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PRECEDENT OF THE TTAB

Mailed: April 8, 2020

**UNITED STATES PATENT AND TRADEMARK OFFICE**  
**Trademark Trial and Appeal Board**

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*In re Republic Tobacco, L.P.*

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Serial No. 88039351

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Anthony J. McShane of Neal Gerber & Eisenberg LLP,  
for Republic Tobacco, L.P.

Thomas P. Young, Trademark Examining Attorney, Law Office 120,  
David Miller, Managing Attorney.

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Before Mermelstein, Pologeorgis, and Johnson,  
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

Republic Tobacco, L.P. (“Applicant”) seeks registration on the Principal Register of the standard character mark KRYSTAL KLEAR for the following goods, as amended, in International Class 34:<sup>1</sup>

Cigarette rolling papers; cigarette papers made with tobacco leaves; cigarette paper booklets; roll-your-own smoking tobacco; loose tobacco for pipes and cigars; cigarette rolling machines; pocket machines for rolling cigarettes for personal use; hand-held machines for injecting tobacco into cigarette tubes; machines allowing smokers to make cigarettes by themselves; cigarette tubes; hand-held injector machines

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<sup>1</sup> Application Serial No. 88039351, filed on July 16, 2018, based on an allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15. U.S.C. 1051(b).

for filling cigarette tubes with tobacco for personal use; filter tips for cigarettes; roll-your-own kits for making cigarettes containing cigarette papers, filter tips and tobacco; cigarettes; cigarette lighters not of precious metal.

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 of likelihood of confusion with the following two registered marks, owned by the same Registrant:

- Registration No. 3321944 for the standard character mark KLEAR registered on the Supplemental Register for "cigarette papers; cigarette rolling papers";<sup>2</sup> and
- Registration No. 3364510 for the composite mark



(CLEAR disclaimed) registered on the Principal Register for "cigarette papers" in International Class 34.<sup>3</sup>

When the refusal was made final, Applicant appealed. The appeal is fully briefed. For the reasons explained below, we reverse the refusal.<sup>4</sup>

## **I. Likelihood of Confusion**

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of

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<sup>2</sup> Issued on October 23, 2007; renewed.

<sup>3</sup> Issued on January 8, 2008; renewed. The registration includes the following description of the mark: "The mark consists of the word 'KLEAR' behind fingers rolling tobacco into a cigarette." Color is not claimed as a feature of the mark.

<sup>4</sup> The TTABVue and Trademark Status & Document Retrieval ("TSDR") citations refer to the docket and electronic file database for the involved application. All citations to the TSDR database are to the downloadable .PDF version of the documents.

confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *DuPont* factor for which there is evidence and argument of record. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”).

In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (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.”); *see also In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

In this case, we base our Section 2(d) likelihood of confusion findings and decision

on Registration No. 3321944, which is of the standard character mark KLEAR for the goods identified therein. This mark bears a closer resemblance to Applicant's mark because it does not contain the additional design in Registrant's other cited mark. A finding of likelihood of confusion between Applicant's mark and this registered mark suffices by itself to bar registration of Applicant's mark under Section 2(d), obviating the need to determine likelihood of confusion as to the other cited registration. *See In re Max Capital Grp., Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1201-02 (TTAB 2009). Alternatively, if confusion is found not likely as to the cited KLEAR mark, then confusion would also not be likely with respect to the cited mark that includes a design element.

#### **A. Similarity of the Goods**

We initially compare the goods under the second *DuPont* factor. In making our determination regarding the relatedness of the goods, we must look to the goods as identified in Applicant's application and the goods listed in cited Registration No. 3321944. *See 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. Hous. Computs. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that 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 regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.")); *see also In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011).

Moreover, registration must be refused in a particular class if Applicant's mark for any of its identified goods in that class is likely to cause confusion with the Registrant's mark for any of its identified goods. *See SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 938-39 (Fed. Cir. 1983) (holding that a single good from among several may sustain a finding of likelihood of confusion); *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods or services in the application).

Both Applicant and Registrant identify the identical goods, namely, "cigarette rolling papers." Additionally, Registrant's broadly worded "cigarette papers" encompass Applicant's more limiting "cigarette papers made with tobacco leaves." As such, the parties' respective goods are legally identical in part.

Thus, the second *DuPont* factor highly favors a finding of likelihood of confusion.

#### **B. Similarity of Trade Channels and Classes of Purchasers**

Next we consider established, likely-to-continue channels of trade, the third *DuPont* factor. Because we have found that Applicant's and Registrant's goods are legally identical in part, we must presume that these goods travel through the same channels of trade and are offered to the same or overlapping classes of purchasers. *In re Viterra Inc.*, 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); *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).

Thus, the third *DuPont* factor also weighs in favor of finding a likelihood of confusion.

