

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: May 6, 2021

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

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*In re Mas Clarella SL*

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Serial No. 88079246

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Michael F. Krieger and Adam D. Stevens of Kirton McConkie,  
for Mas Clarella SL.

Benjamin H. Roth, Trademark Examining Attorney, Law Office 122,  
Kevin Mittler, Managing Attorney.

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Before Adlin, Pologeorgis, and English,  
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

Mas Clarella SL (“Applicant”) seeks registration on the Principal Register of the standard character mark NYMPHS OF CLARELLA for “wines” in International Class 33.<sup>1</sup>

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

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<sup>1</sup> Application Serial No. 88079246, filed on August 15, 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).

likelihood of confusion with the standard character mark THE NYMPH registered on the Principal Register for “wines” in International Class 33.<sup>2</sup>

When the refusal was made final, Applicant appealed and requested reconsideration. When the request for reconsideration was denied, the appeal resumed. The appeal is fully briefed. For the reasons explained below, we affirm the Section 2(d) refusal.<sup>3</sup>

### **I. Preliminary Matter - Evidentiary Objection**

We first turn to an evidentiary objection lodged by the Examining Attorney regarding evidence submitted by Applicant for the first time with its appeal brief. Specifically, the Examining Attorney objects to the inclusion of copies of (1) a U.S. trademark registration for the standard character mark LA LYMPHINA for “wine,” (2) a European Union trademark registration also for the mark LA NYMPHINA, and (3) a European Union trademark registration for the mark CUISSE DE NYMPHE for “liqueurs; liquor-based aperitifs; gin.”<sup>4</sup>

It is well-settled that the record in an ex parte proceeding should be complete prior to appeal. Trademark Rule 2.142(d); 37 CFR § 2.142(d). Exhibits that are attached to a brief but not made of record during examination are untimely, and will not be considered. *See In re Fitch IBCA, Inc.*, 64 USPQ2d 1058, 1059 n.2 (TTAB 2002); *see also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP)

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<sup>2</sup> Registration No. 4376154, issued on July 30, 2013; renewed.

<sup>3</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.

<sup>4</sup> Examining Attorney’s Brief, p. 7; 9 TTABVUE 8.

§§ 1203.02(e) and 1207.01 (June 2020). To the extent Applicant wished to introduce additional evidence after its appeal had been filed, Applicant should have filed a written request with the Board to suspend the appeal and remand the application for further examination pursuant to Trademark Rule 2.124(d). Applicant did not do so. Accordingly, the Examining Attorney's objection is sustained and we have given no consideration to these three registrations in our analysis.<sup>5</sup>

## II. Section 2(d) - 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 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 consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). 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 Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry

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<sup>5</sup> Even if we were to consider the two European Union registrations, foreign trademark registrations have no probative value. *Cf. In re Hag AG*, 155 USPQ 598, 599 (TTAB 1967) (“The foreign registrations ... are not persuasive on the issue before us [whether KABA is generic] because it has not been demonstrated that the criteria for registration in these countries involve examination systems in any way analogous to that of this country; and manifestly applicant's right of registration must be determined under the provisions of the Lanham Act as interpreted by the various judicial tribunals in this country.”); *see also* TBMP § 704.03(b)(1)(A) (“Foreign Registrations. A foreign registration owned by a party to a Board inter partes proceeding . . . is not evidence of the use, registrability, or ownership of the subject mark in the United States.”).

mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). “[E]ach case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973) (internal citations removed).

#### **A. Relatedness 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. *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).

Here, Applicant’s goods and Registrant’s goods are identical, namely, wine. Thus, the second *DuPont* factor heavily favors a finding of a likelihood of confusion.

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

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 identical, we must presume that the goods travel through the same channels of trade

and are offered to the same or overlapping classes of purchasers. *In re Viterro 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).

