

This Opinion is Not a
Precedent of the TTAB

Mailed: May 10, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In re Cruz
—

Serial No. 86845373

Travis D. Wilson, Esq. for Jose Cruz Jr.

Leslee Friedman, Trademark Examining Attorney, Law Office 120,
David Miller, Managing Attorney.

—
Before Bergsman, Gorowitz and Pologeorgis,
Administrative Trademark Judges.

Opinion by Gorowitz, Administrative Trademark Judge:

Jose Cruz Jr. (“Applicant”) seeks registration on the Principal Register of the
mark PA’DENTRO (in standard characters) for

Liquor and liqueur beverages, namely, flavored tequila and
ready to drink tequila-based beverages; Tequila, in
International Class 33.¹

¹ Application Serial No. 86845373 was filed on December 10, 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). The mark, as originally identified in the application, was PA’DENTRO TEQUILA. On February 3, 2016 Applicant filed a Preliminary Amendment deleting the word TEQUILA. The amendment was accepted. Additionally, in response to the Examining Attorney’s March 28, 2016 Office Action, Applicant, *inter alia*, provided the following English translation of its PA’DENTRO mark: “The English translation of

Registration was refused on the basis of Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the registered mark ADENTRO for "wines,"² as to cause confusion, mistake, or to deceive.

When the refusal was made final, Applicant appealed. We affirm the refusal to register.

I. Evidentiary Issue.

The Examining Attorney objected to Applicant's submission with its brief of documents purported to be screenshots from Registrant's website.³ Evidence submitted after an appeal has been filed is untimely and will not be considered by the Board. Trademark Rule 2.142(d); 37 CFR § 2.142(d). Therefore, this evidence has not been considered.

II. 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, two key considerations are the

PA'DENTRO is 'INSIDE.'" September 8, 2016 Response to Office Action, TSDR p. 2. All references to TSDR citations are to documents in the .pdf format.

² Registration No. 3939206, issued March 29, 2011, Section 8 and 15 affidavits accepted and acknowledged.

³ The attachments do not identify the source thereof (e.g., the URL) or the date on which they were accessed and therefore, they would not be considered even if timely submitted. *See Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010).

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 Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). USPQ2d 1531 (Fed. Cir. 1997).

A. Similarity or dissimilarity of the marks.

We start our analysis with the first *du Pont* factor, the similarity or dissimilarity of the marks in their entirety in terms of appearance, sound, connotation and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). In evaluating the similarities between marks, the emphasis must be on the recollection of the average purchaser, who normally retains a general, rather than specific, impression of trademarks. *In re Cynosure, Inc.*, 90 USPQ2d 1644, 1645 (TTAB 2009), citing *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

The Examining Attorney contends that

Applicant's standard character mark PA'DENTRO is substantially similar to the registered mark, ADENTRO in standard characters. The marks have only slight differences in sound, and are nearly identical in appearance. Slight differences in the sound of similar marks will not avoid a likelihood of confusion. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012). As such, the minor differences in sound and appearance do not obviate the overwhelming similarities in the marks, and the words translate identically, therefore having the same connotation. This similarity in sound, appearance, and connotation creates a similar overall commercial impression.

Examining Attorney's Brief, 6 TTABVUE 4. Applicant argues that "in terms of phonetics and auditory distinctions, the marks are pronounced as spelled and therefore verbalized and heard differently."⁴ We disagree with the Applicant that the marks are verbalized and heard differently. "There is no correct pronunciation of a trademark, and consumers may pronounce a mark differently than intended by the brand owner." *In re Viterra Inc.*, 671 F.3d 1358, 1367, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012) (upholding the Board's affirmance of a Section 2(d) refusal to register XCEED for agricultural seed based on a likelihood of confusion with the registered mark X-SEED and design, SEED disclaimed, for identical goods). *See also Interlego AG v. Abrams/Gentile Entm't Inc.*, 63 USPQ2d 1862, 1863 (TTAB 2002) (finding similarity between LEGO and MEGO, despite the applicant's contention that consumers would pronounce MEGO as "me go").

The differences between the marks is the addition of the letter "P" and an apostrophe in the first syllable of Applicant's mark. However, slight differences in marks do not normally create dissimilar marks. *See United States Mineral Products Co. v. GAF Corp.*, 197 USPQ 301, 306 (TTAB 1977) ("'AFCO' and 'CAFCO,' which differ only as to the letter 'C' in USM's mark, are substantially similar in appearance and sound").

