

This Opinion is not a
Precedent of the TTAB

Mailed: March 9, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Moonlite Bar-B-Q Inn, Inc.

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Serial No. 86636794

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Theodore A. Breiner of Breiner & Breiner, L.L.C.,
for Moonlite Bar-B-Q Inn, Inc.

Patty Evanko, Trademark Examining Attorney, Law Office 119,
J. Brett Golden, Managing Attorney.

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Before Zervas, Bergsman and Shaw,
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Moonlite Bar-B-Q Inn, Inc. (“Applicant”) has filed an application for registration on the Principal Register of the standard character mark MOONLITE for “wines” in International Class 33.¹

¹ Application Serial No. 86636794 was filed on May 20, 2015 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging Applicant’s bona fide intent to use the mark in commerce.

The Examining Attorney issued a final refusal of registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), claiming Applicant's mark is likely to cause confusion with the following standard character marks (registered to different owners) on the Principal Register:

- CLAIR DE LUNE in typed² form for "wines" in International Class 33 (Registration No. 1883866, twice renewed);³
- MOONLIGHT MEADERY (MEADERY disclaimed) in standard character form for "honey wine, wine" in International Class 33 (Registration No. 4076907 ("the '907 registration"), renewed).
- MOONLIGHT BREWING COMPANY (BREWING COMPANY disclaimed) in standard characters for "beer" in International Class 32 (Registration No. 6031677 ("the '677 registration").

² In applications filed before November 2, 2003, "standard character" drawings were known as "typed" drawings. A typed drawing is the legal equivalent of a standard character drawing. TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 807.03(i) (July 2021).

³ The registration states that the English translation of "CLAIR DE LUNE" is "moonlight." An English definition of "clair de lune" from the Merriam-Webster (Online) Dictionary (<https://www.merriam-webster.com/dictionary/clair%20de%20lune>, accessed on February 25, 2022) is:

1 : a pale blue or green-blue glaze used on porcelain

also : porcelain of this color

2: a bluish gray that is greener and paler than average dusk (see DUSK sense 3a), lighter than Medici blue, and stronger than puritan gray

We take judicial notice of this definition. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

After the refusal was made final, Applicant appealed. Applicant and the Examining Attorney filed briefs.⁴ We affirm the refusal to register.

Our determination under Section 2(d) of the Trademark Act is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on a likelihood of confusion. See *In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973) (“*DuPont*”); see also *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that “[t]he 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.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We consider each *DuPont* factor that is relevant or for which there is argument and evidence of record. See *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). “Not all of the [*DuPont*] factors are relevant to every case, and only factors of significance to the particular mark need be considered.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1719 (Fed.

⁴ Applicants attached exhibits to its appeal brief. The exhibits were previously submitted with the January 5, 2021 Response and should not have been submitted with Applicant’s brief. *ITC Entm’t Grp. Ltd. v. Nintendo of Am. Inc.*, 45 USPQ2d 2021, 2022-23 (TTAB 1998) (filing duplicative submissions is a waste of time and resources, and is a burden on the Board).

Cir. 2012) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)).

As explained below, because Applicant's proposed mark is likely to cause confusion with the MOONLIGHT MEADERY mark, we need not address likelihood of confusion based on the other cited registrations. We therefore generally refer to the MOONLIGHT MEADERY registration as the cited registration and as the cited mark.

a. Similarity of the Goods, Trade Channels and Classes of Purchasers

We evaluate the relatedness of the respective goods based on their identifications in the subject application and cited registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *see also Octocom Sys. Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.").

Applicant's and Registrant's identifications of goods both recite "wine" and Registrant also recites "honey wine." Their goods are at least in part identical. Applicant does not contend otherwise.

Because the goods described in the application and the cited registration are at least in part identical, we presume that the channels of trade and classes of

purchasers are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012) (identical goods are presumed to travel in same channels of trade to same class of purchasers); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *United Glob. Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011).