Accordingly, the third *DuPont* factor also strongly 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 entireties as to appearance, sound, connotation and commercial impression. *See Stone Lion* 110 USPQ2d at 1160; *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 369 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) §1207.01(b)-(b)(v) (October 2018). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, Slip Op. No. 18-2236 (Fed. Cir. Sept. 13, 2019); TMPEP §1207.01(b).

“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*, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017) (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713 1721 (Fed. Cir. 2012) (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, 108 (TTAB 1975).

Our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on a comparison of 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 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.”). However, “in articulating reasons for reaching a conclusion on the issue of confusion, 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 consideration of the marks in their entireties.” *In re Nat'l Data*, 224 USPQ at 751.

Finally, where the goods of an applicant and registrant are identical, 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); TMEP § 1207.01(b).

Applicant's mark is NYMPHS OF CLARELLA in standard characters and the

cited mark is THE NYMPH, also in standard characters. Here, the marks at issue are visually and aurally similar in that both marks include the term NYMPH or its plural form. The addition of the article “the” in the cited mark has little significance and does not distinguish the marks. *See Motorola, Inc. v. Griffiths Elecs., Inc.*, 317 F.2d 397, 137 USPQ 551, 552 (CCPA 1963) (THE is “of trifling importance”); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009) (“The marks [WAVE and THE WAVE] are virtually identical. The addition of the word ‘The’ at the beginning of the registered mark does not have any trademark significance”); *In re Narwood Prods., Inc.*, 223 USPQ 1034 n.2 (TTAB 1984) (noting “the insignificance of the word ‘the’” in comparison of THE MUSIC MAKERS and MUSICMAKERS).

Moreover, while Applicant’s proposed mark contains the additional wording “OF CLARELLA” following the term “NYMPHS,” consumers generally are more inclined to focus on the first word, prefix, or syllable in any trademark or service mark. *See Palm Bay Imps., Inc.*, 73 USPQ2d at 1692 (finding similarity between VEUVE ROYALE and two VEUVE CLICQUOT marks in part because “VEUVE . . . remains a ‘prominent feature’ as the first word in the mark and the first word to appear on the label”).

Further, Applicant argues that while adding a house mark to an otherwise confusingly similar mark does not always obviate a likelihood of confusion, the Examining Attorney incorrectly fails to recognize that addition of a house mark may at times be sufficient to distinguish sources of even identical goods.<sup>6</sup> Applicant’s

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<sup>6</sup> Applicant’s Appeal Brief, p. 12; 7 TTABVue 17.

argument suggests that the wording OF CLARELLA or CLARELLA in its proposed mark constitutes a portion of Applicant's house mark. This is supported by Applicant's name, MAS CLARELLA SL, which intimates that the wording CLARELLA is in fact a part of Applicant's house mark. While it may be true that the addition of a house mark in some circumstances may obviate a finding of likelihood of confusion, in this instance, where both marks share the same dominant term, i.e., NYMPH in singular or plural form, we find that the addition of Applicant's apparent house mark CLARELLA to Applicant's proposed mark is insufficient to distinguish the marks. *See, e.g., In re Christian Dior, S.A.*, 225 USPQ 533, 535 (TTAB 1985) (addition of house mark DIOR to applicant's LE CACHET DE DIOR for shirts does not obviate likely confusion with CACHET for dresses and toiletries).

Additionally, consumers who are familiar with Registrant's THE NYMPH wines and who then encounter Applicant's NYMPHS OF CLARELLA wines may think Applicant's wines are a product line extension of Registrant's wines. *See, e.g., Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, \*7 (TTAB 2019) ("ROAD WARRIOR looks, sounds, and conveys the impression of being a line extension of WARRIOR"); *Joel Gott Wines LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1433 (TTAB 2013) ("Purchasers of opposer's GOTT and JOEL GOTT wines are likely to assume that applicant's goods, sold under the mark GOTT LIGHT and design, are merely a line extension of goods emanating from opposer"); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (holding that VANTAGE TITAN for MRI diagnostic apparatus and TITAN for medical ultrasound device were confusingly



similar and that the addition of applicant's "product mark," VANTAGE, to the registered mark would not avoid confusion); *Schieffelin & Co. v. Molson Cos.*, 9 USPQ2d 2069, 2073 (TTAB 1989) ("Those consumers who do recognize the differences in the [BRADOR and BRAS D'OR] marks may believe that applicant's mark is a variation of opposer's mark that opposer has adopted for use on a different product.").