### **C. Similarity of the Marks**

We next consider the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 369 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). “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.” *In re i.am.symbolic, LLC*, 123 USPQ2d at 1748 (quoting *Coach Servs. Inc.*, 101 USPQ2d at 1721 (internal quotation marks omitted)). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Further, where the goods of an applicant and registrant are identical or encompassing in part, as is the case here, the degree of similarity between the marks required to support a finding that confusion is likely declines. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *In re Viterra Inc.*, 101 USPQ2d at 1908); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1207.01(b) (October 2018).

Applicant’s mark is KRYSTAL KLEAR in standard characters and the mark in cited Registration No. 3321944 is KLEAR, also in standard characters. Here, the

marks at issue are visually and aurally similar in that both marks include the term KLEAR. Moreover, we find that consumers are likely to likely to perceive the terms KLEAR and KRYSTAL KLEAR as misspellings and the phonetic equivalents of the words “clear” and “crystal clear” and pronounce them as such.

The evidence of record includes the dictionary definitions of the terms “clear” and “crystal clear” which are defined as follows:<sup>5</sup>

- clear: (of a substance) transparent; unclouded
- crystal clear: completely transparent and unclouded.

Based on these definitions, we find that the marks are similar in connotation and overall commercial impression.

Further, incorporating the entirety of one mark within another, as is the case here, does not necessarily obviate the similarity between the compared marks nor does it necessarily overcome a likelihood of confusion under Section 2(d) of the Trademark Act. *See Coca-Cola Bottling Co. v. Jos. E. Seagram & Sons, Inc.*, 526 F.2d 556, 557, 188 USPQ 105, 106 (CCPA 1975) (finding BENGAL LANCER and design and BENGAL confusingly similar); *see* TMEP § 1207.01(b)(iii).

That being said, we note that the cited KLEAR mark is registered on the Supplemental Register. Registration on the Supplemental Register constitutes an admission that the mark is descriptive at the time of registration.<sup>6</sup> *See In re Clorox*

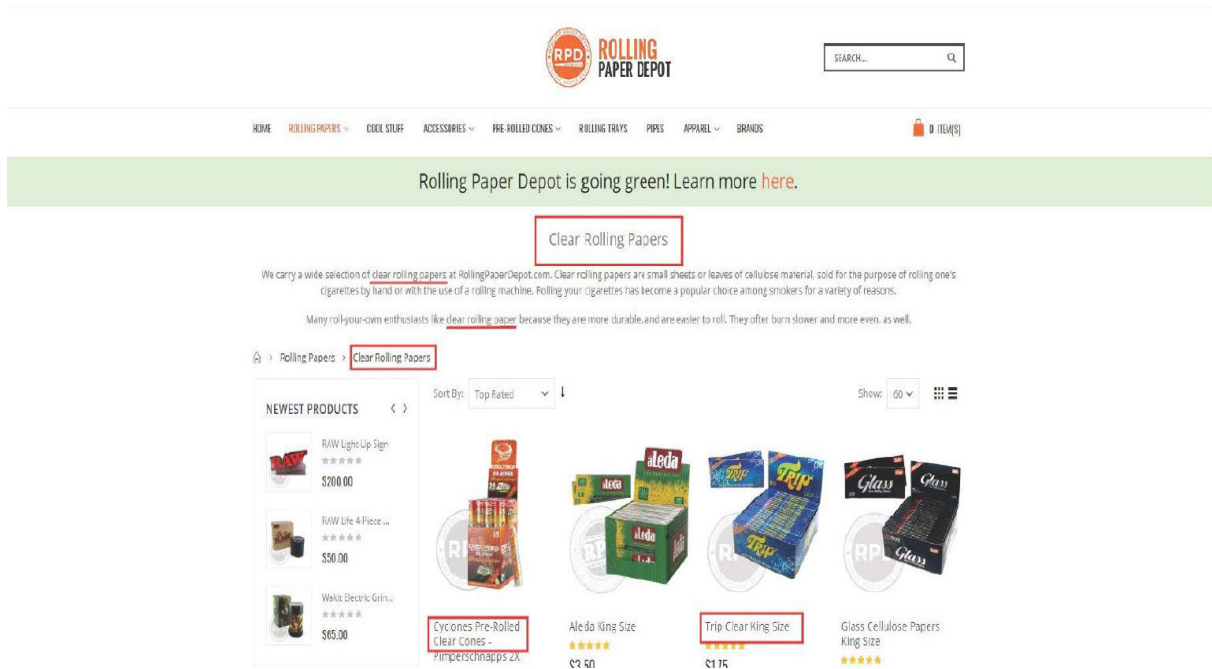
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<sup>5</sup> November 2, 2018 Office Action; TSDR pp. 13 and 15 (accessed from [www.oxforddictionaries.com](http://www.oxforddictionaries.com) on November 2, 2018).

