

This Opinion is Not a
Precedent of the TTAB

Mailed: December 6, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Crystal Cruises, LLC

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Serial Nos. 86950812 & 86950841¹

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& Geraldson LLP
for Crystal Cruises, LLC

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Before Kuhlke, Adlin, and Lynch,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

¹ Because the cases have common questions of fact and law, the appeals are hereby consolidated. *See, e.g., In re Anderson*, 101 USPQ2d 1912, 1915 (TTAB 2012) (The Board *sua sponte* consolidated two appeals). Citations to the TSDR record are to Serial No. 86950812.

I. Background

In separate applications, Crystal Cruises, LLC (“Applicant”) seeks registration on the Principal Register of the following marks, both for “Restaurant services” in International Class 43:

海馬日本料理²

海马日本料理³

Each application contains a description stating “[t]he mark consists of six Chinese characters,” and a transliteration statement that “[t]he non-Latin characters in the mark transliterate to ‘Haima rìben liàoli’ and this means ‘seahorse Japanese cuisine’ in English.” Applicant has disclaimed “the non-Latin characters that transliterate to ‘rìben liàoli.’”

The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with the registered mark SEAHORSE in standard characters for “bar, lounge services” in International Class 43.⁴ After the Examining Attorney made the refusals final, Applicant appealed. For the reasons set forth below, we affirm the refusals to register.

II. Likelihood of Confusion

The determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. du Pont de Nemours*

² Application Serial No. 86950812 was filed March 23, 2016 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on an alleged intent to use the mark in commerce.

³ Application Serial No. 86950841 was filed March 23, 2016 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on an alleged intent to use the mark in commerce.

⁴ Registration No. 2961555 issued June 7, 2005, and has been renewed.

& Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as “*du Pont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (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 [services] and differences in the marks.”).

A. Similarity of the Marks

We compare the marks “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). The test assesses not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the services offered under the respective marks is likely to result. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *see also Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012).

The marks differ in appearance and sound because Applicant’s marks are in Chinese while the registered mark is an English language word, but we find the connotation and commercial impression of the marks quite similar. The record,

including Applicant's own translation of its marks, shows that Applicant's marks translate from Chinese to English as SEAHORSE JAPANESE CUISINE. The Examining Attorney contends that the dominant portion of Applicant's marks translates to SEAHORSE, and that this element should be considered the equivalent of the registered mark under the doctrine of foreign equivalents.

“Under the doctrine of foreign equivalents, foreign words from common [modern] languages are translated into English to determine ... similarity of connotation in order to ascertain confusing similarity with English word marks.” *Palm Bay Imps.*, 73 USPQ2d at 1696. We find that Chinese qualifies as a common, modern language, based on the U.S. Census data introduced by Applicant, showing that among foreign languages primarily spoken at U.S. homes, Chinese is the second most common after Spanish.⁵ In addition, while the Census figures are substantial, they nevertheless almost certainly undercount the percentages of Americans who know Chinese because they document the primary language spoken at home. Many U.S. residents who know or have studied Chinese may speak English at home. For example, those who have emigrated to the United States, or have lived in China, or whose parents or relatives are Chinese, may be familiar with or even fluent in Chinese but may still speak English as the primary language in their homes. None of these U.S. consumers familiar with Chinese would be represented in Applicant's cited statistics. Accordingly, we have no hesitation in considering Chinese a common, modern language.

⁵ November 30, 2016 Response to Office Action at 8-14.

