

<p>This Opinion is Not a Precedent of the TTAB</p>

Mailed: August 4, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In re Adrenalin Gaming, LLC
—

Serial No. 86877784
—

Rob L. Phillips of FisherBroyles LLP,
for Adrenalin Gaming LLC.

Matthew Howell, Trademark Examining Attorney, Law Office 123,
Susan Hayash, Managing Attorney.

—
Before Cataldo, Shaw and Goodman,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Adrenaline Gaming, LLC (“Applicant”) seeks registration on the Principal Register of the mark ADRENALIN ATTRACTIONS (in standard characters, “ATTRACTIONS” disclaimed) for

“amusement park rides” in International Class 28.¹

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 of

¹ Application Serial No. 86877784 was filed on January 16, 2016, based upon Applicant’s allegation of use of the mark in commerce as of October 31, 2013 under Section 1(a) of the Trademark Act.

likelihood of confusion with Registration No. 4482059 for the mark ADRENALIM
(in standard characters) for

“amusement park rides and water park rides” in International Class
28.²

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

Evidentiary Matter

Applicant attached two evidentiary exhibits to its appeal brief that it did not introduce into the record during prosecution of the involved application.³

Trademark Rule 2.142(d) reads as follows:

The record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal. If the appellant or the examining attorney desires to introduce additional evidence after an appeal is filed, the appellant or the examining attorney should submit a request to the Board to suspend the appeal and to remand the application for further examination.

Applicant cannot make evidence of record by attaching it to its appeal brief. Nor is Applicant’s evidence proper subject matter for judicial notice.⁴ Thus, the Examining

² Issued on February 11, 2014. “The word ‘adrenalim’ has no meaning in a foreign language.”

³ 4 TTABVUE 9-12.

⁴ See Trademark Board Manual of Procedure (TBMP) § 1208.04 (June 2017) and authorities cited therein.

Attorney's objection⁵ to the evidence attached to Applicant's appeal brief on the ground of untimeliness is sustained, and we give this evidence no consideration.

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). We discuss the *du Pont* factors for which Applicant and the Examining Attorney have presented evidence and arguments.

Relationship of the Goods, Trade Channels and Classes of Purchasers

We first turn to the *du Pont* factors involving the similarity or dissimilarity of Applicant's goods and the goods in the cited registration, their channels of trade and purchasers. It is settled that in making our determination, we must look to the goods as identified in the application vis-à-vis those recited in the cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Computers Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Integrated Embedded*, 120 USPQ2d 1504, 1514 (TTAB 2016); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). It is not necessary that the respective goods be competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods are

⁵ 6 TTABVue 15-6.

related in some manner, or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could give rise to the mistaken belief that they originate from the same producer. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). See also *On-line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984). The issue here is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of these goods. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

The “amusement park rides” identified in the involved application are included among the “amusement park rides and water park rides” identified in the cited registration. As a result, Applicant’s goods are identical in part to those identified in the cited registration.⁶

Because the goods are identical in part and there are no recited restrictions as to their channels of trade or classes of purchasers, we must assume that the goods are, or will be, sold in all the normal channels of trade to all the usual purchasers for such goods, and that the channels of trade and the purchasers for Applicant’s goods

⁶ We observe that “water park rides” would appear to be related on the face of their identification to “amusement park rides.” However, in the absence of evidence of such a relationship, we decline to so find.

and the goods in the cited registration would be the same. *See Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003); *Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910, 1913 (TTAB 2000); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994).

Similarities and Dissimilarities of the Marks

We turn to a comparison of Applicant's ADRENALIN ATTRACTIONS mark and the registered ADRENALIM mark for similarities and dissimilarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 110 USPQ2d at 1160 (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F. 3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re 1st USA Realty Profrls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007)). The similarity or dissimilarity of the marks is determined based on the marks in their entirety, and the 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 National 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").

We observe that while we have placed the two marks next to one another for comparison purposes, consumers may not necessarily encounter the marks in such proximity and must rely upon their recollections thereof. *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467 (TTAB 1988). We further observe that, “[w]hen marks would appear on virtually identical goods or services, the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines.” *See Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992), cert. denied, 506 U.S. 1034 (1994). *See also ECI Division of E-Systems, Inc. v. Environmental Communications Inc.*, 207 USPQ 443, 449 (TTAB 1980).