<sup>6</sup> In addition, we note that registrations on the Supplemental Register are entitled to no statutory presumptions under Section 7(b) of the Trademark Act. *See* Section 26 of the

Co., 578 F.2d 305, 198 USPQ 337, 340 (CCPA 1978).

Applicant submitted Internet evidence demonstrating that third parties use the term “clear” descriptively in connection with goods identical to those identified in the cited registration, e.g., cigarette rolling papers.<sup>7</sup> For example:



Trademark Act (“registrations on the supplemental register shall not be subject to or receive the advantages of [Section 7(b) of the Act]”; *In re Federated Department Stores Inc.*, 3 USPQ2d 1541, 1543 (TTAB 1987) (a Supplemental Register registration is evidence of nothing more than the fact that the registration issued on the date printed thereon).

<sup>7</sup> April 24, 2019 Response to Office Action, Exhs. A-J, TSDR pp. 14-67.

The Examining Attorney argues that because the evidence submitted by Applicant shows use of the term “clear,” instead of “klear,” the evidence is not probative. *See* Examining Attorney’s Brief, p. 9, 6 TTABVUE 10. We have previously rejected this type of reasoning. *See Plak-Shack, Inc. v. Cont’l Studios of Ga., Inc.*, 204 USPQ 242 (TTAB 1979) (finding that evidence of widespread use of the term PLAQUE was relevant to show that its phonetic equivalent, PLAK, was descriptive, diluted, and a weak source-identifier in the industry).





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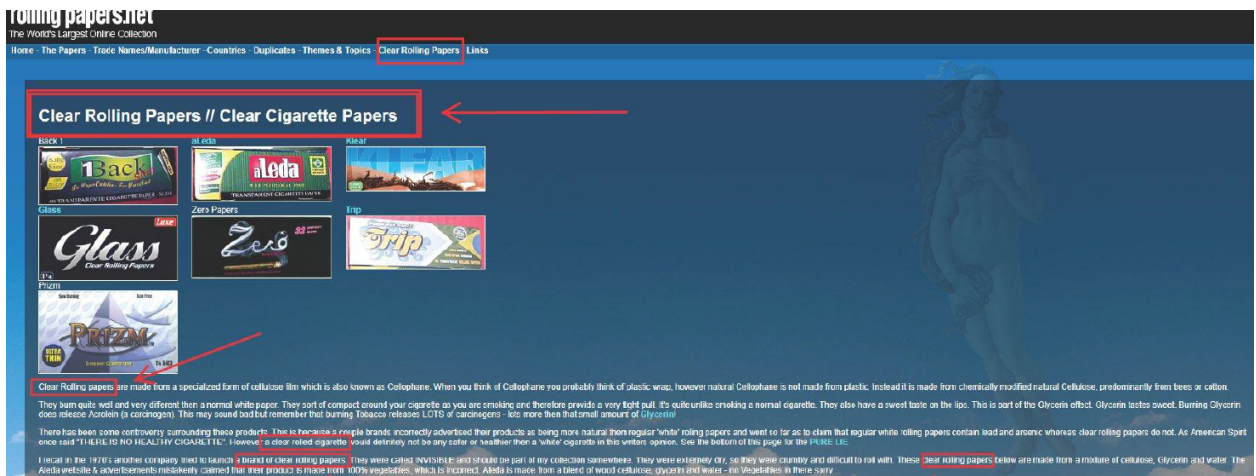
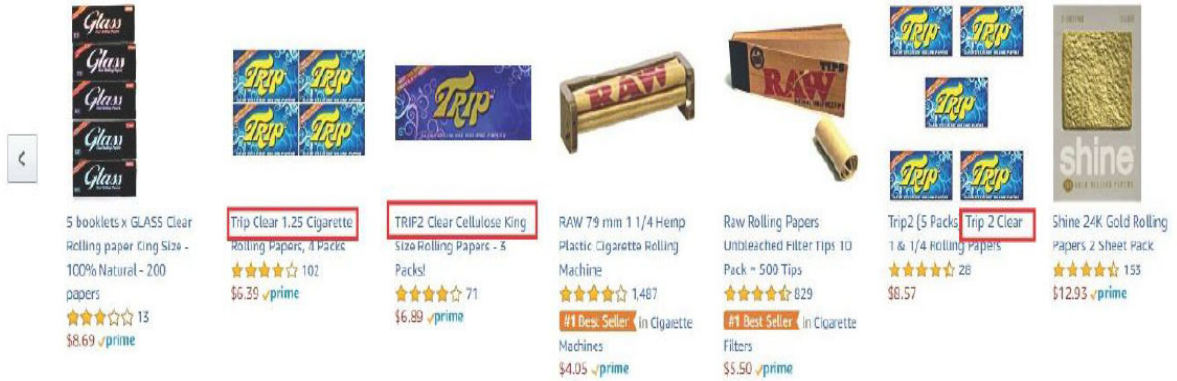
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Aleda Clear King Size are a totally transparent rolling papers made in Brazil. These papers are made from natural cellulose, with no glue. They burn very smoothly with little ash. 100% biodegradable.

