

This Opinion is not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Trilliant Food and Nutrition, LLC
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Serial No. 87400795
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Kyle T. Peterson of Patterson Thuent Petersen, PA,
for Trilliant Food and Nutrition, LLC.

Amanda Galbo, Trademark Examining Attorney, Law Office 125,
Mark Pilaro, Managing Attorney.

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Before Zervas, Cataldo and Kuczma,
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Trilliant Food and Nutrition, LLC (“Applicant”) seeks registration on the Principal Register of the standard character mark FALL HARVEST for “coffee for use in single-serve brewing machines” in International Class 30.¹

¹ Application Serial No. 87400795, filed on April 6, 2017, pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), asserting a *bona fide* intent to use the mark in commerce.

The Examining Attorney refused registration of Applicant's mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on Registration No. 2198448 for the typed-form mark² AUTUMN HARVEST BLEND for "whole roasted coffee beans, ground roasted coffee beans and processed ground coffee beans."³ The term BLEND has been disclaimed.

After the Examining Attorney made the refusal final, Applicant appealed. Both Applicant and the Examining Attorney filed briefs. We affirm the refusal to register.

Likelihood of Confusion

Our determination under Section 2(d) of the Trademark Act is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on a likelihood of confusion. *See 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 Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks." *Federated*

² Prior to November 2, 2003, "standard character" marks were known as "typed" drawings. A typed mark is the legal equivalent of a standard character mark. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012) ("until 2003, 'standard character' marks formerly were known as 'typed' marks.").

³ Registered October 20, 1998 (renewed October 27, 2008).

Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976);
see also In re Davia, 110 USPQ2d 1810, 1812 (TTAB 2014).

The Goods, Trade Channels and Purchasers

The first *du Pont* factor we consider is the relationship between 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) (goods as identified in involved application and cited registration compared); *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also, Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). We find that the goods overlap. Registrant's "whole roasted coffee beans, ground roasted coffee beans and processed ground coffee beans" are broadly described so that its coffee beans include ground roasted coffee beans "for use in single-serve brewing machines." The record depicts the following single serve brewing machine requiring ground coffee beans:⁴

⁴ May 23, 2017 Office Action.

Hamilton Beach Single Serve Scoop Coffee Maker



A friend of mine recommended the Hamilton Beach Single Serve Scoop Coffee Maker to me when I was looking for input writing this article (hat-tip James). Good news is that this single cup coffee maker with no pods is cheap. Coming in at just under \$50 (at the time of writing) you will be hard-

See also webpage at <https://beanground.com>, stating that fresh ground coffee can be used in a coffee maker rather than pods:⁵

The Touch Brewer T528S can also take coffee pods if you want to use them but you are not tied down to their brand, and any [cheap coffee pods like these](#) will work. If you don't want to use coffee pods that's not a problem, simply use fresh ground coffee in the empty pod that's shipped with the system (the Touch Brewer T528S comes with a cup-like device to put freshly coffee grounds in).

Because the identifications of goods in the application and cited registration overlap and are unrestricted as to trade channels and purchasers, we must presume that Applicant's and registrant's goods travel in the same ordinary trade and

⁵ *Id.*

distribution channels and will be marketed to the same potential consumers. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *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); *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) (finding goods, which were in part identical and in part related, as being offered and sold to the same classes of purchasers and channels of trade). The coffee drinking consumer who is a member of the general public is, of course, the purchaser of both Applicant's and registrant's goods.

Applicant argues that its goods will be used by consumers only in single-service brewing machines.⁶ This may be true, but both the identification itself and the evidence reflects that coffee of the type identified in registrant's identification of goods is unrestricted as to its method of brewing, and may also be used in single-serve brewing machines.

In view of the foregoing, we find that the *du Pont* factors regarding the similarity of the goods, trade channels and purchasers weigh heavily in favor of a likelihood of confusion.

⁶ Applicant's brief at 3-4, 4 TTABVUE 4-5.

Strength of Registrant's Mark

Applicant argues that “the term ‘HARVEST’ is not an inherently unique indicator of origin for coffee” and that “given the widespread registration and weak nature of the term ‘HARVEST’ ... Applicant’s Mark FALL HARVEST should be deemed capable of coexisting too.”⁷ Applicant submitted registrations for the following third-party marks that include the term HARVEST, all for coffee:

HARVEST DELIGHT	FIELD HARVEST
WORLD HARVEST	SUSTAINABLE HARVEST
PEAK HARVEST	ONE HARVEST
DAKOTA HARVEST	WILD HARVEST
HARVEST ROASTING	HARVEST OF HOPE
PERFECT HARVEST	WOMEN’S HARVEST
HARVEST TO HOME	CERRTIFIED [sic] HARVEST

In addition, Applicant submitted a registration owned by a third-party for HARVEST RIDGE COFFEE CO. for “coffee based beverages.”

