

This Opinion Is Not a
Precedent of the TTAB

Mailed: December 4, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Gabor Alex Stibinger

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Serial No. 87144063

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Jack Baldini of Baldini Law LLC,
for Gabor Alex Stibinger.

Louis Kolodner, Trademark Examining Attorney, Law Office 122,
John Lincoski, Managing Attorney.

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Before Wellington, Kuczma, and Larkin,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Applicant Gabor Alex Stibinger seeks to register on the Principal Register the mark SNAP FUNNEL, in standard characters and with “FUNNEL” disclaimed, for “funnels; household utensils, namely, specialized funnels with a small diameter inner bottom opening and a larger diameter bottom outer ring specially adapted to stabilize the utensil to various size bottles that also acts as a pour spout; household utensils,

namely, silicone funnels; pouring spouts for household use,” in International Class 21.¹

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, as applied to the goods identified in the application, so resembles the registered standard-character mark SNAP & POUR for a “funnel which snaps onto plastic containers, including automotive fluids and household cleaners and detergents” in International Class 21,² as to be likely to cause confusion, to cause mistake, or to deceive.

After the Examining Attorney made the refusal final, Applicant requested reconsideration and then appealed to this Board. The request for reconsideration was denied by the Examining Attorney. The appeal is fully briefed. We affirm the refusal to register.

I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all 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.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the relatedness of the goods or services and the similarities

¹ Application Serial No. 87144063 was filed August 19, 2016, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce.

² Registration No. 2216329, issued January 5, 1999, renewed.

between the marks. *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.”).

A. Legal Identity of the Goods/ Trade Channels/ Classes of Purchasers

With regard to the goods and channels of trade, we must make our determinations under these factors based on the goods as they are identified in the application and the cited registration. *See In re Dixie Rests.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *see also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Computs. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

In this case, Applicant’s identification of goods includes “funnels,” which encompass Registrant’s “funnel which snaps onto plastic containers, including automotive fluids and household cleaners and detergents.” Thus, these goods are legally identical.³

In view of the partial legal identity of the goods, and in the absence of restrictions or limitations in their identifications, it is presumed that the channels of trade and

³ Applicant’s goods that are described as “household utensils, namely, silicone funnels” also would encompass Registrant’s funnels that are used for household cleaners and detergents. We only mention these specific goods because it is sufficient for a refusal based on likelihood of confusion that relatedness is established for any item encompassed by the identification of goods in a particular class in the application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

classes of customers for these goods are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (legally identical goods are presumed to travel in same channels of trade to same class of purchasers); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *In re Am. Cruise Lines, Inc.*, 128 USPQ2d 1157, 1158 (TTAB 2018). Accordingly, the factors involving the relatedness of the goods and their trade channels and classes of purchasers weigh heavily in favor of finding a likelihood of confusion.

B. Purported Weakness of the Cited Mark and Term SNAP

In the likelihood of confusion analysis, marks vary along a spectrum from very strong to very weak. *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017). In determining where a mark falls within this spectrum, we may consider any inherent weakness based on the nature of the mark itself. *In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).”); *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014). And, as set out as the *du Pont* sixth factor, we may give weight to any commercial weakness based on third-party use of similar marks for the same or similar goods/ services. That is, we must consider evidence, if present, of “[t]he number and nature of similar marks in use on similar goods.” *du Pont*, 177 USPQ at 567. Indeed, the Federal Circuit has stated that evidence of extensive registration

and use of a term by others can be “powerful” evidence of weakness. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015).

Applicant argues that the cited mark, SNAP & POUR, and the term common to both marks, SNAP, are weak due to the existence of “a crowd” of SNAP marks for similar goods.⁴ Applicant contends that the registered mark “describes the goods” and “is a directive – ‘snap, then pour.’” Applicant concludes that the registered mark is “an extremely descriptive and thus, weak mark, all by itself.”⁵ In support, Applicant made of record various third-party registrations for marks containing the term SNAP and covering a variety of goods and services.⁶ Applicant also provided printouts from his own website and a website advertising for sale a “Snap N Pour” funnel, showing use of each mark with a description of the product.⁷ Applicant also submitted a

⁴ 7 TTABVUE 8.

⁵ *Id.* at 11.

⁶ Applicant submitted, in total, copies of 61 third-party registrations with its request for reconsideration. 4 TTABVUE. Applicant also submitted copies of 14 third-party applications; however, as we often point out, these have no probative value other than to show that the applications have been filed. *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1270 n.8 (TTAB 2009); *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1366 n.7 (TTAB 2007). *See also Frito-Lay North Am., Inc. v. Princeton Vanguard, LLC*, 109 USPQ2d 1949, 1956 n.9 (TTAB 2014) (“The applications are not evidence of anything except that they were filed.”), *vacated and remanded on other grounds, Princeton Vanguard, LLC v. Frito-Lay North America, Inc.*, 786 F.3d 960, 114 USPQ2d 1827 (Fed. Cir. 2015).

