

This Opinion is Not a  
Precedent of the TTAB

Mailed: October 25, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Peter Wood, Geoffrey Dean-Smith, and Tasha Mudd*

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Serial No. 87022288

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Heather A. Sapp of Raj Abhyanker, P.C.  
for Peter Wood, Geoffrey Dean-Smith, and Tasha Mudd

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

Opinion by Lynch, Administrative Trademark Judge:

I. Background

Joint applicants Peter Wood, Geoffrey Dean-Smith, and Tasha Mudd (“Applicants”) seek registration on the Principal Register of the standard-character mark SINFUL ZINFANDEL, with ZINFANDEL disclaimed, for “Wine created

primarily from Zinfandel grapes” in International Class 33.<sup>1</sup> 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 ZINFUL in standard characters for “Distilled Spirits; Wines” in International Class 33.<sup>2</sup> After the Examining Attorney made the refusal final, Applicant appealed. We affirm the refusal.

## 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 & 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 goods. *See In re Chatam Int’l Inc.*, 380 F.2d 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 goods and differences in the marks.”).

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<sup>1</sup> Application Serial No. 87022288 was filed May 6, 2016, based on Applicant’s allegation of an intent to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

<sup>2</sup> Registration No. 3412326 issued April 15, 2008; Section 8 affidavit accepted and Section 15 affidavit acknowledged.

A. The Goods, Trade Channels, and Classes of Consumers

First, we must determine whether the goods are sufficiently related that consumers would mistakenly believe they emanate from the same source. In this analysis of the second *du Pont* factor, we look to the identifications of goods in the application and the cited registration. See *Stone Lion Capital Partners, LP 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).

The subject application identifies “Wine created primarily from Zinfandel grapes,” while the cited registration includes “Wines.” Registrant’s “Wines” encompass all types of wine, including Zinfandel. See *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013) (applying principle that “registration encompasses all goods or services of the type described”). Thus, the goods are identical in part.

Turning to the trade channels, we presume, as we must, that Applicants’ and Registrant’s overlapping goods move in the *same* normal channels of trade for wine and that they are available to the same classes of consumers. *In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion). These factors weigh heavily in favor of likely confusion.

## B. Similarity of the Marks

Turning next to the first *du Pont* factor, we compare the applied-for and cited marks “in their entirety as to 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, 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 goods 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).

Applicants’ SINFUL ZINFANDEL mark consists of two English language words, while Registrant’s ZINFUL consists of one coined term<sup>3</sup> apparently derived from the same terms comprising Applicant’s mark. First, we find that SINFUL dominates Applicants’ mark. *See Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1354 (Fed. Cir. 2000) (“Once all the features of the mark are considered, . . . it is not improper to state that, for rational reasons, more or less weight has been given to a particular feature of the mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety.”). As the first word in Applicants’ mark, SINFUL “is most likely to be impressed upon the mind of a purchaser and remembered.” *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d

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<sup>3</sup> January 17, 2017 Response to Office Action at 15 (no dictionary definition for “ziful”).

1895, 1897 (TTAB 1988). Also, the only other word in the mark, ZINFANDEL, is generic,<sup>4</sup> and disclaimed. Nothing about its combination with SINFUL, used on Zinfandel wine, significantly impacts the overall impression of the mark, although ZINFANDEL does make Applicant's mark look and sound more similar to Registrant's mark. The significance of ZINFANDEL in the comparison of marks is diminished, because consumers would be unlikely to focus on the generic term to distinguish source. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985).<sup>5</sup> Applicants' dominant term, SINFUL, rhymes with Registrant's mark, ZINFUL, so it sounds similar, and differs from it only by one letter, so it looks similar. In fact, because the differing letters "S" and "Z" generally have a similar sound and even sometimes have the same sound,<sup>6</sup> consumers will pronounce SINFUL and ZINFUL very similarly. *See Viterra*, 101 USPQ2d at 1911 (noting the significance of similarities in sound, given that consumers use words in marks to "call for" the goods).

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<sup>4</sup> Applicant has identified wine created primarily from Zinfandel grapes, and the record includes several definitions of "zinfandel," including the Oxford Dictionary's, which defines it as "[a] red or blush dry wine made from the Zinfandel grape." August 9, 2016 Office Action at 4 (oxforddictionaries.com).

