *Kellogg Co. v. Pack’em Enters. Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1144-45 (Fed. Cir. 1991) (“We know of no reason why, in a particular case, a single *duPont* factor may not be dispositive,” holding that “substantial and undisputed differences” between two competing marks justified a conclusion of no likelihood of confusion); *Keebler Co. v. Murray Bakery Prods.*, 866 F.2d 1386, 9 USPQ2d 1736, 1739 (Fed. Cir. 1989) (agreeing with the Board that the “more important fact for resolving the issue of likelihood of confusion in this case is the dissimilarity in commercial impression between the marks”). When we consider the marks in their entirety, we find that

the differences between Applicant's mark and each of the cited registered marks are substantial, and certainly sufficient to distinguish them.

### III. Conclusion

We have considered all of the arguments and evidence of record, including those not specifically discussed herein, as they pertain to the relevant *du Pont* factors. To the extent that any other *du Pont* factors for which no evidence is of record may nonetheless be applicable, we treat them as neutral. For the reasons discussed above, we conclude that Applicant's mark is not likely to cause confusion with either of the cited registered marks, HYDE PARK and JAMES F.C. HYDE, when those marks are used on or in connection with the goods identified in the application and cited registrations.

**Decision:** The refusal to register Applicant's mark based on Section 2(d) of the Trademark Act is reversed.