

This Opinion is Not a
Precedent of the TTAB

Mailed: January 16, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re 8 Vini, Inc.

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Serial No. 85857391

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Paul W. Reidl, Esq. for 8 Vini, Inc.

Rebecca Smith, Trademark Examining Attorney, Law Office 110,
(Chris A.F. Pedersen, Managing Attorney).

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Before Quinn, Cataldo, and Wolfson,
Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

8 Vini, Inc. (“Applicant”) filed an application to register the mark MASQUERADE (in standard characters) for “sparkling wines; wines” in International Class 33.¹

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, when applied to Applicant’s goods, so resembles the previously registered mark

¹ Application Serial No. 85857391, filed February 22, 2013 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a bona fide intention to use the mark in commerce.

MASCARADE (in typed form) for “mixed beverage containing alcohol and fruit juice” in International Class 33² as to be likely to cause confusion.³

When the refusal was made final, Applicant appealed. Applicant and the Examining Attorney filed briefs.

Applicant describes this appeal as a “failure of proof case.” (Brief, p. 3). Applicant argues that the marks are different, asserting that its mark is a common English-language word that means “a party at which people wear masks and often costumes,” whereas the cited mark is a French-language term meaning “farce”; and that the marks are pronounced differently. Further, Applicant contends that the goods are different, and that the Examining Attorney’s third-party registration evidence “misses the mark because none of the registrations contain the goods specified in the cited registration, and the web excerpts do not demonstrate that there are actual, branded wine and fruit juice beverages sold by wineries to consumers under the same trademark (or otherwise).” *Id.* Applicant introduced dictionary listings, three third-party abandoned applications,⁴ and excerpts of third-party websites.

The Examining Attorney maintains that the marks are similar, relying on the doctrine of foreign equivalents. The Examining Attorney also contends that the

² Registration No. 2916561, issued January 4, 2005; renewed. The registration includes the following statement: “The English translation of the applied mark is ‘MASQUERADE.’”

³ Prior to November 2, 2003, “standard character” drawings were known as “typed” drawings. A typed mark is the legal equivalent of a standard character mark. TMEP § 807.03(i) (2014).

⁴ The three third-party applications, now abandoned, have no probative value. In general, third-party applications are not evidence of anything other than of the fact that they were filed. *Interpayment Services Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003). In this case, they are irrelevant to the issue herein, as they have been abandoned.

goods are related; more specifically, that the goods are complementary and, in this regard, she submitted over fifty third-party registrations, and excerpts of third-party websites. The Examining Attorney also submitted a French-to-English translation of “mascarade” from an online dictionary.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We first turn to compare the marks. Applicant and the Examining Attorney disagree about the applicability of the doctrine of foreign equivalents in this case. The French term “mascarade” is translated to English as “farce.” (www.dictionnaire.reverso.net; www.collinsdictionary.com).⁵ The Examining Attorney also relies upon the translation of the term “mascarade” to “masquerade” in the cited registration. The term “masquerade” is defined as “a party at which people wear masks and often costumes; a way of appearing or behaving that is not true or real; to pretend to be someone or something else.” (www.merriam-webster.com). Accordingly, there is conflicting evidence whether the terms “masquerade” and “mascarade” are foreign equivalents; that is, the evidence does

⁵ As shown by Applicant’s submission, the term “farce” in turn is defined as “a funny play or movie about ridiculous situations and events; something that is so bad that it is seen as ridiculous.” (www.merriam-webster.com).

not establish that “the English translation is unambiguously literal and direct, with no other relevant connotations or variations in meaning.” TMEP § 1207.01(b)(vi)(B) (2014). At best, the Examining Attorney’s evidence establishes that there are two English-language meanings for the French term “mascarade,” namely “farce” and “masquerade.” Further, an American purchaser is unlikely to stop and translate the term “mascarade” into an English equivalent, but rather will simply accept it as is. Accordingly, we agree with Applicant and find that the doctrine is not applicable to the likelihood of confusion issue before us. *See In re Sarkli, Ltd.*, 721 F.2d 353, 220 USPQ 111, 113 (Fed. Cir. 1983); *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1648-50 (TTAB 2008).

