

This Opinion is Not a
Precedent of the TTAB

Mailed: November 6, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Kiona Vineyards, LLC
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Serial No. 87356605
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Kevin E. Regan of Helsell Fetterman, LLP,
for Kiona Vineyards, LLC.

Susan Leslie DuBois, Trademark Examining Attorney, Law Office 111,
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Before Wellington, Wolfson, and Coggins,
Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

Kiona Vineyards, LLC (“Applicant”) seeks registration on the Principal Register

of the mark  (with VINEYARDS disclaimed) for “wines” in
International Class 33.¹

¹ Application Serial No. 87356605 was filed on March 2, 2017, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and first use in commerce since at least as early as March 22, 2007. The application contains the following description: The mark consists of stylized large cursive font of “Kiona” above the word “Vineyards” in all capital letters. Color is not claimed as a feature of the mark.

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as applied to the goods identified in the application, so resembles the mark KIANA, in typed form, for "wine" in International Class 33,² as to be likely to cause confusion, to cause mistake, or to deceive. We affirm the refusal to register.

I. Likelihood of Confusion

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). We discuss the *du Pont* factors for which Applicant and the Examining Attorney have presented evidence and arguments. "Not all of the [*du Pont*] factors are relevant to every case, and only factors of significance to the particular mark need be considered." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1719 (Fed. Cir. 2012) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257 (Fed. Cir. 2010)).

² Registration No. 2725616, issued June 10, 2003; Section 8 declaration accepted; Section 15 declaration acknowledged; renewed.

A. Identity of the Goods, Channels of Trade, and Classes of Customers

We turn first to the goods, channels of trade, and classes of consumers. We must make our determinations under these factors based on the goods as they are identified in the application and cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *Octocom Sys., Inc. v. Hous. Computs. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Both Applicant's and Registrant's goods are "wine(s)." Because the goods are identical, we must presume that the channels of trade and classes of purchasers are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (legally identical goods are presumed to travel in same channels of trade to same class of purchasers); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *United Glob. Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011).


We find that the *du Pont* factors of the relatedness of goods, channels of trade, and classes of consumers weigh heavily in favor of likelihood of confusion.

B. Similarity or Dissimilarity of the Marks

We next turn to the *du Pont* factor focusing on the "similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial

impression.” *du Pont*, 177 USPQ at 567. *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 110 USPQ2d at 1160; *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). Similarity in any one of these elements may be sufficient to find the marks similar. *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018).

“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., Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1721 (quotation omitted). Consumers may not necessarily encounter the marks in close proximity and must rely upon their recollections thereof over time. *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1468 (TTAB 1988). Moreover, where the goods of the applicant and registrant are identical, as they are in this case, the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as would be required with diverse goods. *See Bridgestone Ams. Tire Operations, LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012); *Viterra*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 94 USPQ2d at 1260.

Applicant’s mark is  with VINEYARDS disclaimed. Registrant’s mark is KIANA in typed form which is the legal equivalent to a standard-character mark. *See Oakville Hills Cellar, Inc. v. Georgallis Holdings, LLC*, 826 F.3d 1376, 119 USPQ2d 1286, 1287 (Fed. Cir. 2016); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 807.03 (Oct. 2018).

As to appearance, Applicant argues that the cited mark is one word while its mark is comprised of two words, and that its mark uses stylized fonts and contains a large and embellished letter “K.” Main Brief, p. 6 (4 TTABVue 11). We note that in Applicant’s mark the word KIONA is presented in a large cursive font while the descriptive word VINEYARDS is presented in a much smaller block letter font beneath KIONA. We are mindful of the fact that, because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, our analysis cannot be predicated on dissecting the marks into their various components. That is, our decision must be based on the entire marks, not just part of the marks. *In re Nat’l 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 23, 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”). On the other hand, 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 Nat’l Data Corp.*, 224 USPQ at 751. In considering Applicant’s mark as a whole, we find the term KIONA to be its dominant element because of the larger size of the term KIONA in the mark, compared with the term VINEYARDS, as well as the fact that the term KIONA is the first word of the mark. *See Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Fondée En 1772*, 73 USPQ2d at 1692 (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and

the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word); *Presto Prod. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”).

Further reinforcing its dominant position is the fact that the term KIONA has no demonstrated significance or weakness as applied to wine. VINEYARDS, on the other hand, has been disclaimed by Applicant and is merely descriptive, if not generic, for the goods.³ Because VINEYARDS is at best merely descriptive for the goods, and has been appropriately disclaimed, it is less likely to make an impact in the minds of consumers. *See Swatch AG (Swatch SA) (Swatch Ltd.) v. M. Z. Berger & Co., Inc.*, 108 USPQ2d 1463, 1470 (TTAB 2013), *appeal dismissed in part*, 559 Fed. Appx. 1009 (Fed. Cir. 2014) *and aff’d.*, 787 F.3d 1368, 114 USPQ2d 1892 (Fed. Cir. 2015) (“It is well-settled that descriptive or generic matter may have little or no significance in likelihood of confusion determinations”); *In re Dixie Rests., Inc.*, 41 USPQ2d at 1533-34 (disclaimed matter that is descriptive of or generic for a party’s goods is typically less significant or less dominant when comparing marks). *Cf. Cunningham v. Laser Golf Corp.*, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given

³ A vineyard is “a plantation of grapevines, typically producing grapes used in winemaking. *synonyms*: vinery, domaine, cru, winery, microwinery.” From www.bing.com, May 24, 2017 Office Action, TSDR 3.

little weight in reaching a conclusion on the likelihood of confusion.”) (quoting *In re Nat'l Data Corp.*, 224 USPQ at 752).