Evidence of extensive registration and use by others of a term on the same or very similar goods can be “powerful” evidence of weakness. *See Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015). While Applicant’s third-party registration evidence demonstrates that HARVEST is weak when used in

⁷ Applicant’s brief at 7-8.

connection with coffee, (i) registrant's mark is not only the term HARVEST but includes other terms; (ii) Applicant has not established any weakness in registrant's mark as a whole; and (iii) even weak marks are entitled to protection against registration of similar marks for identical goods, as is the case here. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 1401 182 USPQ 108, 109 (CCPA 1974); *Matsushita Electric Co. v. National Steel Co.*, 442 F.2d 1383, 170 USPQ 98, 99 (CCPA 1971) ("Even though a mark may be 'weak' in the sense of being a common word in common use as a trademark, it is entitled to be protected sufficiently to prevent confusion from source arising"). Here, registrant is at least entitled to protection from registration of Applicant's very similar mark for overlapping goods. In view of the foregoing, this *du Pont* factor, at best, slightly favors Applicant.

The Marks

We compare the marks for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Palm Bay Imps.*, 73 USPQ2d at 1692. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression 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). Under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections. *Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255, 259 (TTAB

1980). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Assoc. of the United States Army*, 85 USPQ2d 1264 (TTAB 2007); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Applicant seeks to register the mark FALL HARVEST and registrant's mark is AUTUMN HARVEST BLEND. Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, 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. Vv. 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"). On the other hand, different features may be analyzed to determine whether the marks are similar. *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1430 (TTAB 2013) (citing *Price Candy Co. v. Gold Medal Candy Corp.*, 220 F.2d 759, 105 USPQ 266, 268 (CCPA 1955)). In fact, 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.

The Examining Attorney argues,

The marks are similar because the wording "FALL" in Applicant's mark is identical in connotation to the wording

“AUTUMN” in Registrant’s mark. Further, the marks at issue feature the identical term “HARVEST.” Registrant’s additional term “BLEND” does not sufficiently distinguish the marks in order to obviate confusion.⁸

The Examining Attorney’s analysis is correct. FALL and AUTUMN have the same meaning. See definition of “fall” as “4. Autumn” from *American Heritage Dictionary of the English Language*.⁹ BLEND is a highly descriptive or even generic term which does not distinguish the marks but rather indicates that the product is a mixture of coffees. See definition of “blend” - “a mixture or kind produced by blending: *a special blend of rye and wheat flours,*” from *Random House Dictionary* (Random House, Inc., 2017).¹⁰ Thus, even if the term HARVEST is a weak source indicator for coffee, due to the inclusion of the terms AUTUMN and FALL as terms preceding the term HARVEST in the marks, *i.e.*, terms which have the same meaning and both modify HARVEST, the overall meaning and commercial impression of the marks is the same. Despite the differences in the marks through the presence of BLEND as the terminal term in registrant’s mark (which has been disclaimed), and the inclusion of different terms for the same season (“fall” and “autumn”), we find that the marks are similar in meaning and commercial impression. Similarity in any one of the elements of sound, appearance, meaning, or commercial impression is sufficient to support a

⁸ 6 TTABVUE 4.

⁹ (accessed at <https://www.ahdictionary.com/word/search.html?q=fall> on April 28, 2017), April 28, 2017 Office Action, TSDR .pdf 6-9.

¹⁰ <http://www.dictionary.com/browse/blend?s=t> (accessed December 7, 2017). The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

determination of likelihood of confusion. *See Krim-Ko Corp. v. The 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”); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988) (“In appropriate cases, a finding of similarity as to any one factor (sight, sound or meaning) alone ‘may be sufficient to support a holding that the marks are confusingly similar’”) (citations omitted). Therefore, even if the marks are somewhat different in appearance and sound, it would not necessarily mean there was no likelihood of confusion. The *du Pont* factor regarding the similarity of the marks therefore favors a finding of likelihood of confusion.

Conclusion

We have considered all of the arguments and evidence of record, including those not specifically discussed herein, and all relevant *du Pont* factors. The goods at issue are identical in part, and would move through identical trade channels to the same classes of customers. When identical goods are at issue, the degree of similarity of the marks that is necessary to find a likelihood of confusion is not as great as where the goods are disparate. *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1721; *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Applicant’s mark and registrant’s mark are similar in meaning and commercial impression, and Applicant has not established any substantial weakness in registrant’s mark as a whole, although it has established weakness in the common term HARVEST. We therefore find that the mark FALL HARVEST for “coffee for use in single-serve brewing machines” is likely to cause

confusion with the mark AUTUMN HARVEST BLEND for “whole roasted coffee beans, ground roasted coffee beans and processed ground coffee beans.”

Decision: The refusal to register under Section 2(d) is affirmed.