⁴ In Applicant's analysis, he refers to his mark as "PA' DENTRO TEQUILA," however, since Applicant deleted the word TEQUILA from his mark in the Preliminary Amendment that he filed on February 3, 2016 that was subsequently approved by the Office, the mark at issue in this appeal is PA'DENTRO.

Applicant's mark will likely be pronounced as PA DEN TRO while Registrant's mark will be pronounced as AH DEN TRO and, therefore, the sounds of the two marks create similar impressions when heard. *In re Energy Telecomm. & Elcc. Ass'n*, 222 USPQ 350, 351 (TTAB 1983) ("Slight differences in the sound of similar marks do not avoid the likelihood of confusion.").

As indicated above, Applicant translated his mark into English as "inside." September 8, 2016 Response to Office Action, TSDR p. 2. The cited registration, Registration No. 3939206 includes the following statement: "The English translation of 'ADENTRO' in the mark is inside." March 28, 2016 Office Action, TSDR p. 8. Therefore, the meanings of Applicant's mark PA'DENTRO and the cited mark ADENTRO are identical.

Despite the identical meanings of the marks, Applicant argues that the marks "do not yield to the same and/or similar interpretation." Appeal Brief, 4 TTABVUE 12. Applicant contends that

[t]he Examining Attorney's own evidence illustrates the distinction between the marks. As the Examining Attorney correctly noted in the Final Action dated September 26, 2016, "ADENTRO is a formal term" and PA'DENTRO" is a slang, urbanized expression.

Id. Applicant's statement mischaracterizes the Examining Attorney's statement, which acknowledges Applicant's argument about the different interpretations of the marks, and then responds by indicating that even if "potential purchasers realized the apparent differences between [A]pplicant's and [R]egistrant's marks, they could still reasonably assume, given the overall similarities in sound, appearance, connotation and commercial impression in the respective marks, that [A]pplicant's

goods provided under the PA'DENTRO mark constitute a new or additional goods line from the same source as the goods sold under the ADENTRO mark with which they are acquainted or familiar, and that [A]pplicant's mark is merely a variation of the [R]egistrant's mark." September 26, 2016 Office Action, TSDR p. 3. We agree.

The first *du Pont* factor favors a finding of likelihood of confusion.

B. Similarity or dissimilarity and nature of the goods.

We next turn our attention to a comparison of the similarity or dissimilarity and nature of Applicant's goods and Registrant's goods. We base our evaluation on the goods as they are identified in the application and cited registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Computs. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *In re Risesmart, Inc.*, 104 USPQ2d 1931, 1934 (TTAB 2012).

In determining whether Applicant's goods are related to Registrant's goods, it is not necessary that the goods of Applicant and Registrant be similar or competitive in character to support a holding of likelihood of confusion; it is sufficient for such purposes to establish that the goods are related in some manner or that conditions and activities surrounding marketing of these goods are such that they would or could be encountered by same persons under circumstances that could, because of similarities of marks used with them, give rise to the mistaken belief that they originate from or are in some way associated with the same producer. *Coach Servs.*,

Inc. v. Triumph Learning LLC, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012); *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1410 (TTAB 2010); *Schering Corp. v. Alza Corp.*, 207 USPQ 504, 507 (TTAB 1980); *Oxford Pendaflex Corp. v. Anixter Bros. Inc.*, 201 USPQ 851, 854 (TTAB 1978).

As noted above, Applicant's goods are identified as "liquor and liqueur beverages, namely, flavored tequila and ready to drink tequila-based beverages;⁵ tequila." The goods identified in the cited registration are "wine."

The Examining Attorney made of record eleven active third-party, used-based registrations showing that the same entity has registered a single mark identifying both tequila and wine.⁶ As a general proposition, although use-based third-party registrations alone are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless may have probative value to the extent they may serve to suggest that the goods are of a kind that emanate from a single source. *See In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

⁵ The fact that neither the Applicant nor the Examining Attorney addressed the presence of "flavored tequila and ready to drink tequila-based beverages" in the identification of goods in the application does not detract from a finding that the parties' respective goods are not related for likelihood of confusion purposes. Likelihood of confusion must be found as to the entire class if there is likely to be confusion with respect to any item in the identification of goods for that class. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

⁶ March 28, 2016, Office Action, TSDR pp. 23-52.