Overall, we find that Applicant's mark and the cited mark are much more similar than dissimilar in sound, appearance, and connotation.

Notwithstanding the foregoing, to determine whether these marks, considered in their entireties, are sufficiently similar in overall commercial impression for confusion to be likely, we must also consider the relative commercial and conceptual strength of Registrant's mark.

"In determining strength of a mark, we consider both inherent strength, based on the nature of the mark itself, and commercial strength or recognition." *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017) (citing *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014)); *see also In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning)."). "[T]he strength of a mark is not a binary factor" and "varies along a spectrum from very strong to very weak." *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675-76 (Fed. Cir. 2015) (internal citations omitted). "The weaker [the registrant'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.* at 1676 (internal citations omitted). *See also Palm Bay Imps., Inc.*, 73 USPQ2d at 1693 (“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.”).

The fifth *DuPont* factor, the fame of the prior mark, and the sixth *DuPont* factor, the number and nature of similar marks in use for similar goods or services, may be considered in tandem to determine the strength of the cited mark and the scope of protection to which it is entitled. *Bell's Brewery, Inc.*, 125 USPQ2d at 1345; *DuPont*, 177 USPQ at 567; *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1033 (TTAB 2016 (“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.”); *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1059 (TTAB 2017) (“As to commercial weakness, ‘the probative value of third-party trademarks depends entirely upon their usage’”) (quoting *Palm Bay Imps.*, 73 USPQ2d at 1693),

Additionally, the Federal Circuit has held that if there is evidence that a mark, or an element of a mark, is commonly adopted by many different registrants, that may indicate that the common element has some non-source identifying significance that undermines its conceptual strength as an indicator of a single source. *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) (“[E]vidence of third-

party registrations is relevant to ‘show the sense in which a mark is used in ordinary parlance,’ ... that is, some segment that is common to both parties’ marks may have ‘a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak”) (quoting *Juice Generation*, 115 USPQ2d at 1674).

Applicant argues that the term NYMPH is weak when used in connection with wines.<sup>7</sup> As a result, Applicant maintains that the addition of the wording “OF CLARELLA” in its mark is sufficient to avoid a likelihood of confusion.<sup>8</sup> In support of its argument, Applicant submitted the following evidence:

### **Third-Party Registration Evidence**

Applicant submitted copies of the following U.S. third-party registrations:<sup>9</sup>

- U.S. Registration for the mark THE COCKTAIL NYMPH for “Bartending services; Consulting services in the field of hospitality; Providing information in the field of drinks, namely, providing information about bartending”;<sup>10</sup> and
- U.S. Registration for the mark BREWNYMPH for “On-line social networking services; Online social networking services in the field of beer, craft beer, breweries, homebrewing, beer events, food and drink, travel, community events, sports, fitness, entertainment, outdoor activities, active lifestyle; Online social networking services in the field of beer, craft beer, breweries, homebrewing, beer events, food and drink, travel, community events, sports, fitness,

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<sup>7</sup> Applicant’s Appeal Brief, pp. 5-9; 7 TTABVUE 10-14.

<sup>8</sup> *Id.* at p. 9; 7 TTABVUE 14.

<sup>9</sup> Applicant also submitted six foreign registrations for marks consisting of NYMPH-formative marks for wine and other alcoholic beverages. As previously noted, foreign registrations have no probative value in our strength analysis. *See* fn. 5, *supra*. Accordingly, we have given no consideration to these six foreign registrations.