Thus, we will undertake a “traditional” comparison of the marks in their entireties as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005), quoting *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567. “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.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Inter IKEA Sys. B.V. v. Akea, LLC*,

110 USPQ2d 1734, 1740 (TTAB 2014); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Applicant concedes that the two marks “have similar spellings,” but goes on to state “they have very different meanings and pronunciation.” (Brief, p. 3). Indeed, because of the similar spellings, with both marks’ beginning with the same three letters “MAS-” and ending with the same four letters “-RADE,” the marks MASQUERADE and MASCARADE are similar at least in appearance.

As to sound, Applicant argues that the respective marks are pronounced differently. Applicant points to the dictionary and translation entries of record, contending that MASQUERADE is pronounced “mas-kə-rād” whereas MASCARADE is pronounced “maskarad.” This evidence shows, however, that the first portion of each mark sounds alike, namely “mask.” Thus, contrary to Applicant’s contention, we find that the marks are likely to have an aural similarity. Moreover, any minor differences in the sound of these marks may go undetected by consumers and, therefore, would not be sufficient to distinguish the marks. In any event, “there is no correct pronunciation of a trademark, and consumers may pronounce a mark differently than intended by the brand owner.” *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012) (citing *Interlego AG v. Abrams/Gentile Entm’t Inc.*, 63 USPQ2d 1862, 1863 (TTAB 2002) (finding similarity between LEGO and MEGO, despite the applicant’s contention that consumers would pronounce MEGO as “me go”)).

With respect to meaning, as indicated earlier, the doctrine of foreign equivalents is not applicable herein; thus, there is no reason to translate the term “mascarade.” We find it likely that American consumers will simply perceive the term “mascarade” as it is, most likely as an alternate or variant of the term “masquerade,” or even as an intentional misspelling of “masquerade.” In these situations, consumers are likely to attach similar meanings to the marks.

The similarities in appearance, sound and meaning are sufficient so that the marks are likely to engender similar overall commercial impressions. The first *du Pont* factor dealing with the similarity between the marks weighs in favor of a finding of likelihood of confusion.

We next direct our attention to the second *du Pont* factor regarding the similarity/dissimilarity between the goods. It is well settled that the goods of Applicant and Registrant need not be identical or competitive, or even be offered through the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective goods of Applicant and Registrant are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993). The issue here, of course, is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of these goods.

L'Oreal S.A. v. Marcon, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984). At the outset of our consideration of this factor, we acknowledge that there is no *per se* rule that all alcoholic beverages are related. See *In re White Rock Distilleries*, 92 USPQ2d 1282, 1285 (TTAB 2009).

It is settled that in making our determination regarding the relatedness of the goods, we must look to the goods as identified in the application and the cited registration. See *Octocom Sys., Inc. v. Houston Computers Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). Thus, we compare Applicant's "sparkling wines; wines" to Registrant's "mixed beverage containing alcohol and fruit juice."

The Examining Attorney's evidence bearing on the relatedness of the goods includes copies of several use-based third-party registrations which individually cover, under the same mark, different types of alcoholic beverages. Applicant is critical of this evidence, contending that the specific types of goods involved herein are not reflected in the referenced registrations. We do not entirely disagree with Applicant's assessment of the Examining Attorney's third-party registration evidence; several of the fifty-one registrations do not cover goods of the specific types involved in this appeal and, thus, they have limited probative value. While the identification "alcoholic beverages except beer" may be viewed as encompassing Registrant's mixed alcoholic beverage, because this identification is so broad (indeed covering the entire class), we view the registrations covering both "alcoholic beverages except beer" and "wines" as less relevant to the specific comparison of the

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goods in this case, namely “sparkling wines; wines” on the one hand, and “mixed beverage containing alcohol and fruit juice” on the other. At the same time, however, in stating that *none* of the registrations covers the type of goods listed in the cited registration, Applicant is not entirely accurate either.