The *DuPont* factors regarding the similarity of the goods, trade channels and classes of consumers weigh in favor finding a likelihood of confusion.

b. Similarities of the Marks

We now consider whether Applicant's and Registrant's marks are similar when viewed in their entirety in terms of appearance, sound, connotation and commercial impression. *See Stone Lion Capital Partners*, 110 USPQ2d at 1160 (quoting *Palm Bay Imps.*, 73 USPQ2d at 1689). The test under this *DuPont* factor is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar that confusion as to the source of the goods offered under the respective marks is likely to result. *See In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (TTAB 2017); *Coach Servs. Inc.*, 101 USPQ2d at 1721. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016); *In re Mr. Recipe, LLC*,

118 USPQ2d 1084, 1089 (TTAB 2016). Because the goods at issue are wine, the average purchaser is the ordinary adult consumer who purchases or drinks wine.

The similarity or dissimilarity of the marks is determined by considering the marks in their entireties, and hence our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). However, while we must consider the marks in their entireties, it is appropriate to accord greater importance to the more distinctive elements in the marks in determining whether the marks are similar. *In re Nat'l Data*, 224 USPQ at 751 (“[T]here 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 consideration of the marks in their entireties.”).

Also, “[i]t is also well established that, when the goods at issue are identical, ‘the degree of similarity necessary to support a conclusion of likely confusion declines.’” *In re Viterra*, 101 USPQ2d 1912 (citing *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992)).

Applicant’s mark is MOONLITE, a combination of MOON and LITE. “Lite” is defined as “an informal, simplified spelling of light, used esp. in labeling or

advertising commercial products.”⁵ MOONLITE hence would be perceived as, and would be pronounced identically to, “moonlight.” We find that MOONLITE is pronounced the same as “moonlight,” and note that slight differences in spelling in marks do not normally create dissimilar marks. *In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1405 n.17 (TTAB 2018) (“We find that the minor differences between I LOVE YOU and I LUV U in appearance due to the different spellings of the words ‘love’ and ‘you’ do not outweigh the identity of the entire marks in terms of sound, connotation, and commercial impression.”); *In re Cynosure, Inc.*, 90 USPQ2d 1644, 1646 (TTAB 2009) (CYNERGY and SYNERGIE are highly similar, if not identical, phonetic equivalents).

Turning to Registrant’s mark, it is a combination of MOONLIGHT and MEADERY, with MOONLIGHT appearing before MEADERY. The first term in a mark is often its dominant portion of that mark. *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”). *See also, Palm Bay Imps.*, 73 USPQ2d at 1692; *Century 21 Real Estate* 23 USPQ2d at 1700.

In addition to being first, MOONLIGHT is followed by MEADERY, which offers little as a source indicator. According to Applicant, “meadery” is “a facility that

⁵ WEBSTER’S NEW WORLD COLLEGE DICTIONARY (4th ed. 2010) (accessed at <https://www.collinsdictionary.com/us/dictionary/english/lite> on February 28, 2022). We take judicial notice of this dictionary American English definition.

produces mead.”⁶ “Mead” is “a fermented beverage made of water and honey, malt, and yeast.”⁷ As defined, MEADERY is similar to the terms “winery” or “brewery,” which offer little as a source indicator for wine or beer, made in a winery or in a brewery, respectively.⁸ Further, as noted above, the term MEADERY has been disclaimed, and disclaimed matter is often “less significant in creating the mark’s commercial impression.” *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001). We find that MOONLIGHT is therefore the dominant portion of Registrant’s mark.

Because the dominant portion of Registrant’s mark is identical to Applicant’s mark in sound and meaning, and is highly similar in appearance thereto, we find that the marks, considered as a whole, are similar in sound, meaning and appearance. Further, because of this similarity in sound, meaning and appearance, we find that that the commercial impression of each mark is similar.

We are unpersuaded by Applicant’s arguments that the marks are dissimilar. First, Applicant argues that “applicant’s mark is for one word, MOONLITE, and the cited registration is for two words, MOONLIGHT MEADERY”; and that applicant’s mark is spelled different, appears different, is pronounced different and, therefore,

⁶ 4 TTABVUE 6. Page references to the application record are to the downloadable .pdf version of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. References to the briefs are to the Board’s TTABVUE docket system.