The Examining Attorney also submitted Internet evidence constituting an e-commerce direct-to-consumer website, charbay.com, demonstrating that a single entity provides both tequila and wine under the same trademark.⁷

Applicant argues that the products offered under the cited mark are completely different than Applicant's products because Applicant's tequila "is a liquor exclusive to Mexico...made from 100% Blue Agave" with an alcohol content ranging from 35% to 55% while Registrant's goods are a domestic wine made with Spanish varietals using old world wine making techniques.⁸

While "wine" and "tequila" are neither identical nor even competitive, it is settled that it is not necessary that the respective goods be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. That is, the issue is not whether consumers would confuse the goods themselves, but rather whether they would be confused as to the source of the goods. *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1264-65 (TTAB 2011); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984). The goods need only be sufficiently related that consumers would be likely to assume, upon encountering the goods under similar marks, that the goods originate from, are sponsored or authorized by, or are otherwise connected to the same source. *See In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

⁷ March 28, 2016, Office Action, TSDR, pp. 55-58.

⁸ Applicant's Brief, 4 TTABVUE 14.

The Board discussed this point in *Monarch Wine Co. v. Hood River Distillers, Inc.*:

As to the distilled alcoholic beverages of applicant, and the wines and champagnes of opposer, we are fully aware of the specific differences between them such as appearance, flavor, aroma, alcoholic content, cost, consumer recognition, and even the fact that distilled alcoholic beverages are separated from wines and champagnes and sold at different counters in different sections in retail liquor stores. However, the issue before us is not the likelihood of confusion as between the specific products of applicant and opposer, but rather the likelihood of confusion as to the source of such products. The fact that purchasers may be aware of the differences between the goods does not necessarily preclude the likelihood that they would confuse one trademark for another, and thereby be misled into believing that the goods have a common origin.

Monarch Wine, 196 USPQ 855, 857 (TTAB 1977) (internal citations omitted).

Moreover,

the products of both parties are alcoholic beverages which flow through the same channels of trade to the same class of purchasers, and we believe that a prospective purchaser of an alcoholic beverage upon entering and browsing through the various alcoholic products located or displayed on the various shelves or counters in retail liquor establishments would, upon encountering a whiskey, rum, brandy or vodka identified by the term “MONARCH”, and then continuing on his jaunt to another counter or section of the same store and seeing a wine or champagne sold under the identical mark “MONARCH”, be likely to believe that both products originated with the same producer.

Id. See also *Schieffelin & Co. v. Molson Companies Ltd.*, 9 USPQ2d 2069, 2073 (TTAB 1989) (finding malt liquor and Cognac brandy to be related under the second *du Pont* factor, even though “we have no doubt that purchasers are not likely to consume a malt liquor thinking that it is Cognac brandy”).

Under similar factual situations, the Court of Appeals for the Federal Circuit and the Board have repeatedly found spirits and wine to be related. *See, e.g., In re Chatam Int'l Inc.* 380 F.3d 1340, 71 USPQ2d 1944, 1947-8 (Fed. Cir. 2004) (“Indeed, the goods [tequila and beer or ale] often emanate from the same source because ‘both are alcoholic beverages that are marketed in many of the same channels of trade to many of the same consumers.’”) (*quoting Majestic Distilling*, 65 USPQ2d at 1204 (finding malt liquor related to tequila given the identity of trade channels despite the fact that “malt liquor is a brewed product, whereas tequila is distilled”)); *Monarch Wine*, 196 USPQ 855 (distilled spirits related to wine); *In re AGE Bodegas Unidas, S.A.*, 192 USPQ 326 (TTAB 1976) (wines related to whiskey). The Board has noted that different types of alcoholic beverages are related in that “[a] typical consumer of alcoholic beverages may drink more than one type of beverage and may shop for different alcoholic beverages in the same liquor store. Moreover, a person may serve more than one kind of alcoholic beverage before or during a meal or at a party.” *Schieffelin*, 9 USPQ2d at 2073.

In view thereof, we find that the evidence of record, as well as legal precedent, sufficiently demonstrates that the goods identified in Applicant’s application and the goods identified in the cited registration are related. Thus, the second *du Pont* factor also weighs in favor of finding a likelihood of confusion.