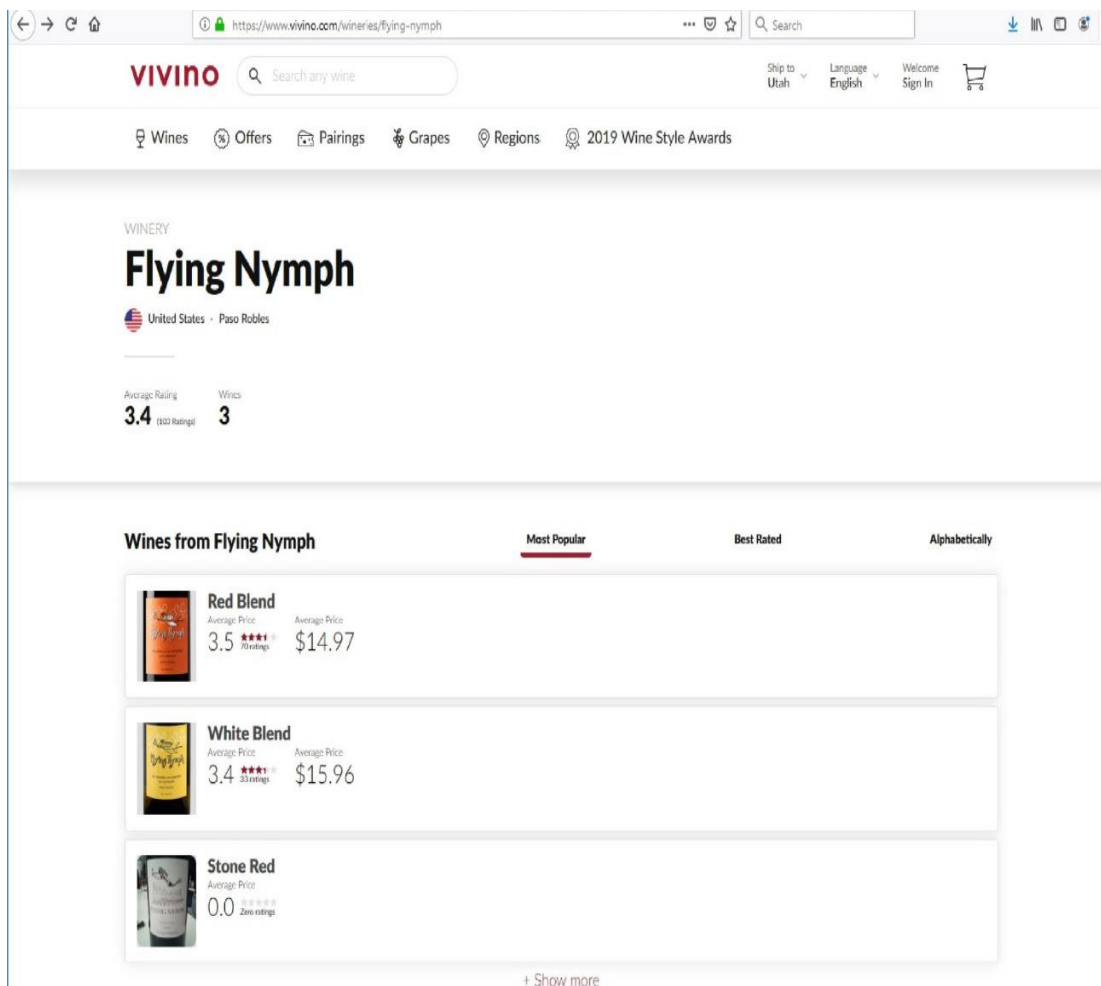
<sup>10</sup> August 31, 2020 Request for Reconsideration; TSDR pp. 99-100.

entertainment, outdoor activities, active lifestyle provided via a website.”<sup>11</sup>

### **Third-Party Use Evidence**

Applicant also submitted the following evidence obtained from the Internet of purported third-party uses of the term NYMPH used in connection with wine:

#### **•FLYING NYMPH<sup>12</sup>**



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<sup>11</sup> *Id.*; TSDR pp. 101-102.

