

This Opinion is not a
Precedent of the TTAB

Mailed: December 12, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Northern Brewer, LLC
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Serial No. 86973148

Victor J. Baranowski of Schmeiser, Olsen & Watts LLP
for Northern Brewer, LLC.

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Before Mermelstein, Gorowitz and Heasley,
Administrative Trademark Judges.

Opinion by Gorowitz, Administrative Trademark Judge:

Northern Brewer, LLC (“Applicant”) seeks registration on the Principal Register
of the mark TROPICAL BLISS in standard characters, for

Kits for making wine having flavors of non-tropical fruits
comprised primarily of fruit juice, crushed grapes, fruit
juice concentrates and chemical additives, as well as dry
wine yeast, yeast nutrients, clarifying agents, fining
agents, sugar syrup, granular sugar, dextrose, stabilizers,
tannin, oak chips, wood chips, oak powder, and oak extract,
in International Class 33.¹

¹ Application Serial No. 86973148 was filed on April 12, 2016, based upon Applicant’s alleged first use of the mark on April 12, 2016 and first use of the mark in commerce on June 21, 2016, under Section 1(a) of the Trademark Act.

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 BLISS for "wines,"² as to be likely to cause confusion, or to cause mistake, or to deceive.

When the refusal was made final, Applicant filed a request for reconsideration, which was denied. Thereafter, Applicant filed an appeal. We reverse the refusal to register.

I. 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 *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In considering the evidence, 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). See also *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

² Registration No. 3187029, issued December 19, 2006, renewed.

A. Similarity or Dissimilarity of the Goods.

We start our analysis with the second *du Pont* factor and determine the relatedness of Applicant's goods and Registrant's goods. "In comparing the . . . goods, '[t]he issue to be determined . . . is not whether the goods . . . are likely to be confused but rather whether there is a likelihood that purchasers will be misled into the belief that they emanate from a common source.'" *Anheuser-Busch, LLC v. Innvopak Sys. Pty. Ltd.*, 115 USPQ2d 1816, 1825 (TTAB 2015) (quoting *Helene Curtis Indus. Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1624 (TTAB 1989)). 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).

In our analysis, we focus on the wording of the identifications of goods in the application and registration, rather than what the record may reveal regarding

Applicant's and Registrant's particular goods, because "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." *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)).

The Examining Attorney made of record eighteen active third-party, used-based registrations showing that the same entity has registered a single mark identifying both wine and kits for making wine.³ 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 may 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), *aff'd*, 864 F.2d 149 (Fed. Cir. 1988).

The Examining Attorney also submitted Internet evidence of webpages from several websites reflecting sales of wine and winemaking supplies, for example Fulkerson Winery — www.fulkersonwinery.com, (sells wine and offers home wine making ingredients and classes);⁴ J&D Cellars Winery & Vineyard —

³ November 21, 2016 Office Action, TSDR pp. 25-98. All citations to the Trademark Status and Document Retrieval (TSDR) database are to the PDF version of the documents.

⁴ July 6, 2016 Office Action, TSDR pp. 6-9.

www.jndcellars.com, (winery specializing in small batch wines, also sells winemaking supplies);⁵ Presque Isle Wine Cellars — www.piwine.com (winery and online wine store; sells winemaking supplies);⁶ and Seven Lakes Vineyard — www.sevenlakeswinery.com (wine and wine making classes, wine making kits).⁷ Relying on the evidence of record, the Examining Attorney has made a prima facie case that the goods are related.

To rebut the evidence, Applicant argues that “wines and [] wine-making kits are not related in the mind of the consuming public as to the origin of the goods” Appeal Brief, 4 TTABVue 13. Applicant contends that the sale of wine kits and wine by a single party “is uncommon on the whole, and far less common than winemakers selling beer and vice versa.” *Id.* The relationship between wine and beer is not before us and thus is irrelevant to our decision. Applicant has not introduced any evidence to support its argument that consumers would not consider wines and wine-making kits sold under the same or similar marks to be related. Accordingly, we find that the second *du Pont* factor favors a finding of likelihood of confusion.

B. The similarity or dissimilarity of the channels of trade.

As discussed *supra*, in establishing the similarities of the goods, the Examining Attorney submitted websites on which both wine and wine-making kits are sold

⁵ *Id.*, TSDR pp 10-11.

⁶ *Id.*, TSDR pp 12-13.

⁷*Id.*, TSDR pp 14-20.

under the same mark. Applicant submitted a summary of results of a search for “wine making kits” from the Google search engine.⁸ Applicant’s search summary is of limited probative value since the information is truncated and does not include critical information, including whether wine is also advertised or sold on each site. *See Luxco, Inc. v. Consejo Regulador del Tequila, A.C.*, 121 USPQ2d 1477, 1488 n. 59 (TTAB 2017).

Since the Examining Attorney has established that wine and wine making kits are sold on the same websites and thus in the same channels of trade, we find that the third *du Pont* factor favors a finding of likelihood of confusion.

C. The number and nature of similar marks in use on similar goods.

The sixth *du Pont* factor requires us to consider evidence pertaining to the number and nature of similar marks in use on similar goods. “The purpose of a defendant introducing third-party uses is to show that customers have become so conditioned by a plethora of such similar marks that customers ‘have been educated to distinguish between different such marks on the bases of minute distinctions.’” *Palm Bay*, 73 USPQ2d at 1691.

With its November 17, 2016 Response, Applicant submitted screenshots from the following eleven websites, each of which reflects the use of the word “BLISS” in connection with wine and/or related goods:

Bliss Family Vineyards – (www.blissvineyard.com)

⁸ March 6, 2017 Request for Reconsideration, TSDR pp. 22-25.