For these reasons, consumers are more likely to focus on the word KIONA in Applicant's mark when comparing it to Registrant's mark. Moreover, because the registered mark is in typed or standard characters, it may be depicted in any font style, color or size, including a stylization identical to Applicant's presentation of KIONA in its mark, thus increasing the similarities between the marks. Trademark Rule 2.52(a), 37 CFR § 2.52(a); *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018); *In re RSI Sys. LLC*, 88 USPQ2d 1445, 1448 (TTAB 2008); *In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988).

The dominant portion of Applicant's mark differs from the cited mark by one letter: the vowel “O” in KIONA is exchanged for the vowel “A” in the same position of KIANA. There is a significant visual resemblance between these terms. Even when Applicant's mark is viewed as a whole, the small, subordinate, and at a minimum highly descriptive word VINEYARDS does not diminish the visual similarity between KIANA and the prominent and dominant term KIONA in Applicant's mark. In view thereof, we find the marks to be quite similar in appearance.

As to sound, Applicant argues that the cited mark consists of three syllables while its own mark consists of five syllables; and that while consumers may have different pronunciations of KIANA, such as “kee-ah-na” or “ky-an-nah,” they would not pronounce the “A” in the cited mark with an “oh” sound, as they would in KIONA. Main Brief, p. 5 (4 TTABVUE 10). In support of its argument, Applicant submitted a

copy of a wine label from the back of one of its wine bottles which contains the line: “Kiona (Kigh-Oh-Na) is a Yakama Nation word that translates as ‘brown hills.’”⁴ Applicant’s mark as filed does not include its label and all the information thereon. Applicant’s mark is KIONA VINEYARDS in stylized font. Thus, Applicant’s focus on other information on its label (such as the intended pronunciation) is inappropriate. Moreover, ordinary consumers upon first encountering either Applicant’s or Registrant’s mark in the marketplace, would not necessarily have the knowledge of Registrant’s intended pronunciation. Applicant did not submit any other evidence as to possible or standard pronunciations of the term KIONA or evidence of any possible or standard pronunciations of the term KIANA.

While Applicant may have a desired or particular pronunciation of its mark, for purposes of a likelihood of confusion analysis, there is no “correct” or certain pronunciation of a mark that is not a common English word because it is impossible to predict how the public will pronounce such a mark; therefore, “correct” pronunciation cannot be relied on here to avoid a likelihood of confusion. *See, e.g., Viterra*, 101 USPQ2d at 1912 (upholding Board’s affirmance of refusal to register XCEED based on a likelihood of confusion with the registered mark X-SEED and design); *Centraz Indus. Inc. v. Spartan Chem. Co. Inc.*, 77 USPQ2d 1698, 1701 (TTAB 2006) (acknowledging that “there is no correct pronunciation of a trademark” and finding ISHINE (stylized) and ICE SHINE confusingly similar for identical goods); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 n.3 (TTAB 1987) (“[C]orrect

⁴ November 1, 2017 Response to Office Action, TSDR 17.

pronunciation as desired by the applicant cannot be relied upon to avoid a likelihood of confusion.”). In view thereof, we find that the terms KIONA and KIANA may be pronounced in a similar manner. The terms otherwise have the same structure and contain the same remaining letters in the same order which, absent any evidence to the contrary, are likely to be pronounced the same. The inclusion of the disclaimed word VINEYARDS in Applicant’s mark, while adding an additional two syllables to the sound of the mark, does not change the pronunciation of the dominant term KIONA. Accordingly, we find that Applicant’s mark, when considered in its entirety, is more similar than dissimilar in sound to Registrant’s mark.

As to connotation and commercial impression, Applicant argues that the term KIONA is a Native American, Yakama Nation word which translates as “brown hills” and has been used to refer to the arid hills of Eastern Washington; that the addition of VINEYARDS to KIONA reinforces the connotation of KIONA as a place where grapes are grown; and that KIANA is a proper noun of Irish origin used as a name for an individual person. Main Brief pp. 9-11 (4 TTABVUE 14-16). The Examining Attorney, on the other hand, submitted “negative” dictionary evidence showing that neither KIONA nor KIANA could be found in the MERRIAM-WEBSTER DICTIONARY at www.merriam-webster.com/dictionary.⁵

⁵ November 22, 2017 Office Action, TSDR 5-4. “Negative” dictionary evidence has been defined as “evidence showing that the dictionaries searched do not have an entry for the term.” *In re Olin Corp.*, 124 USPQ2d 1327, 1332 (TTAB 2017). Applicant concedes “that neither word [KIONA nor KIANA] is found in an English dictionary.” Main Brief p. 9 (4 TTABVUE 14).