<sup>12</sup> *Id.*; TSDR pp. 24-35.

• **NAKED NYMPH** from Fieldwood Winery<sup>13</sup>

Twisted Cord: (Concord) This is one of the region's most popular wines. We make ours for people who like to taste the grape in their wine. Sweet and delicious, it pairs well with fruits, nuts, desserts and many red meats. (Just in!)

Twisted Cord: (Concord) This is one of the region's most popular wines. We make ours for people who like to taste the grape in their wine. Sweet and delicious, it pairs well with fruits, nuts, desserts and many red meats. (Just in!)

Our Dryer Whites: (\$12.00)

Naked Nymph: (Chardonnay) Our naked Chardonnay is aged in Stainless Steel instead of oak for a clean, fruity and somewhat buttery flavor. It pairs well with poultry dishes, pork and seafood. Tastes best chilled to about 50 F. (Available)

After Glow: (Pinot Grigio) Crisp, Dry and Refreshing! Our medium body wine pairs well with lighter fare from shellfish to chicken. (Available)

• **BLUSHING NYMPHE and ROSE DE NYMPHE ÉMUE**<sup>14</sup>



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Subscribe now to our email list and receive 10% off your first purchase!



**2017 Chateau Maris Blushing Nymph Rose**

**\$28.00**

750ml

10% Discount on 3+ Bottles.

<sup>13</sup> *Id.*; TSDR p. 38.

<sup>14</sup> *Id.*; TSDR p. 42-44 and pp. 88-89. The record demonstrates that the BLUSHING NYMPHE and ROSE DE NYMPHE ÉMUE wines are offered by the same third-party source, i.e., Chateau Maris.

Français ▼

Devise : EUR € ▼

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Nos vins / Rosé / Rose de Nymphé Émue

## ROSE DE NYMPHE ÉMUE

La Cuisse de Nymphé est une variété de rose, d'un rose très pâle tirant légèrement sur le mauve. Elle fut apportée en France à la fin du xvie siècle, depuis la Crimée. Elle porta tout d'abord le nom de "Rosier blanc royal".

Ce Rosé est issue d'un assemblage de Grenache noir.

**13,00 €**

TTC -  
Shipping  
Cost  
excluded

**Quantité**1 ^  
v

🛒 AJOUTER AU PANIER

Partager

**Millésime**

2009

### Description

#### Détails du produit

NEZ :

Très frais et minéral, des notes équilibrées de cerises au marasquin, d'abricot, d'eucalyptus, et de framboise.

DEGUSTATION :

Ce Rosé est à servir frais. Son acidité porte des arômes de framboises et de zest d'orange. Ce vin se mariera



<https://www.cellartracker.com/wine.asp?iWine=3020747>



**Avg Score: 86 Points**

86 Points 

mineral, smoky, a bit greasy, medium-strong, as if a smoked salmon had fallen into the wine, takes some time getting used to,

### WHAT DO YOU THINK?

Add A Tasting Note


• **NYMPH**<sup>16</sup>



## •DOMAINE DES NYMPHES<sup>17</sup>

8/28/2020

Domaine des Nymphes - site officiel


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BIB Côtes du Rhône 5L rosé

A.O.P Rasteau Cuvée Les Encostes


Des cuves du domaine sortent

- les CDR \* Rouge
- Le CDR Rosé
- Le CDR blanc
- Le CDR Villages Rasteau Ro
- Les VDN\* de Rasteau

\* CDR = Côtes du Rhône, VDN = Vin de

Le domaine vend ses vins rouge  
Celle-ci se fait en général en fû

Vin rouge



**A.O.P Rasteau  
Cuvée Les Encostes**

**Millésime :** 2015  
**Description :**  
Terroir: Cette cuvée est issue du terroir argilo calcaire de Rasteau où nos vignes sont âgées moyenne de 40 ans.

Cépages: 70% Grenache noir, 20% Syrah, 10% Mourvèdre.