⁷ Attached to Response to Office Action filed June 8, 2017, TSDR pp. 10-13. It is unclear whether the latter website is affiliated with Registrant or depicts Registrant’s goods for sale.

definition of the term “snap” showing that it has various meanings as a verb and a noun, including the following:⁸

(verb) “to click, as a mechanism ...”

(verb) “to move, strike, shut, catch, etc., with a sharp sound, as a door, lid or lock”

(verb) “to bring, strike, shut, open, operate, etc., with a sharp movement: *to snap a lid down.*”

(noun) “a catch or fattener that closes by pressure and clicks together.”

(noun) “(informal) a task or job that is easy or profitable to do.”

With regard to Applicant’s argument that the cited registered mark, SNAP & POUR, is commercially weak due to it being “one of a crowd” of SNAP-formative marks, the record does not support such a finding. Specifically, there is no evidence showing any of the third-party registered marks being used in commerce. As the Board explained in *In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016), “citation of third-party registrations as evidence of market weakness is unavailing because third-party registrations standing alone, are not evidence that the registered marks are in use on a commercial scale, let alone that consumers have become so accustomed to seeing them in the marketplace that they have learned to distinguish among them by minor differences.” *See also AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269-70 (CCPA 1973); *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1059 (TTAB 2017) (“[a]s to commercial strength, [t]he probative value of third-party trademarks

⁸ *Id.* at TSDR pp. 32-40.

depends entirely upon their usage”) (quoting *Palm Bay Imps. Inc. v. Veuve Cliquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005)). Moreover, none of the third-party registrations are for funnels. Indeed, many of the registrations, including those identified in Applicant’s brief, involve a wide variety of goods that are clearly unrelated to funnels for household use – shot glasses, shopping and utility collapsible baskets, shower caddies, dental care kits, pet feeding dishes, etc. The Federal Circuit recently weighed in on the impropriety of reliance on evidence that does not involve the same or similar goods for purposes of establishing commercial weakness. See *Omaha Steaks Intl., Inc. v. Greater Omaha Packing Co., Inc.*, ___ F.3d. ___, 128 USPQ2d 1686, 1693-94 (Fed. Cir. 2018) (“we emphasize[] the controlling inquiry is the extent of third-party marks in use on ‘similar’ goods or services”). (citation omitted).

Although we find no commercial weakness with respect to SNAP-formative marks, the record does establish that the term SNAP is suggestive of features of funnels. Specifically, this term connotes a manner in which the funnel can be attached to a container -- that the funnels “snap” onto the container for a tight fit. This connotation is demonstrated by Applicant’s own website printouts that tout the “grip-fit action” of his goods and contain illustrations demonstrating how the funnel clips (or snaps) onto a plastic bottle.⁹ Applicant also uses the term “snap” in advertising to describe the ease with which athletes can add nutritional supplements

⁹ June 8, 2017 Response to Office Action, TSDR 10-25.

to their drinks (“using [supplements] should be a snap”).¹⁰ Indeed, Applicant, in traversing a descriptiveness refusal during prosecution, acknowledged these two suggestive meanings in stating that he “uses SNAP to suggest both that [his] device fastens into place and that [his] device is a ‘snap’ [read – easy] to use.”¹¹

As to Registrant’s mark, SNAP & POUR, we cannot agree with Applicant’s characterization of this mark as “extremely descriptive,” because this is an ex parte proceeding and, “inasmuch as the cited mark is registered on the Principal Register, we must assume that it is at least suggestive.” *In re Fiesta Palms*, 85 USPQ2d at 1363 (citing *In re Dixie Rests., Inc.*, 41 USPQ2d at 1534-35). However, we find this mark is suggestive of a feature and function of Registrant’s funnels – namely, that one can attach them in a manner similar to Applicant’s funnels, i.e., by clipping (or “snapping”) them onto a container, and that, once attached, the funnel is used to pour the contents from the container. Again, this suggested meaning is evidenced by the website printouts advertising a “Snap N Pour” funnel that is designed to fit onto the opening or neck of containers and act as a funnel for pouring (to “protect against spills and drips when pouring”).¹²

The third-party registrations submitted by Applicant, while not evidence that the underlying marks have been used in commerce, help corroborate the suggestive nature of the term “snap” to express a quality or feature of goods. *Tektronix, Inc. v.*

¹⁰ *Id.*

¹¹ *Id.* at p. 6.

¹² *Id.* at 26-29.