In this case, Applicant’s ADRENALIN ATTRACTIONS mark is similar to the registered mark ADRENALIM to the extent that the term comprising the registered mark is nearly identical in appearance and sound to the first term in Applicant’s mark. Applicant’s mark also includes the disclaimed term “ATTRACTIONS.” Applicant correctly argues that a “disclaimer does not remove the disclaimed matter from a mark.”⁷ However, the Examining Attorney introduced evidence, reproduced in part below, that “ATTRACTIONS” is merely descriptive of Applicant’s goods.⁸

⁷ 4 TTABVUE 6.

⁸ May 9, 2016 first Office action at 10.



- ★ HOME
- ★ EVENTS
- ★ MIDWAY & ATTRACTIONS
- ★ BUY TICKETS

- ★ ABOUT AOA
- ★ FIND AN EVENT
- ★ DISCOUNTS
- ★ EMAIL LIST
- ★ BOOKINGS
- ★ SAFETY
- ★ PHOTO GALLERY
- ★ CLASSIFIEDS
- ★ EMPLOYMENT
- ★ CONTACTS

MIDWAY & ATTRACTIONS

The actual presentation of our midway is a vital component of our success. We pay strict attention to every detail in an effort to assure our event will provide the public with maximum entertainment.

The Amusements of America midway includes a variety of the most popular carnival foods, tastefully presented to please every palate. We also feature games of skill and chance designed to suit players of all ages and interests. There are even special games for children that guarantee a prize with every play ensuring that everyone goes home with a smile on their face!

Our family-friendly environment features clean, well maintained, state-of-the-art ride equipment, operated by trained and competent personnel. Our fabulous flashing light and color displays, and exciting music all combine to furnish the ultimate in thrilling carnival experience. Our wide selection of amusement rides feature rides for patrons of all ages. From the thrill seekers to junior riders, we have you covered.

Not sure what ride is right for you or your child? Our rides are categorized at five different levels including spectacular rides, thrill rides, family rides, and kiddy rides. Each ride listed on our web site includes a thrill scale to help riders decide if a particular attraction meets their level of comfort. Rides with a thrill level of 5 are categorized as most aggressive while rides ranked with a level of 1 are categorized as having a low thrill. Be sure to [print a copy of our height requirements](#) before attending one of our events so that you know how tall your child must be in order to ride each ride.



Aside from rides, games, and food, Amusements of America fills the grounds with customer amenities including shaded rest areas with benches and picnic tables, misting fans for hot summer days, and photo opportunity areas with character cut-outs. We compliment the midway with professional landscaping and flower planters, clear and bright signage, flags, and overhead lighting to transform the grounds into an amusement park atmosphere. At Amusements of America, we realize the importance of customer service. Guests that need assistance are welcome to visit one of our customer relations booths for event information, help with an armband, or to answer any questions that they may have.

For more information on some of our rides and attractions, please select a category below:

We thus find that ADRENALIN is the dominant element of Applicant's mark, and accordingly it is entitled to more weight in our analysis. It is 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.*, 224 USPQ at 751.

Furthermore, we note that ADRENALIN, the distinctive word in Applicant's mark, is also the first word therein. *Presto Products, Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("...[It is] a matter of some importance since it 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 Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1692 ("The presence of this strong distinctive term as the first word in both parties' marks renders the marks similar, especially in light of the largely laudatory (and hence non-source identifying) significance of ROYALE."). In addition, consumers are often known to use shortened forms of names, and it is likely that Applicant's goods are referred to as "ADRENALINE." Cf. *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 219 (CCPA 1978) (Rich, J., concurring: "the users of language have a universal habit of shortening full names – from haste or laziness or just economy of words").

With regard to connotation, Applicant argues that

Applicant's mark utilizes the well-recognized term "Adrenalin" which connotes excitement, anticipation, exhilaration, rush, etc., while the Cited Mark is for the arbitrary term AdrenaLIM. When a consumer observes Applicant's mark, the consumer will understand immediately that the mark relates to excitement while the consumer may not understand to what the Cited Mark relates. Indeed, it requires some Internet research to determine that "LIM" in AdrenaLIM refers to Lim Technology developed by the owner of the AdrenaLIM mark. Whitewater's own website explains that "LIM" is an acronym for Linear Induction Motor.⁹

⁹ 4 TTABVUE 6.

