

**This Opinion is Not a
Precedent of the TTAB**

Mailed: February 19, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Sunton Enterprises, Inc.
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Serial No. 85863532
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Howard A. MacCord, Jr. of MacCord Mason PLLC,
for Sunton Enterprises, Inc.

Matt Einstein, Trademark Examining Attorney, Law Office 115,
John Lincoski, Managing Attorney.

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Before Seeherman, Cataldo and Wolfson,
Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Sunton Enterprises, Inc. has appealed from the final refusal of the Trademark Examining Attorney to register AYLAZZARO in standard characters for “handbags, luggage and trunks” in Class 18.¹ Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles the mark LAZARO, registered in standard characters for handbags,

¹ Application Serial No. 85863532, filed February 28, 2013, based on Section 1(b) of the Trademark Act (intent-to-use).

briefcases, briefcase-type portfolios and wallets in Class 18² that, if used on Applicant's goods, it is likely to cause confusion or mistake or to deceive.

We affirm the refusal to register.

Our determination of the issue of likelihood of confusion is based on an analysis of all of 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., 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 and/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 Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Turning first to the goods, the "handbags" identified in Applicant's application are legally identical to the "handbags" identified in the cited registration. Because these goods are identical, this *du Pont* factor strongly favors a finding of likelihood of confusion. We also point out that the Examining Attorney has submitted evidence to show the relatedness of Applicant's luggage and trunks with the briefcases and wallets identified in the cited registration. We need not engage in an extensive discussion of this evidence because a showing of likelihood of confusion with respect to any of the goods in the application and those in the cited registration is sufficient

² Registration No. 3204972, issued February 6, 2007; Section 8 affidavit accepted; Section 15 affidavit acknowledged. The registration also includes leather jackets, leather coats, pants and skirts in Class 25.

for us to affirm the refusal. *See Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA).

Because the goods are, in part, legally identical, they are deemed to travel in the same channels of trade. *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994). This *du Pont* factor, too, favors a finding of likelihood of confusion.

We next consider the *du Pont* factor of the similarity of the marks, which analysis also includes consideration of the strength of mark in the cited registration and the number and nature of similar marks in use on similar goods. Essentially, it is Applicant's position that the cited registration is entitled to a limited scope of protection, and therefore the differences in the marks are sufficient to distinguish them.

We disagree. Applicant has submitted third-party registration evidence consisting of three registrations owned by a single entity for LAZARO marks: Registration No. 2111493 for wedding gowns and Registration Nos. 1150956 and 1151303 for, respectively, NOIR BY LAZARO and NOIR BY LAZARO in stylized form, for wedding gowns and dresses, bridesmaids gowns and dresses and evening gowns. Third-party registrations can be used to show the meaning of a mark in the same way that dictionaries are used. *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1261 (Fed. Cir. 2010); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694 (CCPA 1976).³ We can draw no conclusion that LAZARO

³ Applicant also submitted two applications by this same entity for other marks containing the term LAZARO, but the probative value of third-party applications is only to show that the applications were filed. *Interpayment Services Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003).

has a particular significance for handbags, or indeed for wedding and bridesmaid and evening gowns, from the fact that a single entity owns these three registrations.

Applicant has also submitted evidence of third-party use of LAZARO marks, including use by the third-party registrant of LAZARO for bridal gowns; the text describing the clothing shows that “Lazaro” refers to a person, who is the designer of the goods (“In traditional Lazaro style, his latest collection...”).⁴ There is also a designer named “Lazaro” who designs jewelry sold under the mark LAZARO, see CHURCHILL Online website (“Designer Lazaro used vintage glass cameos...”).⁵ Another website shows Mezlan men’s shoes, with the heading “Mezlan Lazaro Black Genuine Patent Leather Wing Tip Italian Calfskin Loafer Shoes.”⁶ Most pertinent, in terms of the goods, is the listing of “Etienne Aigner Purse Handbag Lazaro Collection.”⁷ It is clear from the text referring to the Etienne Aigner handbags that “Lazaro” would be perceived as the style name of the bag. For example, other bags are called “Etienne Aigner Purse Handbag Logan Collection” and “Etienne Aigner Melinda Small Satchel Handbags.”

Significant third-party use of a particular term in trademarks can result in a conclusion that consumers will look to other elements of a mark to distinguish one mark from another. *See In re Broadway Chicken, Inc.*, 38 USPQ2d 1559, 1565-66

⁴ Response filed December 9, 2013, p. 2, www.jlmcouture.com.

⁵ Response filed December 9, 2013, p. 8-9, www.shopatchurchill.com. There is no indication that the designer of LAZARO jewelry is the same person who designs LAZARO bridal gowns.

⁶ Response filed December 9, 2013, p. 10-12, www.amazon.com.