Nonetheless, “the doctrine of foreign equivalents is not an absolute rule and should be viewed merely as a guideline,” applying “only when it is likely that the ordinary American purchaser would ‘stop and translate [the word] into its English equivalent.” *Id.* (citations omitted). For example, *In re Spirits Int’l N.V.*, 563 F.3d 1347, 90 USPQ2d 1489, 1492 (Fed. Cir. 2009) describes exceptions when a consumer familiar with the foreign language would not stop and translate. Despite Applicant’s unsubstantiated arguments, we consider the exceptions inapplicable in this case, however. On this record, we do not find that “the literal translation is irrelevant,” that the Chinese wording has a “well established alternative meaning,” or that the context in which the marks appear renders translation unlikely. *See id.* In fact, because the evidence shows that the English translation is unambiguously literal and direct,⁶ with no other relevant connotations or variations in meaning, we deem it appropriate to apply the doctrine. *See, e.g., In re Ithaca Ind., Inc.*, 230 USPQ 702 (TTAB 1986) (holding LUPO and WOLF and design likely to cause confusion in part because LUPO is the foreign equivalent of the English word “wolf”). Given the undisputed literal and direct translation of Applicant’s marks as SEAHORSE JAPANESE CUISINE, and no evidence that the relevant consumer would **not** stop and translate the mark, we reject Applicant’s unsupported contention that the Examining Attorney must make an additional showing that the Chinese characters are “common or commonly known among readers of Chinese.”⁷ *See In re Oriental*

⁶ January 5, 2017 Office Action at 6-7; Application at 2 (Applicant’s own transliteration/translation statement).

⁷ 10 TTABVUE 7 (Applicant’s Brief).

Daily News, Inc., 230 USPQ 637, 638 (TTAB 1986) (Chinese characters that mean ORIENTAL DAILY NEWS held merely descriptive of newspapers, with the Board stating, “we see no reason why descriptive words represented by Chinese characters should be treated any differently from descriptive words in other contemporary languages.”).⁸

Applying the doctrine of foreign equivalents, we find that the SEAHORSE element of Applicant’s marks dominates, including because as the first word it “is most likely to be impressed upon the mind of a purchaser and remembered,” *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) and *Palm Bay Imps.*, 73 USPQ2d at 1692, especially given that the remaining wording JAPANESE CUISINE is disclaimed as generic for or descriptive of the type of food served by the identified restaurants.⁹ Here, consumers would not view JAPANESE CUISINE as source-indicating. *See In re Dixie Restaurants, Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (in comparing THE DELTA CAFÉ to DELTA, the term CAFÉ lacks sufficient distinctiveness to create a different commercial impression). This dominant SEAHORSE element of Applicant’s marks is identical in connotation and commercial impression to the cited mark SEAHORSE.

⁸ We do not find persuasive Applicant’s attempt to distinguish the *Oriental Daily News* case because in that case the specimens showed the Chinese characters forming the mark appearing with an English language translation. In *Oriental Daily News*, the Board relied on the accompanying English translation only to confirm the meaning of the Chinese characters. Here, Applicant has supplied the meaning itself.

⁹ Other evidence in the record also supports the genericness or descriptiveness of JAPANESE CUISINE. *See* January 5, 2017 Office Action at 8-17.

Applicant argues that even if consumers would stop and translate its marks, the visual and phonetic differences arising from the appearance of its marks in Chinese characters and the transliterated pronunciation change the commercial impression and outweigh the similarity in meaning. However, this argument could be made in any foreign equivalents case, almost all of which by definition involve comparing marks in different languages that typically look and sound different. *Cf. In re Oriental Daily News*, 230 USPQ at 638 (the relevant purchasing public would perceive the Chinese characters sought to be registered in accordance with their English language meaning). Thus, while we have considered the appearance and sound of the marks in their entireties, we find that their differences in appearance and sound are outweighed by the significant similarity in connotation and commercial impression under the doctrine of foreign equivalents. *See In re Sarkli, Ltd.*, 721 F.2d 353, 220 USPQ 111, 113 (Fed. Cir. 1983) (“the PTO may reject an application ex parte solely because of similarity in meaning of the mark sought to be registered with a previously registered mark”); *see also In re Thomas*, 79 USPQ2d 1021, 1025 (TTAB 2006) (MARCHE NOIR for jewelry likely to be confused with BLACK MARKET MINERALS for retail jewelry store services, despite marks being “decidedly different in sound and appearance,” in large part because “marche noir” means “black market” in French); *In re Perez*, 21 USPQ2d 1075 (TTAB 1991) (EL GALLO for fresh vegetables likely to be confused with ROOSTER for fresh fruit, because “[w]hile the marks are concededly distinguishable in their appearance and sound, it is our view

that the equivalency in meaning or connotation is sufficient, in this case, to find likelihood of confusion”).