⁷ <https://www.merriam-webster.com/dictionary/mead> (accessed on February 28, 2022). We take judicial notice of this definition.

⁸ See January 7, 2021 Office Action, bialwinder.com, “A Winery and a Microbrewery,” TSDR 45; fentonbrewery.com, “Fenton Winery & Brewery,” TSDR 47; schramvineyards, “Schram Vineyards Winery & Brewery,” TSDR 48; and vonjakobvineyard, “Von Jakob Winery & Brewery,” TSDR 49.

creates a different commercial impression from the cited mark MOONLIGHT MEADERY.”⁹ As explained above, because Applicant’s mark is similar to the dominant term in the cited mark, even when considered as a whole, the marks are more similar than dissimilar.

Second, Applicant argues that the owner of the MOONLIGHT BREWING COMPANY maintained that there was no likelihood of confusion between MOONLIGHT BREWING COMPANY and MOONLIGHT MEADERY in a cancellation proceeding involving the marks MOONLIGHT MEADERY and MOONLIGHT BREWING COMPANY, “as the petition was withdrawn with prejudice, including the registrant of the [cited] registration taking the position that ‘[the] MOONLIGHT element is weak.’”¹⁰ There is no evidence in the record that supports Applicant’s argument, and “[a]ttorney argument is no substitute for evidence.” *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005); *see also Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018).

In addition, it is well settled that the Board does not take judicial notice of USPTO records. *See Corp. Fitness Programs Inc. v. Weider Health and Fitness Inc.*, 2 USPQ2d 1682, 1683-84, n.3 (TTAB 1987) (“The Board does not take judicial notice of registrations that reside in the Patent and Trademark Office.”). To be clear, we do

⁹ 4 TTABVUE 11.

¹⁰ *Id.* at 7.

not take judicial notice of any submissions in the cancellation proceeding Applicant mentions in its brief.

Assuming Applicant had submitted evidence to support its argument, we note that the withdrawal of the petition to cancel in that cancellation proceeding has little bearing on the issue of likelihood of confusion between the mark of the '907 registration and Applicant's mark because the present appeal involves different marks and different goods. Further, a determination of likelihood of confusion is not limited to the question of whether marks are similar or dissimilar. The Board considers other *Dupont* factors, and such factors may have been in play that molded the actions of the owner of the cited mark in the cancellation proceeding.

Third, Applicant argues that "the three cited registrations were allowed over each other, thereby indicating the narrow scope of protection to be accorded the MOONLIGHT MEADERY trademark";¹¹ and that "the coexistence of "the '907 registration for MOONLIGHT MEADERY and the '677 registration for MOONLIGHT BREWING COMPANY is direct and incontrovertible evidence that there is no likelihood of confusion between these trademarks[,] and the public must be entitled to rely on this evidence when selecting a trademark and considering the scope of protection to be accorded previously registered trademarks."¹² These arguments fail as well, at least because of the differences in the marks and goods noted above.

¹¹ *Id.* at 6.

¹² *Id.* at 10.

In addition, it is well-settled that each trademark application must be considered based on the facts in the record; the Board is not bound by individual decisions of examining attorneys on applications. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to [applicant’s] application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”); *see also In re Rodale Inc.*, 80 USPQ2d 1696, 1700 (TTAB 2006) (“Although consistency in examination is a goal of the Office, the decisions of previous trademark examining attorneys are not binding on us, and we must decide each case based on the evidence presented in the record before us.”).

Fourth, Applicant cites to *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459 (Fed. Cir. 1998) (“CRISTAL” and “CRYSTAL CREEK” for wines not confusingly similar) and *Oakville Hills Cellar, Inc. v. Georgallis Holdings, LLC*, 826 F.3d 1376, 119 USPQ2d 1286 (Fed. Cir. 2016) (MAYA and MAYARI for wine not confusingly similar). The marks involved in those decisions are different from those involved in this appeal.¹³ Most trademark cases are highly fact-specific. While prior cases can be instructive on points of law and procedure, and the overall approach to considering registrability, citation to a prior decision will rarely – if ever – be an adequate substitute for an analysis of the specific facts (as

¹³ The Examining Attorney accurately points out that “Applicant’s case is distinguishable ... because the wording that was added to ‘CRISTAL/CRYSTAL’ was a non-descriptive term that changed [the] meaning of the term in common. While CRISTAL conjures up a type of glass, CRYSTAL CREEK suggests clear water.” 6 TTABVUE 5-6. In *Oakville Hill Cellar*, there was insufficient evidence that consumers would perceive MARAI as MAYA- and -RI. *Oakville Hills Cellar*, 119 USPQ2d at 1289.

demonstrated by the record evidence) at issue in a particular case. These decisions hence are not persuasive.