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A novel spelling or an intentional misspelling that is the phonetic equivalent of a merely descriptive word or term is also merely descriptive if purchasers would perceive the different spelling as the equivalent of the descriptive word or term. *See In re QuikPrint Copy Shop, Inc.*, 616 F.2d 523, 205 USPQ 505, 507 & n.9 (CCPA 1980) (holding “QUIK-PRINT,” a phonetic spelling of “quick-print,” merely descriptive of printing and photocopying services); *In re Calphalon Corp.*, 122 USPQ2d 1153, 1163 (TTAB 2017) (holding “SHARPIN,” a phonetic spelling of “sharpen,” merely descriptive of cutlery knife blocks with built-in sharpeners); *In re Carlson*, 91 USPQ2d 1198, 1203 (TTAB 2009) (holding “URBANHOUSING,” a phonetic spelling of “urban” and “housing,” merely descriptive of real estate services); *see also* TMEP § 1209.03(j). As previously noted, we find that relevant consumers would perceive the cited mark KLEAR as the misspelling of the term “clear.”

In view thereof and based on the evidence submitted by Applicant, we further find that the cited mark KLEAR is, at a minimum, highly descriptive of cigarette rolling papers that are transparent. Because there are no limitations in the identification of goods in the cited registration regarding the nature of Registrant’s cigarette rolling papers, we presume that Registrant’s goods encompass cigarette rolling papers that are transparent. As such, we find that the cited KLEAR mark is conceptually very weak.

We have previously held that adding an additional, distinctive term to a registered mark is more than sufficient to avoid a likelihood of confusion where the shared registered term is highly suggestive or merely descriptive of the goods or services at

issue. *See, e.g., In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986) (reversing Board's holding that contemporaneous use of BED & BREAKFAST REGISTRY and BED & BREAKFAST INTERNATIONAL for similar services, was likely to cause confusion, because the descriptive nature of shared wording and the marks' differences in sight and sound weighed against confusion); *In re S.D. Fabrics, Inc.*, 223 USPQ 54, 55-56 (TTAB 1984) (holding DESIGNERS/FABRIC and DAN RIVER DESIGNER FABRICS not likely to cause confusion; the descriptive nature of DESIGNERS/FABRIC and DESIGNER FABRICS made addition of distinctive DAN RIVER sufficient to avoid confusion); *In re Shawnee Milling Co.*, 225 USPQ 747, 749 (TTAB 1985) (holding GOLDEN CRUST and ADOLPH'S GOLD'N CRUST not likely to cause confusion, noting GOLDEN CRUST and GOLD'N CRUST were highly suggestive of the goods, so ADOLPH'S was sufficient to distinguish the marks). Moreover, Applicant's KRYSTAL KLEAR mark is an alliterative phrase in which both words are similarly misspelled which distinguishes it from the term KLEAR alone. *Cf. In re Kraft, Inc.*, 218 USPQ 571, 573 (TTAB 1983) (finding that the mark LIGHT N' LIVELY "has an alliterative lilting cadence which encourages persons encountering it to perceive it as a whole."). Thus, we find that the inclusion of the term KRYSTAL in Applicant's involved mark is sufficient to differentiate it from the cited KLEAR mark.

Accordingly, the first *DuPont* factor disfavors a finding of likelihood of confusion.

## **II. Conclusion**

We have considered all of the arguments and evidence of record. We have found that (1) the marks at issue are similar in appearance, sound, connotation, and

commercial impression; (2) Applicant's identified goods are legally identical in part to Registrant's recited goods; and (3) the parties' respective goods move in overlapping trade channels and would be offered to the same or overlapping classes of purchasers. Notwithstanding, because the record demonstrates that that the cited mark KLEAR, or its phonetic equivalent, i.e., clear, is highly descriptive of Registrant's goods and, therefore conceptually significantly weak, we find that that addition of the term KRYSTAL in Applicant's applied-for mark is sufficient to avoid a finding of likelihood of confusion. In view thereof, we conclude that Applicant's KRYSTAL KLEAR mark, as used in connection with the goods identified in its involved application, is not likely to cause confusion with the cited mark KLEAR for Registrant's identified goods under Section 2(d) of the Trademark Act.

**Decision:** The refusal to register Applicant's KRYSTAL KLEAR mark under Section 2(d) of the Trademark Act is reversed.