In support of its arguments, Applicant submitted a short Wikipedia entry for “Kiona, Washington” stating that “Kiona is an unincorporated community in Benton County, Washington,” and “is an Indian term meaning ‘brown hills.’”⁶ While the entry discusses the historical farming crops of the area (“corn, wheat, alfalfa, potatoes, and fruit, especially apples”), it does not mention that grapes or the production of wine is or has ever been associated with the area. Other than a copy of a wine label from the back of one of Applicant’s wine bottles which contains the line: “Kiona (Kigh-Oh-Na) is a Yakama Nation word that translates as ‘brown hills,’”⁷ there is no other evidence suggesting that KIONA is a term meaning “brown hills” or is a location associated with grapes or wine. Specifically, the web page from www.ghosttowns.com does not mention any translation; instead, it explains that Kiona was a bustling town in the 1890’s which began to fade after the turn of the 20th century, lost its school to the new community of Benton City across the river, lost its post office about 35 years ago, had its few remaining businesses “obliterated” in the late 1960’s and early 1970’s, and maintains only a small population now in the shadow of its larger neighbor Benton City.⁸ Further, neither the web page from www.nationregisterofhistoricplaces.com (referring to a Benton City-Kiona Bridge over the Yakima River in Benton City)⁹

⁶ November 1, 2017 Response to Office Action, TSDR 19-20

⁷ *Id.* at TSDR 17.

⁸ *Id.* at TSDR 21.

⁹ *Id.* at TSDR 23.

nor the web excerpt from www.kibesd.org (the home page for the Kiona-Benton City School District)¹⁰ contains any substantive information or discussion about KIONA.

Although Applicant claims that a web page from a KIONA-brand marijuana company states that “[t]he golden hills area, known Natively [sic] as Kiona, is a renowned terroir for vineyards and craft horticulture,” the web excerpt from kionathc.com does not contain such a reference; nor does it indicate where that company is located, other than having retail “partners” in several Washington cities.¹¹

Applicant also submitted web pages from Nameberry and babynames.allparenting.com in an attempt to show that KIANA is a name for a female.¹² These pages differ on the origin, one suggesting that KIANA is a modern invented name and the other suggesting it may be of Irish, Persian, or Hawaiian origin. The Nameberry page lists the popularity of KIANA as “#859,” but we have no context for that number nor any indication if it represents popularity worldwide, in the United States, or in any other geographic area; indeed, the page mentions American, Iranian, Finnish, Persian, and Alaskan references to the name.

On the sparse evidence submitted, Applicant has not demonstrated that KIONA or KIANA would convey any particular connotation or commercial impression to ordinary consumers of wine. However, giving Applicant the benefit of the doubt as to

¹⁰ *Id.* at TSDR 27.

¹¹ *Id.* at TSDR 29-31.

¹² *Id.* at TSDR 32-34 (nameberry) and 35-37 (babynames).

the “negative” dictionary evidence demonstrating that neither KIONA nor KIANA has a commonly understood meaning, which, in the absence of any countervailing evidence, may indicate that neither term has a recognized meaning other than as Applicant proposes (i.e., “black hills” or an area of Eastern Washington, and a female name), even if we found that the terms convey different connotations and commercial impressions, we must keep in mind, as noted above, that (1) when marks would appear on identical goods, as they do here on wine, the degree of similarity necessary to support a conclusion of likely confusion declines, *see Century 21 Real Estate Corp. v. Century Life of Am.*, 23 USPQ2d at 1700; (2) similarity in any one of the elements of appearance, sound, meaning, or commercial impression is sufficient to support a determination of likelihood of confusion, *see Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion”); and (3) because “consumers may not necessarily encounter the marks in such proximity and must rely upon their recollections thereof,” *In re Integrated Embedded*, 120 USPQ2d 1504, 1513 (TTAB 2016), “[t]he proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks.” *In re Aquitaine Wine USA, LLC*, 126 USPQ2d at 1184 (TTAB 2018). Under these considerations, and while differences exist between the respective marks, we find that in their entirety the marks are more similar than dissimilar. Any differences in connotation or commercial impression the marks may have are outweighed by their similarities in appearance and sound. Accordingly, we find that the *du Pont* factor concerning the similarity or

dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression weighs in favor of likelihood of confusion.

C. Analyzing 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. In view of the identical goods, the absence of limitation to their channels of trade and classes of customers, and the similarity of the sound and appearance of the marks at issue, we find that Applicant's mark, when used on "wines," so closely resembles Registrant's mark as to be likely to cause confusion, mistake, or deception as to the source of Applicant's goods.

II. Decision

The refusal to register Applicant's mark  is affirmed.