

This Opinion is not a  
Precedent of the TTAB

Mailed: February 5, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Frantoio Ulivi Di Liguria S.r.l.*

Serial No. 79250730

Nicholas D. Wells of Legends Law Group PLLC,  
for Frantoio Ulivi Di Liguria S.r.l.

Sarah E. Steinpfad, Trademark Examining Attorney, Law Office 120,<sup>1</sup>  
David Miller, Managing Attorney.

Before Kuhlke, Ritchie, and Goodman,  
Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Frantoio Ulivi Di Liguria S.r.l. (“Applicant”) seeks registration on the Principal Register of the mark DUA and design, as shown below, for “Extra virgin olive oil for food use; extra virgin olive oil for culinary use; olive oil for cooking; olive oil for food use; processed vegetables in olive oil; olive paste; processed olive purée; prepared olives; preserved olives; treated olives, namely, processed olives; canned processed

---

<sup>1</sup> The case was reassigned to this Examining Attorney after the appeal was filed.

olives; tuna fish, not live; fish fillets; processed aubergine purée; preserved artichokes; treated artichokes, namely, preserved artichokes; processed olives in brine; processed peppers in olive oil; processed pickled aubergines; sun-dried tomatoes; processed tomatoes in olive oil; hot chili pepper purée; edible olive oil,” in International Class 29 and “Pesto sauce; condiments, namely, vinegar and sauces; flavored vinegar,” in International Class 30:<sup>2</sup>



The application contains the following description of the mark:

Description of the Mark: The mark consists of the stylized term “DUA” in front of the design of an olive branch.

Colors Claimed: Color is not claimed as a feature of the mark.

The Examining Attorney refused registration of Applicant’s mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), as likely to cause confusion, mistake, or to deceive, based on the mark DUA BELIBIS and design, as shown below, for “Sauces in the form of condiments; savory sauces used as condiments; sweet

---

<sup>2</sup> Serial No. 79250730, filed on July 19, 2018, pursuant to Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f(a), as a Request for Extension of Protection for International Registration No. 1446972.

sauces used as condiments; chili seasoning; chili sauce; chili paste for use as a seasoning; chili oil for use as a seasoning or condiment; vinegar,” in International Class 30:<sup>3</sup>



The registration contains the following additional information about the description, colors, and translation:

Description of the mark: The mark consists of a graphical depiction of two ducks in the colors green, gold and black surrounded by a gold arch within a curved red carrier above the stylized wording “DUA BELIBIS” in the color white.

Colors Claimed: The color(s) green, red, gold, black, and white are claimed as a feature of the mark.

Translation: The English translation of “DUA BELIBIS” in the mark is “TWO WHISTLING DUCKS.”

After the Examining Attorney made the Section 2(d) refusal final, Applicant filed this appeal, which is fully briefed. For the reasons discussed herein, we reverse the refusal to register.

---

<sup>3</sup> Registration No. 4965841 issued May 24, 2016.

## 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 Co.*, 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 or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). *See also In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). We note, nevertheless, that in a case where the marks are found to be sufficiently dissimilar, this factor may be dispositive. *See Kellogg Co. v. Pack'em Ent. Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) (“We know of no reason why, in a particular case, a single *DuPont* factor may not be dispositive.”)

### A. Goods, Trade Channels, and Purchasers

The application identifies goods in both International Class 29 (“IC 29”) and International Class 30 (“IC 30”). Several of the IC 30 goods overlap with the goods identified in the cited registration. For example, the application identifies “pesto sauce; condiments, namely, vinegar and sauces; flavored vinegar,” while the cited registration identifies “savory sauces used as condiments;” as well as “vinegar.” The goods in IC 30 are therefore identical in part.

As for Applicant’s IC 29 goods, there is an overlap with the “hot chili pepper puree” identified by Applicant, and the “chili seasoning; chili sauce; chili paste for use as a

seasoning” in the cited registration. To further show the relatedness of Applicant’s IC 29 goods to the goods identified in the cited registration, the Examining Attorney submitted web evidence showing numerous third parties, such as Cave Creek Olive Oil Co.; Lucero; Fody; Sadaf; Mezzetta; Mediterra; Fiore; The OliveTap; Newman’s Own; Seasons; Midtown Olive Oil; Gustiamo; Colavita; and Tassos,<sup>4</sup> all of which offer for sale various goods identified by Applicant, such as “olive oil for cooking; olive oil for food use” along with goods identified in the cited registration, including “sauces in the form of condiments; savory sauces used as condiments” and/or “vinegar.”

We find that the goods are identical-in-part and otherwise related. As for the channels of trade, when as here, the goods are identical in part or legally identical, they are presumed to travel in the same channels of trade to the same class of purchasers. *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). Thus, without regard to Applicant’s arguments regarding the different origins of the goods and likely differences in the marketplace, we must presume that the trade channels and classes of purchasers are the same.

The second and third *du Pont* factors favor finding a likelihood of confusion.

---

<sup>4</sup> Attached to February 6, 2019 Office Action at 7-60, and April 3, 2019 Final Office Action, at 3-84.

## B. The Marks

We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir.

2005). Applicant's mark is , which contains the literal element "DUA," drawn across a design described as "an olive branch." The mark in the cited

registration is , which contains the literal element "DUA BELIBIS," presented in a stylized form, underneath what Registrant describes as "a graphical depiction of two ducks" in various colors.

Registrant has submitted a translation of its mark as "two whistling ducks." In this regard, to the extent the marks contain the same literal term "dua," it would likely be understood in Applicant's mark as referring to two olive branches, or to the "two" sides of the olive branch in the design of the mark. While the marks contain one overlapping literal element, they differ significantly in appearance, connotation, and commercial impression.

The first *du Pont* factor weighs against finding a likelihood of confusion.

## C. Conclusion

After considering all of the arguments and evidence of record as they pertain to the relevant *du Pont* factors, we find that although the goods are identical in part and

otherwise related, and that they would be presumed to travel through similar and overlapping channels of trade to general classes of consumers, we find the marks to be so dissimilar in similar in sight, sound, connotation, and commercial impression that there is no likelihood of confusion. *See Kellogg Co. v. Pack'em* 21 USPQ2d at 1145.

**Decision:** The Section 2(d) refusal to register Applicant's mark is reversed.