This *du Pont* factor weighs in favor of likely confusion.

B. The Services

Applicant’s restaurant services need not be “competitive or intrinsically related” to Registrant’s bar and lounge services to find a likelihood of confusion. *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1737 (Fed. Cir. 2017). “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.’” *Coach Servs.*, 101 USPQ2d at 1722 (internal citations omitted). In analyzing the second *du Pont* factor, we look to the identifications in the application and cited registration. *See Stone Lion Capital Partners v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Indeed, “[t]he authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of [services] set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s [services], the particular channels of trade or the class of purchasers to which sales of the [services] are directed.” *Octocom Syst.*, 16 USPQ2d at 1787. Thus, we must presume that Applicant’s restaurant services encompass all types, not just

Japanese food restaurants, as argued by Applicant.¹⁰ *See, e.g., In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992) (“Registrant’s goods are broadly identified as computer programs recorded on magnetic disks, without any limitation as to the kind of programs or the field of use. Therefore, we must assume that registrant’s goods encompass all such computer programs including those which are for data integration and transfer.”).

Here, the cited registration covers bar and lounge services, and a bar is defined as “[a] counter at which drinks, especially alcoholic drinks, and sometimes food, are served [or a]n establishment or room having such a counter.”¹¹ This definition suggests some inherent overlap, or at least close relationship, between bar and restaurant services, as both serve food.

In addition, the Examining Attorney submitted persuasive evidence that consumers are accustomed to encountering restaurant services such as Applicant’s and bar and lounge services such as Registrant’s under the same marks. For example:

- The Brewer’s Alley website shows that mark for bar and restaurant services;¹²

¹⁰ 10 TTABVUE 9 (Applicant’s Brief).

¹¹ July 14, 2016 Office Action at 30-31 (American Heritage Dictionary).

¹² July 14, 2016 Office Action at 8-11, 20-23 (brewers-alley.com) (brewpub beer menu, restaurant food menu, and promotion of lunch food specials).

- The BJ's website calls its establishments "BJ's Restaurant and Brewhouse";¹³
- The Capitol City Brewing Company website features a food menu as well as "Signature Brews," and describes the establishment as "Our Nation's Monument to Handcrafted Beer and Great Food!";¹⁴
- The Dogfish Head website refers to its establishments as brewpubs offering "Beer-centric Food;"¹⁵ and
- Website evidence shows Jackson's as a mark for "Mighty Fine Food & Lucky Lounge."¹⁶

The record also includes six use-based third-party registrations that identify both bar and restaurant services under the same marks, suggesting that these services may emanate from the same source. *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015); *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). The foregoing evidence demonstrates the relatedness of Applicant's and Registrant's services.

Applicant in its Reply Brief for the first time criticizes the Examining Attorney's marketplace relatedness evidence for showing brewpubs and combination bar-restaurant establishments rather than standalone restaurants and standalone bars

¹³ *Id.* at 12-19 (bjsrestaurants.com).

¹⁴ *Id.* at 24, 27 (capcitybrew.com).

¹⁵ *Id.* at 28 (dogfish.com).

¹⁶ *Id.* at 33 (greateramericanrestaurants.com).

or lounges under the same marks. We do not find the argument persuasive, as Applicant's and Registrant's recitations refer to types of services without restriction to standalone establishments or otherwise. Thus, the Examining Attorney's evidence is relevant and convincing to show consumer exposure to these types of services being offered under the same mark. In any event, common experience tells us that many restaurants include bars, and many bars serve food.

This factor weighs in favor of likely confusion.

C. Trade Channels and Classes of Consumers

Turning to the trade channels and consumers, the relatedness evidence discussed above demonstrates that services such as those identified in the subject application and cited registration are featured together in the same establishments, and on the same websites, and would be encountered by the same consumers. This factor also favors likely confusion.

III. Conclusion

The similarity of these marks in their entireties for related services that move in the same channels of trade to the same classes of customers renders confusion likely.

Decision: The refusals to register Applicant's marks are affirmed.