Based on our review, the most relevant use-based third-party registrations are the following:

Registration No.	Mark	Goods
3981731	VIRINS	Wine; Alcoholic punch
3737972	VIP ALL ACCESS	Sparkling wines; Alcoholic beverages of fruit; alcoholic fruit cocktail drinks
3684488	SCIENT	Wines; alcoholic beverages of fruit
4296244	CABRITA	Wine; pre-mixed alcoholic liquor cocktails
4264078	Chinese dragon head design	Wine; alcoholic beverages containing fruit
4455275	GANKUTSUCH	Wines; prepared alcoholic cocktail
4355119	DRINK LIKE A LADY	Wines; prepared alcoholic cocktail
4373493	GUN FIGHTER	Wines and sparkling wines; tonic liquor flavored with Japanese plum extracts
4419435	STONE'S	Wine; alcoholic punches; alcoholic cocktail mixes
4401559	MOTHER-IN-LAW RX	Wine coolers; wine-based drinks; alcoholic fruit cocktail drinks
4361386	EH19	Wine; alcoholic beverages containing fruit; alcoholic fruit cocktail drinks
4435097	CAVAS DON NICASIO	Wine; alcoholic beverages containing fruit; alcoholic fruit cocktail drinks

4404772	TEAHUPOO	Wine; alcoholic beverages of fruit; alcoholic fruit cocktail drinks; prepared alcoholic cocktail
4403130	QUINT SANGRIA	Wines; alcoholic beverages containing fruit

“Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source.” *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff’d*, 864 F.2d 149 (Fed. Cir. 1988). *See also In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993). The third-party registrations listed above cover the types of goods identified respectively in Applicant’s application and the cited registration.

The term “mixed drink” is “an alcoholic beverage prepared from two or more ingredients.” (www.merriam-webster.com). The term “wine” is defined in the same dictionary as “an alcoholic drink made from the juice of grapes; an alcoholic drink made from plants or fruits other than grapes.” Applicant argues that “mixed beverages (also known as mixed drinks) are prepared beverages that are typically prepared by a bartender and sold on premises in restaurants and bars.” (Brief, p. 2). Further, Applicant asserts that Registrant’s goods are “a very specific kind of beverage. It isn’t simply a combination of alcohol and fruit juice; rather, it is such a

beverage where two or more such ingredients have been mixed together.” (Brief, p. 6). Registrant’s identification of goods is not limited to preparation by bartenders in restaurants and bars as construed by Applicant; and nothing in the record supports the implication that a beverage where two or more ingredients have been mixed together has necessarily been prepared by a bartender.

The record includes a website describing “Types of cocktails” as follows: “Everyone knows that a cocktail is achieved mixing different measures of ingredients such as juice, fruit, cream, soft drinks and/or alcoholic beverages of any kind.” (www.infodrinks.com). In an entry captioned “List of cocktails” in Wikipedia, the list includes “wine cocktails” and “wine variation cocktails.” (www.wikipedia.org). Another third-party website shows over 200 “wine-based cocktail recipes.” (www.drinksmixer.com). *See also* “Wine Cocktails” on www.pinterest.com.

The record also includes third-party websites of wineries showing that wines are used in cocktail recipes, thereby providing the alcohol of the drink. Thus, the mixture in Registrant’s beverage containing “alcohol and fruit juice” may include wine and fruit. A representative sample of the websites is the following:

Cocktails

Renowned for turning the world’s expectations into something beautiful and unordinary, Kim Crawford is mixing things up with Sauvignon Blanc and Pinot Noir-infused cocktail recipes! Each simple and delicious cocktail complements the fresh, vibrant flavors of Kim Crawford’s award-winning varietals and is certain to leave consumers thirsting for more.
(www.kimcrawfordwines.com)

Cocktails

The fresh, creative flavors flow freely when we create sparkling cocktails. These delicious and fun drinks are some of our favorite ways to enjoy bubbly. We know you'll find the perfect sparkling cocktail for any day or night celebration.

(www.chandon.com).

Applicant dismisses this evidence, arguing:

[T]he internet evidence simply shows that wine makers have offered serving suggestions for their wine on their web sites. This has no bearing on whether these mixed drinks are actually sold at retail (in grocery stores, bars, restaurants or otherwise) and, if so, that consumers would believe that they emanated from the same source because they were sold under similar trademarks. As a beverage, wine could be mixed with anything – water, ice, sugar, fruit juice, other forms of alcohol (which would make a fortified wine), spices (which would make a mulled wine) and the like – but this possibility alone does not establish that all of these goods would be related to each other. Similarly the fact that wine could be used to make a “mixed beverage containing alcohol and fruit juice” does not mean that the two beverages are complementary. (Reply Brief, pp. 5-6).