Élaboration: Vendanges manuelles, vinification traditionnelle.


Elevage: En cuve béton durant 24 mois.

Personnalité: Fraîcheur et onctuosité, arômes: fruits rouges confiturés, note de réglisse. Bou

## •L'AVEN DES NYMPHES<sup>18</sup>



L'Aven des Nymphes Pic-Saint-Loup 2018 | Wine Info






<https://www.vivino.com/l-aven-des-nymphes-pic-saint-loup/w/7638024?...>




Ship to  
Utah

Language  
English





 Wines
 Offers
 Pairings
 Grapes
 Regions



L'Aven des Nymphes  
**Pic-Saint-Loup 2018**

Red wine from Pic-Saint-Loup · France

 Add to Wishlist

Among top 6% of all wines in the world

<sup>17</sup> *Id.*; TSDR pp. 67-80.

<sup>18</sup> *Id.*; TSDR p. 82.



Additionally, Applicant submitted an article from the website [www.npr.org](http://www.npr.org) dated July 30, 2009 and titled "Alabama Bans Wine with Naked Nymph on Label."<sup>19</sup> The article states that Alabama's state liquor board "has banned a California wine called Cycles Gladiator because its label uses an Art Nouveau image that once graced the posters of a turn-of-the-century French bicycle manufacturer." The article quotes an Associated Press report which states the following:

MONTGOMERY, Ala. (AP) - Alabama's ban on a wine that features a nude nymph on the label became a business opportunity for a California vintner who is preparing a marketing campaign to capitalize on being "Banned in Bama."

The Alabama Alcoholic Beverage Control Board recently told stores and restaurants to quit serving Cycles Gladiator wine because of the label. Board attorney Bob Martin said the stylized, art-nouveau rendition of a nude female with a flying bicycle violated Alabama rules against displaying "a person posed in an immoral or sensuous manner."

Bill Leigon, president of Hahn Family Wines in Soledad, Calif., said Thursday that visits to the company's Web site have increased tenfold since news of the ban broke late last week, and callers from across the country have been asking where they can buy the wine.

The label at issue is reproduced below:



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<sup>19</sup> *Id.*; TSDR pp. 103-05.

Applicant also argues that the term “nymph” is somewhat suggestive or even descriptive of wine and, therefore, the inclusion of the additional wording “OF CLARELLA” in Applicant’s mark is sufficient to distinguish its mark from the cited mark.<sup>20</sup> Specifically, Applicant contends that the term “nymph” has a strong association with Dionysus, the Greek god of wine.<sup>21</sup> In support of this argument, Applicant submitted screenshots from the website [www.greekgods.org](http://www.greekgods.org) which states, in part, the following:<sup>22</sup>

When Dionysus was born, he was, like many other illegitimate infants, harassed by Hera and her minions. Those who helped Dionysus had to be moving him constantly to keep his whereabouts a secret. And it was Hermes once again who finally found him a safe shelter with a group of mountain nymphs, away from the eyes of many. Dionysus spent his childhood with these nymphs and invented the process of growing grapes and making wine.

When viewing Applicant’s third-party evidence in its totality, we find that it is insufficient to demonstrate that the cited mark is either conceptually or commercially weak. First, with regard to Applicant’s third-party registration evidence, as indicated in footnotes. 5 and 9, *supra*, six of the eight registrations are foreign and have no probative value. With regard to the two remaining U.S. registrations, the marks are for bartending and online social networking services concerning beer. While these services may relate to alcoholic beverages, they are nonetheless too far afield to be probative of how strong the wording NYMPH(S) is for wine. Accordingly, none of the

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<sup>20</sup> Applicant’s Reply Brief, p. 2, 10 TTABVUE 3.

<sup>21</sup> Applicant’s Appeal Brief, p. 6; 7 TTABVUE 11.

<sup>22</sup> June 3, 2019 Response to Office Action; TSDR pp. 26-27.

third-party registration evidence demonstrates that the term “nymph” is conceptually weak for wine.