TSDR p.7⁹

Bliss Wine Imports - (www.blisswineimports.com)



TSDR p. 9;

Bliss Wine Company - (www.myblisswines.com)



TSDR p. 10;

Sweet Bliss Winery - (www.sweetblisswinery.com)



TSDR p. 11;

⁹ Registrant's website.

Bliss Wine & Gifts - (blisswineandgifts.com)



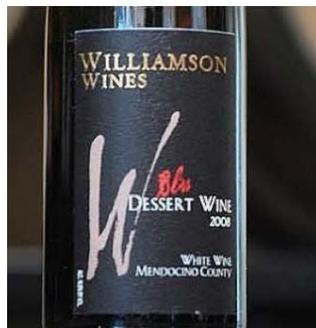
TSDR p. 12;

Bliss in a Bottle - (www.blissinabottle.com)



CHOCOLATE & WINE PAIRED AS NEVER BEFORE
TSDR p. 13;

Williamson Wines – (williamsonwines.com)
BLISS DESSERT WINE



Bliss NOBLE WHITE WINE
TSDR p. 14

Vino Bliss – (www.vinobliss.com)



TSDR p. 15;

Wine Enthusiast - (www.wineenthusiast.com)



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Your love of wine is interpreted at last by Europe's finest glassblowers. A graceful streak of black, Riedel's trademark color, adorns one side, while the heart-shaped center, recessed to aid pouring, remains pure and clear thus bringing you the Riedel Black Tie Bliss wine decanter. Mouth-blown of 24% lead crystal. [See More Product Details](#) ▾

Item # 76192

TSDR p. 14; and

Still Pond Vineyard – (stillpond.com)

[Home](#) / [Still Pond Wines](#) / [Blackberry Bliss](#)



Blackberry Bliss

\$10.00

A full-bodied blackberry flavored muscadine wine that will please your taste buds.

Add to cart

Category: Still Pond Wines

Description **Additional Information**
TSDR p. 17.

As our reviewing court, the Court of Appeals for the Federal Circuit said in *Juice Generation, Inc. v. GS Enters. LLC*,

[t]he weaker an opposer's mark, the closer an applicant's mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection. *Id.* ("Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection."); *In re Coors Brewing Co.*, 343 F.3d 1340, 1345 [68 USPQ2d 1059] (Fed. Cir. 2003) (third-party use can establish that mark is not strong); *Fleetwood Co. v. Mende*, 298 F.2d 797, 799 [132 USPQ 458] (CCPA 1962) ("Where a party uses a weak mark, his competitors may come closer to his mark than would be the case with a strong mark without violating his rights.").

Juice Generation, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015). The evidence establishes that the word BLISS is weak when used to identify the source of wine and related products. As such, the sixth *du Pont* factor favors a finding of no likelihood of confusion.

D. Similarity or Dissimilarity of the Marks.

We finish our analysis with the first *du Pont* factor, the similarity or dissimilarity of the marks. In comparing the marks we must consider the appearance, sound, connotation and commercial impression of the marks at issue. *Palm Bay Imports*, 73 USPQ2d at 1692. "The 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." *Coach Servs. v. Triumph Learning*, 101 USPQ2d at 1721 (citation omitted).

While both marks contain (or consist of) the word BLISS, the addition of the prefatory word TROPICAL changes both the appearance and sound of Applicant's

mark. Further, as the evidence establishes, BLISS as a trademark or component is frequently used and thus weak when used in connection with wine and wine products.

Relying on Merriam-Webster Online Dictionary, both Applicant¹⁰ and the Examining Attorney¹¹ define “bliss” as “complete happiness.” We accept this definition noting that the word “bliss” is also suggestive of the happiness that enjoying wine may bring.

We also take judicial notice of the definition of “tropical”: a: of relating to, occurring in, or suitable for use in the tropics – tropical forests – a tropical disease, b: of, being, or characteristic of a region or climate that is frost-free with temperatures high enough to support year-round plant growth given sufficient moisture – tropical Florida. “Tropical.” *Merriam-Webster.com*. Merriam-Webster.

The addition of the word “tropical” to Applicant’s mark somewhat changes the commercial impression in that it stresses the importance of location suggesting that enjoying wine in a “tropical” location is what causes complete happiness.

Taking into consideration the weakness of the word “bliss,” the differences in sound and appearance and the differences in commercial impressions, we find that the first *du Pont* factor favors a finding of no likelihood of confusion.

¹⁰ March 6, 2017 Request for Reconsideration, TSDR p. 2

¹¹ Examining Attorney’s Brief, 6 TTABVUE 6. As requested by the Examining Attorney, we take judicial notice of the definition.

E. Balancing the factors.

We have considered all the evidence and argument on the relevant *du Pont* factors, whether discussed herein or not. We find that the weakness of the word BLISS in the wine and related fields, and the dissimilarity in the meanings of the marks outweigh the similarity in the goods and the channels of trade. As such, we find that there is no likelihood of confusion between Applicant's use of the mark TROPICAL BLISS for "kits for making wine having flavors of non-tropical fruits comprised primarily of fruit juice, crushed grapes, fruit juice concentrates and chemical additives, as well as dry wine yeast, yeast nutrients, clarifying agents, fining agents, sugar syrup, granular sugar, dextrose, stabilizers, tannin, oak chips, wood chips, oak powder, and oak extract" and the registered mark BLISS for "wines."

Decision: The refusal to register Applicant's mark TROPICAL BLISS is reversed.