

This Opinion is not a
Precedent of the TTAB

Mailed: April 17, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re S.C. Valvis Holding S.A.

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Serial No. 79195691

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Gregory Kenyota, Alex D. Patel, and Paulo A. de Almeida, of Patel & Almeida, P.C.,
for S.C. Valvis Holding S.A.

Andrea B. Cornwell, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

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Before Ritchie, Greenbaum, and Masiello,
Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

S.C. Valvis Holding S.A. (“Applicant”) seeks registration on the Principal Register of the mark LOVE AT FIRST SIP, in standard character form, for goods ultimately identified as “mineral and aerated waters; none of the foregoing flavored with juices,” in International Class 32.¹ The Examining Attorney refused registration of

¹ Serial No. 79195691, filed on August 29, 2016, pursuant to Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f(a), was filed as an extension of protection to the United States of International Registration No. 1317961.

Applicant's mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a prior registration of the mark LOVE AT FIRST SIP, also in standard character form, for "orange juice beverages," in International Class 32.² After the Examining Attorney made the refusal final, Applicant filed a request for reconsideration and an appeal. When the request for reconsideration was denied, the appeal was resumed. Both Applicant and the Examining Attorney filed briefs. We affirm the refusal to register.

I. Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also In re Majestic Distilling Company, Inc.*, 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 similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). *See also In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). We consider the *du Pont* factors for which arguments or evidence were presented. The other factors, we consider to be neutral.

² Registration No. 4402966 issued September 17, 2013.

A. The Marks

We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). The mark in the cited registration is LOVE AT FIRST SIP, in standard character format. Applicant's mark also is LOVE AT FIRST SIP, in standard characters. There is no argument or evidence that the commercial impression would be different when applied to registrant's goods rather than to Applicant's.

Applicant argues that the term LOVE AT FIRST SIP is weak because there is a third-party registration, Registration No. 4690910, for "distilled spirits; vodka," and therefore this "would instead support an argument that LOVE AT FIRST SIP is weak for beverages."³ The existence of a single registration, however, is not enough to narrow the scope of protection of the cited registration. *Cf. Promark v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1244 (TTAB 2015) ("Such third-party registrations and uses are competent to show that the common term has an accepted meaning in a given field.").

We find that the marks are identical in sight, sound, connotation, and commercial impression, and that this first *du Pont* factor weighs heavily in favor of finding a likelihood of confusion.

³ 14 TTABVUE 7.

B. Goods, Trade Channels and Purchasers

When considering the similarity or dissimilarity of the goods, we note that with identical marks, as we have here, the goods need be less similar for us to find a likelihood of confusion. *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001). Moreover, goods need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that the goods are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used or intended to be used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of the parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).⁴

To demonstrate the relatedness of the identified goods, the Examining Attorney submitted copies of third-party registrations with “aerated” or “mineral” water as identified in the application, on the one hand, and “orange juice,” or “orange juice beverages” as identified in the cited registration, on the other. Copies of use-based, third-party registrations may help establish that the goods are of a type which may

⁴ Applicant argues that to show relatedness of the goods, the Examining Attorney must show “something more” than that the different goods are in the same environment or trade channels. 14 TTABVUE 4. In this regard, Applicant cites *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059 (Fed. Cir. 2003) (citing *Jacobs v. Int'l Multifoods Corp.*, 668 F.2d 1234, 212 USPQ2d 641, 642 (CCPA 1982)) noting “requirement that ‘something more’ be shown to establish the relatedness of food and restaurant products for purposes of demonstrating a likelihood of confusion”; as well as *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). These cases are inapposite, however, since the goods at issue here are not food, on the one hand, and restaurant services, on the other, but rather, are both beverages.

emanate from a single source. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993). Examples include CEREBELLUM (Registration No. 3605081); HEI MIAN CAI, and design (Registration No. 3928898); SPC, and design (Registration No. 3949138); JEJU SAMDASOO, stylized (Registration No. 3326635); DYDO, and design (Registration No. 3140570); TROPICAL WORLD, and design (Registration No. 3937739); MIZUMI and design (Registration No. 3997395); BUDGY SMUGGLER, and design (Registration No. 4155063); CITROSE (Registration No. 4312789); DILALI, and design (Registration No. 4624510); GAS BEVERAGES, and design (Registration No. 5209706); and TEWOO (Registration No. 4803560).⁵

Applicant argues that the number of registrations “with any alleged overlap between orange juice beverages and mineral or aerated waters not flavored with juices is clearly *de minimus*.”⁶ To support this, Applicant submitted evidence from the electronic search system showing that 80 out of a total of 2260 total live registrations for “mineral” or “aerated” water in International Class 32, also identify “orange juice.”⁷ Besides being a mere listing of registrations with no further information provided, this search has little probative value, since it does not indicate whether the same entity has *separate* registrations under the same mark for “mineral or aerated waters” and “orange juice beverages.” Applicant also submitted four sets of registrations owned by different entities for “similar marks” for orange juice on the

⁵ Attached to September 8, 2017 Denial of Request for Reconsideration, at 5-45.

⁶ 14 TTABVUE 7.