We also find unpersuasive Applicant’s argument that the term “nymph,” when used in association with wine, is descriptive or even suggestive. A term is descriptive of goods or services within the meaning of Section 2(e)(1) of the Trademark Act if it conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012). Applicant has not provided any argument or evidence to demonstrate that the term “nymph” describes a feature, characteristic or quality of wine, and it is hard to see how it could, as a nymph is “any of numerous minor deities represented as beautiful maidens inhabiting and sometimes personifying features of nature such as trees, waters, and mountains,”<sup>23</sup> and wine is an alcoholic beverage made from grapes. Moreover, Applicant’s evidence regarding the Greek god Dionysus does not demonstrate that the term “nymph” is suggestive of wine. The evidence submitted merely states Dionysus spent his childhood sheltered with mountain nymphs and invented the process of growing grapes and making wine. This does not mean that the consuming public associates nymphs with wine any more than it associates nymphs with childhood or agriculture.

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<sup>23</sup> We take judicial notice of the definition of the word “nymph.” See The American Heritage Dictionary of the English Language [www.ahdictionary.com](http://www.ahdictionary.com). The Board may sua sponte take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including definitions in online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016).

Thus, we do not find this evidence probative in showing that the term “nymph” is suggestive of wine.

Finally, we note that the cited mark issued on the Principal Register without a showing of acquired distinctiveness under Section 2(f) of the Trademark Act. Accordingly, we find Registrant’s THE NYMPH mark, when viewed in its entirety, is inherently distinctive and, therefore, is entitled to the normal scope of protection accorded an inherently distinctive mark.

With regard to Applicant’s third-party use evidence, we find this evidence is insufficient to demonstrate that the word “nymph” is so extensively used by third-parties as to render the term commercially weak in connection with the sale of wine. Applicant submitted eight purported third-party uses of the term “NYMPH” as part of the name of a wine.

Two of these examples are from foreign websites in French, i.e., screenshots of the wines DOMAINES DES NYMPHES and ROSE DE NYMPHE ÉMUE. “Various factors may inform the probative value of a foreign website in any given case, such as whether the website is in English (or has an optional English language version), and whether the nature of the goods or services makes it more or less likely that U.S. consumers will encounter foreign websites in the field of question.” *In re Well Living Lab Inc.*, 122 USPQ2d 1777, 1781 n.10 (TTAB 2017); *see also In re King Koil*, 79 USPQ2d 1048, 1050 (TTAB 2006) (assigning some probative value to information of foreign origin). While the goods at issue, i.e., wine, are of a nature that would make it likely that U.S. consumers would encounter at least some foreign websites that sell

wine, the two websites submitted by Applicant are both in French and one with no apparent option to view an English version.<sup>24</sup> Without any evidence demonstrating the extent to which relevant U.S. consumers have viewed these foreign websites, this evidence has little, if any, probative value in our analysis regarding the commercial strength of the cited mark in the United States.

Similarly, the NPR article submitted by Applicant that discusses Alabama's state liquor board's banning of a wine with a picture of a naked nymph on the label is also not probative. The fact that the Alabama liquor board perceived the pictorial depiction of a nude woman on the label as a nymph does not necessarily mean that relevant consumers of wine would also perceive the naked woman as a nymph. More importantly, here we are focused on the word "nymph" rather than depictions which may arguably be perceived as nymph-like.

We acknowledge that the remaining six websites demonstrate third-party use of the term "nymph" in connection with the sale of wine. However, these six third-party uses are "a far cry from the large quantum of evidence of third-party use and third-party registrations that was held to be significant" in the Federal Circuit's decisions in *Jack Wolfskin* and *Juice Generation. In re Inn at St. John's, LLC*, 126 USPQ2d at 1746; *cf. Jack Wolfskin*, 116 USPQ2d at 1135-36 (at least fourteen relevant third-party uses or registrations of record); *Juice Generation, Inc.*, 115 USPQ2d at 1674-75 (at least twenty-six relevant third-party uses or registrations of record).