<sup>5</sup> Applicants' analysis of these cases is wrong. 7 TTABVUE 4 (Applicants' Reply Brief). The Federal Circuit recently noted, citing *Nat'l Data*, that as long as the mark in its entirety is considered, "the Board may properly afford more or less weight to particular components of a mark for appropriate reasons," including the genericness of a component. *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1676 (Fed. Cir. 2015). While descriptive or generic components of a mark may not be ignored, they "may be given little weight in reaching a conclusion on the likelihood of confusion." *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (quoting *Nat'l Data*, 224 USPQ at 752).

<sup>6</sup> January 17, 2017 Response to Office Action at 11 ("The s spelling is sometimes pronounced as an S sound (sit, cats) and sometimes as a Z sound (wise, dogs)).")

Applicants' own evidence shows that “[t]he S and Z sounds are often studied as a pair because they sound very similar, and both sounds are made in the same part of the mouth.”<sup>7</sup>

The words SINFUL and ZINFUL also result in significant visual resemblance, especially considering that these standard-character marks can be presented in any color, font style or size, and therefore could appear in the same script and color. *See Viterra*, 101 USPQ2d at 1909; *see also* 37 C.F.R. § 2.52(a). We remain mindful that “marks ‘must be considered . . . in light of the fallibility of memory’ and ‘not on the basis of side-by-side comparison.’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (citation omitted).

Turning to meaning and commercial impression, SINFUL means “tainted with, marked by, or full of sin: wicked; such as to make one feel guilty <a *sinful* chocolate cake>.”<sup>8</sup> While ZINFUL is a coined term without a recognized definition, we find that when used on Zinfandel wine, the term brings to mind Zinfandel because of the ZIN component and also evokes something “sinful” or perhaps “sinfully” good because of ZINFUL’s rhyme with and similarity to the word “sinful.” Applicant challenges the notion that the ZIN component would be understood as suggesting Zinfandel, and contends that other connotations such as “zen” are just as likely.<sup>9</sup> Particularly given the use on wine, we find it much more likely that consumers would relate the ZIN

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<sup>7</sup> *Id.* at 8.

<sup>8</sup> January 17, 2017 Response to Office Action at 13 (merriam-webster.com).

<sup>9</sup> 7 TTABVUE 7 (Applicants’ Reply Brief).

component of the mark to Zinfandel. Applicant also argues that because its mark consists of familiar English words while Registrant's consists of an unfamiliar invented word, consumers will not confuse them. However, Registrant's mark does not create an entirely different commercial impression, but rather is in part suggestive of the word "sinful" found in Applicants' mark. We therefore consider this situation distinguishable from the cases cited by Applicant where the Board and the Court found that the coined term resulted in a commercial impression distinct from the familiar word.

Overall, while we have considered the additional word in Applicants' mark and the distinction between SINFUL and ZINFUL, we find that the resemblance in sound, appearance, connotation and commercial impression renders the marks similar, also weighing in favor of likely confusion.

### C. Purchasing Conditions

Applicants contend, without citing any evidence, that wine consumers would "research and spend time on offerings made by the respective parties."<sup>10</sup> As noted above, the unrestricted identifications of goods at issue encompass, in Registrant's case, all types of wine, and in Applicants' case, all types of Zinfandel wine. Wine is a widely available consumer item, and while some wines can be quite expensive and attractive to connoisseurs, others are decidedly not. We cannot infer that the relevant consumers in this case are especially sophisticated, as Applicant argues, but instead

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<sup>10</sup> 4 TTABVUE 17 (Applicants' Brief).

must focus on all potential purchasers of the goods. *Stone Lion Capital Partners*, 110 USPQ2d at 1162-63 (“[T]he Board properly considered *all* potential investors for the recited services, including ordinary consumers seeking to invest in services with no minimum investment requirement.”)

Thus, we find that the relevant customers would not necessarily exercise great care in purchasing.<sup>11</sup> This *du Pont* factor is neutral.

### Conclusion

We have considered all of the arguments and evidence of record and all relevant *du Pont* factors. The overall similarity of the marks for overlapping goods that move in the same channels of trade to the same classes of customers renders confusion likely.

**Decision:** The refusal to register Applicants’ mark is affirmed.

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<sup>11</sup> This finding is consistent with the non-precedential Board decision cited by Applicant regarding wine consumers. In *Bell’s Brewery, Inc. v. Bell Hill Vineyards, LLC*, Opp. No. 91177980, the Board noted the lack of restrictions in the identifications of beer and wine, and stated that “as to the general public, while these are not impulse transactions, the sophistication of the consumer is not very high.”