⁷ Response filed December 9, 2013, p. 3-7, www.amazon.com.

(TTAB 1996). *See also, In re Hartz Hotel Services Inc.*, 102 USPQ2d 1150 (TTAB 2012). However, in this case the very limited evidence of third-party use for goods that are not the same as the goods in issue do not persuade us that the use of LAZARO is so prevalent that consumers will look to other elements in Applicant's mark to distinguish its mark from the cited LAZARO mark. Although bridal or evening gowns may be related to handbags, and jewelry and handbags may both be generally described as fashion accessories, there are still clear differences between the goods such that we cannot say that consumers distinguish the source of these goods based only on the differences in the marks. We give no probative value to the third-party use of LAZARO on men's shoes, both because handbags and men's shoes are sold to different classes of consumers and because, as shown in the website, LAZARO would likely be perceived as a style name for a shoe, with MEZLAN understood as the house mark. The latter comment also applies to the Etienne Aigner handbags. Although these are the only third-party goods that are the same as the handbags in the cited registration, LAZARO would be understood to be a style name, and it is the house mark ETIENNE AIGNER that distinguishes the source of the goods. The evidence of third-party use is simply not at a level that we can say that consumers would distinguish between very similar LAZARO marks when used for identical goods.

With this in mind, and also keeping in mind that when marks would appear on virtually identical goods or services, as they do here, the degree of similarity necessary to support a conclusion of likely confusion declines, *Century 21 Real*

Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992), we turn to a consideration of the similarity or dissimilarity of the marks. We must consider the marks in their entireties as to appearance, sound, connotation and commercial impression. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). Nevertheless, there is nothing improper in stating that 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 National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant's mark is AYLAZARRO in standard characters and the cited mark is LAZARO, also in standard characters. As might be expected, Applicant emphasizes the different beginning letters of its mark, and their effect, in asserting that the marks are different; the Examining Attorney points to the marks' similarities. Both Applicant and the Examining Attorney also discuss another case decided by the Board, involving Applicant's mark AY LAZZARO for handbags and trunks, in which we affirmed a refusal based on likelihood of confusion with the mark in the registration cited against Applicant's current mark. Although that decision has no precedential effect, some of the comments we made in that case are applicable here.

First, we point out that the additional "Z" in Applicant's mark does not distinguish the marks in appearance, as it is buried in the middle of the term, next to another letter "Z". Consumers are not likely to note or remember this difference. Second, because both marks are in standard characters, we must assume that they

can be shown in the same type font. In fact, because Applicant is seeking to register its mark in standard characters, the mark is not limited to any particular font, size, style or color. *In re Viterra Inc.*, 671 FA.3d 1358, 101 USPQ2d 1905, 1909 (Fed. Cir. 2012). As a result, Applicant could depict the letters AY in its mark in a different, and even a smaller font from LAZZARO, e.g., ayLAZZARO or AY**LAZZARO**, such that LAZZARO would be the visually prominent part of the mark. We also find that the marks are phonetically similar. Although Applicant's mark includes the beginning syllable AY, this does not change the pronunciation of the rest of the mark, which is identical to the cited mark. As for connotation, it is not clear whether consumers would ascribe any meaning to the marks, but rather would see them as invented words. To the extent that consumers would recognize LAZARO as a surname (due to the advertising mentions of the designers named LAZARO in connection with wedding gowns and jewelry), they may also, depending on the manner in which Applicant's mark is displayed, view LAZZARO within Applicant's mark as a surname. We hasten to add that we do not base our finding that the marks are similar on a similarity in connotation of the marks; the similarity in appearance and pronunciation is sufficient for us to find, when used on identical goods, that the similarities outweigh the dissimilarities.

Applicant has argued that the purchasers of handbags, because they often cost hundreds of dollars, are sophisticated and careful. The evidence shows Etienne Aigner handbags offered for sale at prices that range from \$57 to \$120 (Response filed December 9, 2013, pp. 3, 5). However, handbags are items that are bought by

the general public, not all of whom buy designer handbags, but may buy inexpensive bags. We cannot assume that all purchasers of handbags exercise more than ordinary care in making such purchases, and we therefore treat this *du Pont* factor as neutral.

Applicant and the Examining Attorney have not discussed nor have they submitted evidence regarding any other *du Pont* factors. To the extent that any are relevant, we treat them as neutral.

After reviewing all of the evidence and argument on the relevant *du Pont* factors, we find that Applicant's mark AYLAZZARO for handbags is likely to cause confusion with the cited registration for LAZARO for handbags. Even if we were to conclude that the cited registration is not entitled to a broad scope of protection, the additional element AY in Applicant's mark is not sufficient to distinguish the marks in view of the identity of the goods,.

Decision: The refusal to register Applicant's mark AYLAZZARO is affirmed.