C. Similarity of Trade Channels and Class of Purchasers

Because there are no limitations or restrictions as to trade channels or classes of purchasers in the respective identifications of goods, we presume that the goods

are or would be marketed in all normal trade channels for such goods and to all normal classes of purchasers of such goods. *See Packard Press Inc. v. Hewlett-Packard Co.*, 56 USPQ2d at 1357. The Examining Attorney submitted evidence demonstrating that the trade channels for both Applicant's and Registrant's goods include liquor stores, bars and restaurants, and the alcoholic beverages sections of retail outlets.⁹ The relevant class of consumers for both goods includes connoisseurs as well as ordinary consumers who consume alcoholic beverages, or purchase different types of alcoholic beverages as gifts or to stock a bar at home. *See Somerset Distilling, Inc. v. Speymalt Whiskey Distribs. Ltd.*, 14 USPQ2d 1539, 1542 (TTAB 1989) ("While we realize that certain purchasers of alcoholic beverages may be aficionados and know not only 'their brands' but which companies make which trademarked products, we also realize that other consumers may not be as knowledgeable, and may purchase Scotch whisky, gin or vodka as gifts, or to stock a bar for their guests."). Thus, the respective goods, as identified, would be provided in the same or at least overlapping channels of trade to the same or overlapping classes of purchasers. Accordingly, the third *du Pont* factor also weighs in favor of finding a likelihood of confusion.

D. Degree of Customer Care in Making Purchasing Decision

Applicant argues that, in terms of alcoholic beverages, consumers are sophisticated enough to distinguish between tequila and wine and because the level of involvement of buyers of alcoholic beverages are guided by tastes, preferences,

⁹ September 26, 2016, Office Action, TSDR, pp. 7-36.

alcohol tolerance and lifestyle, confusion as to the source of each party's respective goods is unlikely.¹⁰ Applicant submitted no evidence in support of its argument. Further, even assuming that purchasers of Applicant's goods are sophisticated, when it comes to their buying decisions, it is settled that even sophisticated purchasers are not immune from source confusion, especially in cases such as this one involving similar marks and related goods. *See Stone Lion Capital Partners*, 110 USPQ2d at 1163 (although the services recited in the application also encompass sophisticated investors, Board precedent requires the decision to be based on the least sophisticated potential purchasers who will exercise care when making financial decisions but who are not immune from source confusion where similar marks are used in connection with related services). Moreover, because neither the identification in Applicant's involved application nor the cited registration is limited to (1) expensive alcoholic beverages, or (2) purchasers who may be aficionados of alcoholic beverages, we must presume the identifications include inexpensive varieties of the identified products and that the consumers of these products include average consumers looking to purchase tequila or wine who may not be as knowledgeable and who, at the very least, are likely to believe that tequila and wine emanate from the same source if they are sold under the same or similar mark. *See Somerset Distilling, Inc., supra*. Therefore, not all of Applicant's purchasers or Registrant's purchasers can be expected to be as highly discriminating as Applicant contends. Furthermore, the evidence of record demonstrates that certain wines and tequila are relatively low cost every-day impulse

¹⁰ Applicant's Appeal Brief, 4 TTABVUE 17-18.

products that are purchased casually.¹¹ When products are low priced and subject to impulse buying without careful consideration, the risk of likelihood of confusion increases because purchasers are held to a lesser standard of purchasing care. *See Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898-99 (Fed. Cir. 2000). We therefore find this factor neutral.

E. Balancing the Factors

We have considered all of the arguments and evidence of record, including those not specifically discussed herein, and all relevant *du Pont* factors. Because we have found that the marks at issue are similar; that Applicant's identified goods are related to Registrant's goods; that they would move in the same or overlapping trade channels; that they are offered to the same or overlapping class of purchasers; and that the parties' respective goods are presumed to include relatively inexpensive varieties of the goods resulting in "impulse" purchasing, we conclude that Applicant's PA'DENTRO mark, as used in connection with the goods identified in the application, so resembles the cited mark ADENTRO for "wines" as to be likely to cause confusion or mistake, or to deceive under Section 2(d) of the Trademark Act.

Decision: The refusal to register Applicant's mark PA'DENTRO is affirmed.

¹¹ *See* September 26, 2016, Office Action, TSDR, pp. 7, 10, 12, 16 and 23.