

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Starr Restaurant Organization, L.P.

Serial No. 77424964

David V. Radack of Eckert Seamans Cherin & Mellott, LLC for
Starr Restaurant Organization, L.P.

Ellen J.G. Perkins, Trademark Examining Attorney, Law
Office 110 (Chris A.F. Pedersen, Managing Attorney).

Before Bucher, Bergsman and Lykos,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Starr Restaurant Organization, L.P. ("applicant")
filed an intent-to-use application on the Principal
Register for the mark TNT TACOS 'N TEQUILA, in standard
character format, for "bar and restaurant services," in
International Class 43. Applicant disclaimed the exclusive
right to use the term "Tacos 'N Tequila."

The Trademark Examining Attorney refused to register
applicant's mark under Section 2(d) of the Trademark Act of
1946, 15 U.S.C. § 1052(d), on the ground that applicant's
mark is likely to cause confusion with Registration No.

3641339 for the mark T&T TACOS TEQUILA for "carry-out restaurants; restaurant and bar services," in International Class 43.¹ The registrant disclaimed the exclusive right to use the words "Tacos" and "Tequila."

Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all of the 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). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. See *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").

¹ Issued June 16, 2009.

A. The similarity or dissimilarity and nature of the services as described in the application and registrations, the likely-to-continue channels of trade and classes of consumers.

The services are legally identical. Because the services described in the application and the cited registration are legally identical, we must presume that the channels of trade and classes of purchasers are the same. *See Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade"); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers").

B. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

We turn now to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont*

de Nemours & Co., 177 USPQ at 567. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 9 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1988). In comparing the marks, we are mindful that where, as here, the services are in part identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the services. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007).

Moreover, in comparing the marks, 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 so that confusion as to the source of the goods offered under the respective marks is likely to result.

San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp., 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), aff'd unpublished, No. 92-1086 (Fed. Cir.

June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than a specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). In this case, the average customer would be an ordinary consumer who patronize restaurants and bars.

The marks are similar in appearance and sound because they share similar letters and words in the same structure. The marks start with the letters TNT or T&T followed by TACOS 'N TEQUILA or TACOS TEQUILA. The letters TNT are phonetically equivalent to T&T and the terms TACOS 'N TEQUILA and TACOS TEQUILA are phonetically similar. In this regard, the ampersand (&) in T&T is a symbol for the word "and"² and "'N" is a contraction of the word "and."³ Thus, any differences in the appearance and sound of the marks are *de minimis*.

The marks engender the same commercial impression. In TNT TACOS 'N TEQUILA, the letters TNT refer to the first letters in Tacos 'N Tequila. In the mark T&T TACOS

² The Random House Dictionary of the English Language (Unabridge), p. 70 (2nd ed. 1987). The Board may take judicial notice of dictionary evidence. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

³ Compact Oxford English Dictionary (askoxford.com) attached to the March 22, 2010 Office Action.

TEQUILA, the letters **T&T** refer to **Tacos** and **Tequila**. In other words, consumers will perceive TNT and T&T as referencing "Tacos and Tequila," Mexican fare.

Applicant contends that its use of the letters TNT has a double meaning as an acronym for TACOS 'N TEQUILA and as an abbreviation for the explosive.⁴ We are not persuaded. As indicated above, when consumers view applicant's mark TNT TACOS 'N TEQUILA, they are going to perceive TNT as referring to TACOS 'N TEQUILA, not an explosive. On the other hand, we acknowledge that if applicant were to use TNT TACOS 'N TEQUILA in connection with a design depicting an explosion, there could be a double entendre with letters TNT interpreted as the explosive. However, likelihood of confusion is determined based on the mark as shown in the drawing of an application and the mark shown in the cited registration. Thus, applicant is free to use its mark without reference to a design depicting an explosion. *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1268 (TTAB 2011). See also *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847-48 (Fed. Cir. 2000) (when the registered mark is a typed drawing, it is irrelevant that registrant has a particular display for the mark, and the Board was correct to ignore those features); *In re Shell*

Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1690 n.4 (Fed. Cir. 1993) (rejecting applicant's argument that it would use the applied-for mark in connection with its other trademarks; registrability is based on the description of the mark in the application); *In re Lebanese Arak Corp.*, 94 USPQ2d 1215, 1220 (TTAB 2010) ("If applicant were to obtain a registration for its mark it would not be limited to use of the mark in conjunction with this trade dress, or in conjunction with the words 'Armenian Wine,' or to any particular rendition now in use"). Furthermore, "[i]t is settled ... that a distinction in trade dress cannot weigh against likelihood of confusion with respect to the registration of a simple word mark like [TNT TACOS 'N TEQUILA]." *Kimberly Clark Corp. v. H. Douglas Enterprises, Ltd.*, 774 F.2d 1144, 1147, 227 USPQ 541, 543 (Fed. Cir. 1985).

In view of the foregoing, we find that the marks are similar in terms of appearance, sound, meaning and commercial impression.

C. Balancing the factors.

In view of the facts that the marks are similar and the services are legally identical and the presumption that the services move in the same channels of trade and are

⁴ Applicant's Brief, p. 2.

sold to the same classes of consumers, we find that applicant's mark TNT TACOS 'N TEQUILA for "bar and restaurant services" is likely to cause confusion with the mark T&T TACOS TEQUILA for "carry-out restaurants; restaurant and bar services."

Decision: The refusal to register is affirmed.