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<sup>24</sup> The foreign website displaying the ROSE DE NYMPHE ÉMUE wine includes a British flag icon, suggesting that that a consumer may view an English version of the website. *See* August 31, 2020 Request for Reconsideration, TSDR pp. 88-89.

Quite simply, the third-party uses here are too few in number to be “extensive” evidence of weakness that is “powerful on its face,” *Jack Wolfskin*, 116 USPQ2d at 1136, and there is no accompanying showing of any long duration or widespread exposure of the referenced uses that might enhance their probative value. Thus, we find that Applicant’s third-party use evidence is insufficient to show that the cited mark THE NYMPH has been weakened to such a degree that consumers of Applicant’s goods will differentiate Applicant’s proposed mark from the cited mark.

Because we have found that the cited mark is not so weak as to be accorded a narrow scope of protection against a similar mark for identical goods, consumers are likely to be confused.

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

#### **D. Consumer Sophistication**

The fourth *DuPont* factor concerns the “conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. Applicant argues that consumers of wine are sophisticated consumers and thus are able to distinguish between even similar trademarks. In support of its argument, Applicant submitted various articles from the Internet that purportedly demonstrate that all classes of wine consumers are conscious of and selective with regard to the sources of their wine.<sup>25</sup>

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<sup>25</sup> June 3, 2019 Response to Office Action, TSDR pp. 28-30; August 31, 2020 Request for Reconsideration, TSDR pp. 17-19.

Applicant's argument is unavailing. By way of extrinsic evidence, Applicant is impermissibly seeking to restrict the scope of the classes of purchasers even though neither the identification of goods in Applicant's application nor the identification of goods in the cited registration are so restricted. It is well settled that in a proceeding such as this, the question of likelihood of confusion must be determined by analyzing the goods identified in the application vis-a-vis the goods recited in the registration, rather than what extrinsic evidence shows those goods to be. *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986).

Moreover, we must presume that Applicant's and Registrant's wine encompasses inexpensive or moderately-priced wine. *In re Bercut-Vandervoort & Co.*, 229 USPQ at 764-65 (rejecting applicant's arguments regarding the high cost and quality of its wine and the sophistication of its purchasers, where application identified goods merely as "wine"). The applicable standard of care is that of the "least sophisticated purchasers." *Stone Lion*, 110 USPQ2d at 1163.

Even assuming that the actual or potential consumers of the parties' goods may be sophisticated, we point out that they may not be sophisticated or knowledgeable in the field of trademarks or immune from source confusion. *See In re Shell Oil Co.*, 922 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993) (indicating that "even sophisticated purchasers can be confused by very similar marks"); *Top Tobacco, LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011); TMEP § 1207.01(d)(vii). Here, where the marks at issue are similar and the goods are identical, confusion is often found likely despite customer sophistication and care.

“That the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods. ‘Human memories even of discriminating purchasers . . . are not infallible.’” *In re Research & Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (quoting *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970)); *In re Wilson*, 57 USPQ2d 1863, 1865-66 (TTAB 2001) (where marks are very similar and goods related, confusion may be likely even among sophisticated purchasers).

Thus, this *DuPont* factor is neutral.

### **III. Conclusion**

We have considered all of the arguments and evidence of record, and all relevant *DuPont* factors of which there is evidence of record. We find that (1) the marks at issue are similar, (2) Applicant’s goods are identical to Registrant’s goods; (3) the parties’ goods are presumed to move in identical trade channels and would be offered to the same classes of purchasers, and (4) the cited mark should be accorded a normal scope of protection. In view thereof, we conclude that Applicant’s NYMPHS OF CLARELLA standard character mark so resembles the cited standard character mark THE NYMPH as to be likely to cause confusion or mistake, or to deceive under Section 2(d) of the Trademark Act.

**Decision:** The refusal to register Applicant’s NYMPHS OF CLARELLA mark under Section 2(d) of the Trademark Act is affirmed.