While there are no dictionary definitions in the record of the terms comprising Applicant's mark, we agree with Applicant that its mark appears to connote exhilarating or exciting attractions. Similarly, there is no evidence made of record during prosecution of the term ADRENALIM comprising the registered mark.¹⁰ As Applicant notes above, "it requires some Internet research" to determine the asserted meaning of "LIM" in the registered mark. Thus, any such meaning is not likely to be readily apparent to consumers simply viewing the registered mark. Further, because ADRENALIM is registered in standard characters, it need not appear as "AdrenaLIM" as argued by Applicant, but rather may appear in any size, font or stylization. *See In re Star Belly Stitcher, Inc.*, 107 USPQ2d 2059, n.1 (TTAB 2013) (applied-for mark displayed with uppercase and lowercase letters treated as standard form mark in all uppercase letters). *See also In re Calphalon Corp.*, 122 USPQ2d 1153 (TTAB 2017). As such, the cited ADRENALIM mark may simply appear to be a novel spelling or misspelling of "ADRENALIN."

Viewed as a whole, we find that ADRENALIN ATTRACTIONS is more similar to than dissimilar from ADRENALIM in appearance and sound. With regard to connotation, in the absence of any evidence as to the meaning of the registered mark, we find that it may connote the highly similar term "ADRENALIN" and that

¹⁰ As discussed above, the untimely exhibits attached to Applicant's brief are not part of the record. In addition, the hyperlinks in Applicant's brief to Internet materials is insufficient to make such materials of record. *See In re HSB Solomon Assocs., LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012) (stating that "a reference to a website's internet address is not sufficient to make the content of that website or any pages from that website of record"); *Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010) (noting that because of the transitory nature of Internet postings, websites referenced only by links may later be modified or deleted).

consumers may simply view ADRENALIM as a novel spelling thereof, to the extent they notice the difference at all. We thus find the marks to be similar in connotation and, overall, to convey similar commercial impressions.

The applicable test is not whether the marks can be distinguished when subjected to a side-by-side comparison. *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). Rather, the proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Sophistication of Consumers

Applicant argues that

The types of products being developed, sold and sourced under both marks relate to expensive, engineered, complex mechanical amusement type rides. For example, [registrant] develops and sells substantial water park rides while applicant develops and sells amusement park rides (e.g., rollercoaster-type rides). Applicant respectfully submits that entities purchasing these complex mechanical rides will not do so cavalierly. Indeed, such purchases are scrutinized as is the source of the complex mechanical goods. Such scrutiny mitigates any customer confusion between Applicant's mark and the Cited Mark. That is, the purchasers of the complex mechanical rides are sophisticated. Simply put, the purchasing decision is not based on only a comparison of the marks, per se, but is based on a deep understanding of the amusement rides, safety associated therewith and their respective manufacturers.¹¹

However, Applicant presented no evidence in support of this contention during prosecution of the involved application, and it is unclear on this record whether the

¹¹ 4 TTABVUE 7.

involved marks will be encountered only by purchasers of amusement and waterpark rides or also by the consuming public that uses such rides. Moreover, even if we accept that the involved goods will be subject to careful purchase, there is nothing in the record to support a finding that the goods and purchasing process are of such a nature that purchasers could distinguish such similar marks for legally identical goods. *See, e.g., Electronic Design & Sales, Inc. v. Electronic Data Sys. Corp.*, 954 F.2d 713, 21 USPQ2d 1388 (Fed. Cir. 1992) (record confirms that opposer's services are expensive and are purchased only by experienced corporate officials after significant study and contractual negotiation and that the evaluation process used in selecting applicant's products requires significant knowledge and scrutiny). Also, and as is frequently stated, even if consumers are knowledgeable in a particular field that does not necessarily mean that they are immune from source confusion. *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988).

Summary

We have considered all of the arguments and evidence of record, including those not specifically discussed herein, and all relevant *du Pont* factors. In view of the similarity of the marks at issue, the in part identical nature of the goods, and the absence of limitation to their channels of trade and classes of customers, we find that Applicant's mark so closely resembles the registered mark as to be likely to cause confusion, mistake or deception as to the source of Applicant's goods. Applicant's unsupported arguments regarding the sophistication of the relevant

purchasers is not sufficient to mitigate in favor of a finding that confusion is unlikely.

Decision: The refusal to register is affirmed.