Daktronics, Inc., 534 F.2d 915, 189 USPQ 693 (CCPA 1976) (third-party registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used”); *Institut Nat’l Des Appellations D’Origine v. Vintners Int’l Co.*, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992) (“Third party registrations show the sense in which the word is used in ordinary parlance and may show that a particular term has descriptive significance as applied to certain goods or services.”). The third-party registrations can be used in the manner akin to that of dictionary as “evidence that a term is suggestive or descriptive of the relevant goods or services. Such terms may be conceptually weak because the more descriptive a term is, the less likely prospective purchasers are to attach source-identifying significance to it.” *Morinaga*, 120 USPQ2d at 1745-46.

In sum, we find no commercial weakness in the term SNAP or Registrant’s mark in connection with funnels. However, the term and the mark possess a degree of inherent weakness due to their suggestive connotations discussed above. As a result, the scope of protection accorded to Registrant’s mark is not as wide as that of an arbitrary or coined mark. See *Joseph Phelps Vineyards*, 122 USPQ2d at 1734 (stating that likelihood of confusion fame varies along a spectrum from very strong to very weak). Moreover, in comparing the overall similarity of the marks, discussed below, we keep in mind that SNAP, itself, is suggestive of the goods and this may decrease the significance of the involved marks’ sharing of this same term.

C. Similarity of the Marks

We now address the first *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.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1691 (quoting *du Pont*, 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) (quotation omitted).

The marks “must be considered ... in light of the fallibility of memory” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)). The proper focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See St. Helena Hosp.*, 113 USPQ2d at 1085; *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971). Because the goods are “funnels” for household use and may be purchased for approximately \$12 each,¹³ the average purchaser is an ordinary consumer who will, at best, exercise a normal level of care.

Our analysis is not predicated on dissection of the involved marks. *Stone Lion*, 110 USPQ2d at 1161. Rather, we are obliged to consider the marks in their entireties. *Id.*; *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered

¹³ *Id.* at p. 26.

piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). Nonetheless, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Stone Lion*, 110 USPQ2d at 1161. For instance, as the Federal Circuit has observed, “[t]hat a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

In addition, where, as here, marks are used on legally identical goods, the degree of similarity between the marks necessary to support a determination that confusion is likely declines. *Bridgestone Ams. Tire Operations LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

With the aforementioned principles in mind, we find the marks to be overall more similar than not. The initial, and sole source-identifying, element of Applicant’s mark is the term SNAP. The addition of the disclaimed, generic term FUNNEL does not help distinguish Applicant’s mark from Registrant’s mark. Because Registrant’s mark, SNAP & POUR, begins with the same word SNAP, this creates visual and aural similarities. Indeed, as we often state, the lead element in a mark – like SNAP in the marks we are comparing – is generally more likely to be noticed and remembered by consumers and thus plays a dominant role in the mark. *See, e.g., Palm Bay*, 73 USPQ2d at 1692 (stating that VEUVE is a prominent part of the mark

VEUVE CLICQUOT because it is the first word in the mark); *Century 21 Real Estate Corp. v. Century Life of Am.*, 23 USPQ2d at 1700 (stating that consumers will first notice the identical lead word on encountering the marks); *In re Integrated Embedded*, 120 USPQ2d 1504, 1513 (TTAB 2016) (noting that the dominance of BARR in the mark BARR GROUP is reinforced by its location as the first word in the mark).

We have given consideration to Applicant's argument that the mark SNAP & POUR conveys an instruction of use to the consumer and, at least with respect to the second part ("pour"), this directive is not expressed in Applicant's mark. We also bear in mind our finding that the term SNAP and the mark SNAP & POUR are suggestive of the goods and thus possess some inherent weakness. However, we cannot ignore that the same suggestive meanings, i.e., that the funnels can be attached by clipping onto containers and/or are easy (a "snap") to use, may be conveyed by both two marks.

Considering the marks in their entireties, we find that Applicant's mark SNAP FUNNEL is not only visually and aurally similar to the registered mark, SNAP & POUR, but also that the two marks have similar commercial impressions. This factor weighs in favor of a finding that confusion is likely.

II. Conclusion

We have considered all of the arguments and evidence of record, including those not specifically discussed, as they pertain to the relevant *du Pont* likelihood of confusion factors. To the extent that any other *du Pont* factors for which no evidence was presented by Applicant or the Examining Attorney may nonetheless be applicable, we treat them as neutral.

Here, the goods are legally identical and will be offered in the same trade channels to the same classes of purchasers. These factors, along with the overall similarity of the marks, persuade us that Applicant's SNAP FUNNEL mark is likely to cause confusion with the registered mark SNAP & POUR. We make this ultimate conclusion despite the fact that the common term SNAP and the registered mark are somewhat weak because of their suggestive nature. A narrowing of the scope of protection for the cited registered mark based on Applicant's evidence does not make confusion unlikely, as even weak marks are entitled to protection against registration of similar marks for identical goods. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 1401 182 USPQ 108, 109 (CCPA 1974); *see also In re i.am.symbolic*, 127 USPQ2d 1627, 1636 n.13 (TTAB 2018).

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