The *DuPont* factor regarding the similarity of the marks hence favors a finding of likelihood of confusion.

d. Purchasing Conditions

Applicant argues that “wines, are not an impulse purchase”; and “[c]onsumers exercise a high degree of care in purchasing wines,” citing *Sazerac Co. v. Fetzer Vineyards, Inc.*, 265 F. Supp. 3d 1013, 1028 (N.D. Cal. 2017).¹⁴ Applicant’s argument fails because it is not supported by any evidence. As mentioned above, “[a]ttorney argument is no substitute for evidence.” *Enzo Biochem*, 76 USPQ2d at 1622. Also, Applicant’s argument does not account for low-cost wines and consumers who do not exercise a high degree of care in purchasing wines.

By not accounting for low-cost wines, Applicant’s attempts to “restrict the scope of its goods in its application and the scope of the goods covered in the cited registration by extrinsic argument ... while neither the recitation of goods in [A]pplicant’s application nor the recitation of goods in the cited registration is so restricted.” *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986). “[T]he question of likelihood of confusion must be determined by an analysis of the marks as applied to the goods identified in the application vis-a-vis the goods recited in the registration, rather than what extrinsic evidence shows those goods to be.” *Id.* at 764-65. “Parties that choose to recite [goods] in their trademark application that exceed their actual

¹⁴ 4 TTABVUE 12.

[goods] will be held to the broader scope of the application.” *Stone Lion*, 110 USPQ2d at 1163. Accordingly, Applicant’s argument that its wine is purchased using a high degree of care “must be disregarded since there is no restriction in the application or registration limiting the goods to particular channels of trade or classes of customers.” *Bercut-Vandervoort*, 229 USPQ at 765.

Further, we determine the degree of care that will be exercised by the least sophisticated potential purchasers of goods, and “[w]e emphasize again that we are bound by the identifications, which are not limited to particular [wines].” *In re Guild Mortg. Co.*, 2020 USPQ2d 10279, *5 (TTAB 2020). “[W]here, as here, the goods are identified without any limitations as to trade channels, classes of consumers or conditions of sale, we must presume that Applicant’s and Registrant’s wine encompasses inexpensive or moderately-priced wine.” *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1195 (TTAB 2018). “Wine purchasers are not necessarily sophisticated or careful in making their purchasing decisions,” *id.*, and because “there is no restriction in the subject application[] and registration as to price or quality, there is no reason to infer that the consumers or purchasers of these alcoholic beverages will be particularly discriminating or careful in distinguishing Applicant’s wine from Registrant’s.” *Stawski v. Lawson*, 129 USPQ2d 1036, 1054 (TTAB 2018) (citing *Aquitaine Wine*, 126 USPQ2d at 1195; *Somerset Distilling Inc. v. Speymalt Whisky Dist. Ltd.*, 14 USPQ2d 1539, 1542 (TTAB 1989); and *Bercut-Vandervoort*, 229 USPQ at 765)). We find that the least sophisticated potential purchaser of wine will

exercise at most ordinary care in purchasing, and the *DuPont* factor regarding conditions of purchase is neutral in our analysis.

e. Conclusion

As discussed above, the goods are least in part identical and we presume the trade channels and classes of purchasers are identical as well. Further, the marks are similar in sound, meaning, appearance and commercial impression. Consumers may mistakenly believe that that MOONLIGHT MEADERY is the honey wine line of MOONLITE wine. We therefore conclude that Applicant's mark for "wine" would likely be confused with the cited mark for "honey wine, wine."

Decision: The refusal to register under Section 2(d) is affirmed.