⁷ Attached to February 1, 2017 Response to Office Action.

one hand and water on the other.⁸ Not only are the third-party marks not identical to each other, as are the marks here in the application and the cited registration, but in line with our precedent, four sets of registrations would hardly constitute strong evidence of industry conditions. *Cf. In re Thor Tech, Inc.* 113 USPQ2d 1546, 1548 (TTAB 2015) (“The existence of almost fifty pairs of substantially identical marks for land motor vehicles and for towable recreational vehicle trailers on the federal Trademark Register suggests to us that businesses in these two industries believe that their respective goods are distinct enough that confusion between even identical marks is unlikely.”).

In addition to third-party use-based registrations, the Examining Attorney also submitted examples of recipes that include both orange juice and some form of sparkling or carbonated water. Relevant excerpts include the following:⁹

Williams Sonoma Sparkling Citrus Spritzer: These breakfast spritzers, made with a mixture of grapefruit and orange juices, get an extra burst of flavor from a sprinkling of lime juice just before sparkling mineral water is added.
Williams-sonoma.com.

Orange Spritzer, Drink Up!: . . . I always mix my juices with sparkling water. The recipe I'm sharing with you today is for my favorite way of drinking orange juice, an orange spritzer!
<http://honestcooking.com>.

Preparation: In a tall glass combine the Cointreau, the orange and lemon juices, and 4 ice cubes. Fill the glass with the seltzer and stir the drink. Garnish it with the orange slice.
Epicurious.com.

⁸ Attached to February 1, 2017 Response to Office Action.

⁹ Attached to February 2, 2017 Final Office Action, at 48-87; and September 8, 2017 Denial of Request for Reconsideration, at 107-115.

Directions: Place the ice cubes in a highball glass. Add the Campari, orange juice, and sparkling water. Add a slice of fresh orange and serve ice cold.

Foodnetwork.com.

Orange spritzer, nonalcoholic recipe: Includes 2 cups orange juice; 2 cups carbonated soda/sparkling mineral water; 2 cups of ice cubes; and 1 fresh orange.

Pepperbowl.com.

Pomegranate Sparkling Orange Juice – Fancy Holiday Drinks: 4 cups 100% pure Florida orange juice; ½ cup pomegranate juice; ½ cup sparkling water.

Superhealthykids.com.

Applicant argues that the recipes are not dispositive. Applicant cites Board precedent, which states:

There is, of course, no per se rule that all food products appearing in the same recipe be considered related for Section 2(d) purposes. It is not unusual for recipes to contain many different ingredients and consumers are not likely to assume merely from the fact that two items are called for in the same recipe that they necessarily emanate from the same source of origin.

In re Davia, 110 USPQ2d 1810, 1816 (TTAB 2014). The Board nevertheless found that there was “conjoint use,” and that the ingredients were “commonly used together.” *Id.* The Board, thus, went on to say:

If two ingredients, however, are found to be complementary in that they are sold in the same stores to the same consumers for the same, related or complementary end use, consumers are likely to be confused upon encountering the goods under the same or similar marks even though the goods may be found in different areas within a store.

Id. Here, we reach the same conclusion as in *In re Davia*, that these beverages are related and complementary, often being included in recipes as integral ingredients

together, and where, as here, they are offered under identical marks, consumers are likely to assume that they derive from a single source.

Regarding channels of trade, the Examining Attorney has submitted evidence that mineral or aerated water is offered via the same retailers as orange juice or orange juice beverages, including at Freshdirect.com and Walmart.com, and even under the same house mark, at Harristeeter.com and Wegmans.com.¹⁰ We thus find that the goods are related and complementary, and are likely to travel through the same channels of trade to the same classes of consumers. The second and third *du Pont* factors also favor finding a likelihood of confusion.

C. Conditions of Sale

The Examining Attorney urges us to consider that the identified items are often sold at a low cost, and may be subject to impulse purchase, which Applicant has not disputed. In particular, the Examining Attorney submitted evidence of sparkling water offered for as low as “3 for \$1.00” and orange juice offered at \$2.50.¹¹ In this regard, we must make our determination based on the least sophisticated consumer. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014) (affirming that TTAB properly considered all potential investors for recited services, which included sophisticated investors, but that precedent requires consumer care for likelihood-of-confusion decision to be based “on

¹⁰ Attached to September 8, 2017 Denial of Request for Reconsideration, at 178-202.

¹¹ Shoprite.com. Attached to September 8, 2017 Denial of Request for Reconsideration, at 185-187. Similar prices are featured on Wegmans.com and Harristeeter.com. *Id.* at 178-188.

the least sophisticated potential purchasers”). We find this factor to favor finding a likelihood of confusion.

D. Conclusion

After considering all of the arguments and evidence of record as they pertain to the relevant *du Pont* factors, we find that the marks are identical in sight, sound, connotation, and commercial impression, and the goods are related and complementary and would travel through some of the same channels of trade and be encountered by the same general classes of consumers, including as an impulse purchase. Thus, we find that there is a likelihood of confusion between Applicant’s mark LOVE AT FIRST SIP for “mineral and aerated waters; none of the foregoing flavored with juices,” and the mark in the cited registration, LOVE AT FIRST SIP, for “orange juice beverages.”

Decision: The Section 2(d) refusal to register Applicant’s mark is affirmed.