We agree with Applicant that the Internet evidence does not show that wineries actually produce and sell such cocktails, but rather shows only that wine purchased by consumers may be combined later with fruit juice to make a cocktail. Thus, the evidence has some probative value, albeit minimal, on the specific relatedness of the goods in this case. However, Applicant is disingenuous in stating that “the Examining Attorney does not explain whether any of the drinks illustrated in the documents is a mixture of wine and fruit juice” and that “to the extent that these web pages contain recipes for the cocktails they use many different ingredients other than fruit juice.” (Brief, p. 8). The multitude of recipes

includes several that utilize fruit juice and/or fruit. *See In re Davia*, 110 USPQ2d 1810, 1815-16 (TTAB 2014).

As noted earlier, we recognize that there is no *per se* rule mandating that all alcoholic beverages be deemed similar goods. We also note that each case must be decided on its own facts. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). In this connection, various alcoholic beverages have been found to be related for purposes of a likelihood of confusion analysis. *See, e.g., In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) (holding GASPAR'S ALE for beer and ale likely to be confused with JOSE GASPAR GOLD for tequila); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003) (holding RED BULL for tequila likely to be confused with RED BULL for malt liquor); *In re Salierbrau Franz Sailer*, 23 USPQ2d 1719 (TTAB 1992) (holding CHRISTOPHER COLUMBUS for beer likely to be confused with CRISTOBAL COLON & design for sweet wine); *Somerset Distilling, Inc. v. Speymalt Whiskey Distribs. Ltd.*, 14 USPQ2d 1539 (TTAB 1989) (holding JAS. GORDON and design for scotch whiskey likely to be confused with GORDON'S for distilled gin and vodka); *Schieffelin & Co. v. Molson Cos.*, 9 USPQ2d 2069 (TTAB 1989) (holding BRAS D'OR for brandy likely to be confused with BRADOR for beer); *Bureau Nat'l Interprofessionnel Du Cognac v. Int'l Better Drinks Corp.*, 6 USPQ2d 1610 (TTAB 1988) (holding trademark COLAGNAC for cola flavored liqueur likely to be confused with certification mark COGNAC for brandy). *See also Pink Lady Corp. v.*

L. N. Renault & Sons, Inc., 265 F.2d 951, 121 USPQ 465 (CCPA 1959) (PINK LADY for fruit juice and PINK LADY and design for wines likely to be confused).

Based on the nature of the goods, the third-party registrations and Internet evidence before us, we conclude that Applicant's wines are related to Registrant's mixed beverage containing alcohol and fruit juice, such goods being alcoholic beverages that may emanate, as shown by the evidence, from the same source and under the same mark. Further, the evidence shows that wine, as an alcoholic beverage, may be combined with fruit and/or fruit juice to make cocktails.

We note next that in the absence of any limitations in the application as to channels of trade and classes of purchasers, we must presume that Registrant's mixed beverage containing alcohol and fruit juice will travel in all the normal trade channels for such goods, such as the same liquor stores, bars or restaurants in which Applicant's wine is or will be sold, and to all normal classes of purchasers for such goods, including ordinary consumers frequenting those liquor stores, bars and restaurants. *See In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). We thus find that, at a minimum, the channels of trade and the classes of purchasers overlap.

The similarity between the goods, and the identity in trade channels and classes of purchasers weigh in favor of a finding of a likelihood of confusion.

We have carefully considered all of the evidence made of record pertaining to the issue of likelihood of confusion, as well as all of the arguments related thereto, including any evidence and arguments not specifically discussed in this opinion. We conclude that purchasers familiar with Registrant's "mixed beverage containing

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alcohol and fruit juice” sold under the mark MASCARADE would be likely to mistakenly believe, upon encountering the mark MASQUERADE for “sparkling wines; wines,” that the goods originated from or are associated with or sponsored by the same source.

Decision: The refusal to register is affirmed.