

This Opinion is not a
Precedent of the TTAB

Mailed: January 16, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Iron Balls International

Serial No. 87299536

Michael J. Hoisington of Higgs Fletcher & Mack LLP,
for Iron Balls International.

Meredith Maresca, Trademark Examining Attorney, Law Office 109,
Michael Kazazian, Managing Attorney.

Before Zervas, Wolfson and Pologeorgis,
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Iron Balls International (“Applicant”) seeks registration on the Principal Register
of the following mark for “gin” in International Class 33:¹



IRON BALLS
ENGINEERED ALCOHOL

¹ Application Serial No. 87299536, filed on January 12, 2017 pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), asserting a bona fide intent to use the mark in commerce.

The wording “ENGINEERED ALCOHOL” is disclaimed and the mark is described as follows:

The mark consists of the phrase “IRON BALLS” above the phrase “ENGINEERED ALCOHOL” with a watermark behind the term “IRON” consisting of a fanciful skull design with a crossed hammer and wrench and the phrase “IRON BALLS ENGINEERED ALCOHOL” encircling the skull design.

The Examining Attorney refused registration 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 previously registered mark IRON BALLS (in standard character form) for “beer” in International Class 32² that, as used on Applicant’s identified goods, it is likely to cause confusion or mistake or to deceive.

After the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal resumed. The appeal is fully briefed. We affirm the refusal to register.³

I. Evidentiary Issue

Applicant states, “Please ignore the portion of the evidence attached in Exhibit E to the [Response] dated April 16, 2018 entitled Craft Beer and Consumer Behavior. This document was inadvertently attached to Exhibit E and the undersigned attorney

² Registration No. 4565000, registered July 8, 2014.

³ The TTABVue and Trademark Status and Document Retrieval (“TSDR”) citations refer to the docket and electronic file database for the involved application. All citations to the TSDR database are to the downloadable .PDF version of the documents.

apologizes for the error. This evidence consists of ... approximately 328 pages.”⁴ We have not considered Exhibit E.

II. Likelihood of Confusion

Our determination under Section 2(d) of the Trademark Act is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on a likelihood of confusion. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973) (“*du Pont*”); *see also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that “[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). “Not all of the [*du Pont*] factors are relevant to every case, and only factors of significance to the particular mark need be considered.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1719 (Fed. Cir. 2012) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)).

⁴ 16 TTABVue 3.

A. Similarity of the Marks

We first consider whether Applicant's and registrant's marks are similar when viewed in their entireties in terms of appearance, sound, connotation and commercial impression. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1689). The test under the first *du Pont* factor is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar that confusion as to the source of the goods offered under the respective marks is likely to result. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017); *Coach Servs. Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1721. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

While we must consider the marks in their entireties, it is entirely appropriate to accord greater importance to the more distinctive elements in the marks than to the less distinctive elements in determining whether the marks are similar. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (“[T]here 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

consideration of the marks in their entirety.”). When a mark comprises both words and a design, the words are normally accorded greater weight because they are more likely to be impressed upon a purchaser’s memory and would typically be used by purchasers to request the goods or services. *See In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012).

Registrant’s entire mark is IRON BALLS. The most notable part of Applicant’s mark is the wording IRON BALLS, which dominates Applicant’s mark by standing out in very large lettering superimposed on a small design component which functions as a background watermark (as characterized by Applicant) and above the smaller disclaimed wording ENGINEERED ALCOHOL. Likelihood of confusion has been found where the entirety of one mark is encompassed by another. *See, e.g., The Wella Corp, v. Calif. Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (CALIFORNIA CONCEPT and surfer design for men’s cologne, hair spray, conditioner and shampoo likely to cause confusion with the mark CONCEPT for cold permanent wave lotion and neutralizer); *In re Riddle*, 225 USPQ 630, 632 (TTAB 1985) (“Richard Petty’s Accu Tune” for automotive service centers specializing in engine tune-ups and oil changes likely to cause confusion with “Accutune” automotive testing equipment.”).

The marks are similar in that both marks contain the wording IRON BALLS, which is the first term (and most prominent in size) in Applicant’s mark. The first term in a mark often dominates its overall impression. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1692 (“The presence of

this strong distinctive term as the first word in both parties' marks renders the marks similar, especially in light of the largely laudatory (and hence non-source identifying) significance of ROYALE.”); *Presto Prods., Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”). *See also Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers must first notice the identical lead word). In addition, IRON BALLS is a stronger source identifier than the other wording in Applicant's mark; ENGINEERED ALCOHOL is merely descriptive of a feature of Applicant's gin, which Applicant disclaimed at the Examining Attorney's request.⁵ According to the definitions in the record, “engineered” signifies that the goods have been made by “skillful craft,”⁶ and “alcohol” indicates that the goods are a “colorless volatile flammable liquid that is produced by the natural fermentation of sugars [which is] is the intoxicating constituent of ... beer, spirits, and other drinks.”⁷ Merely descriptive terms in a mark do little to distinguish one mark from the other. Thus, while we may not ignore ENGINEERED ALCOHOL in Applicant's mark, we find this wording to be subordinate to IRON BALLS.

⁵ Req. for Recon., TSDR 2. The disclaimer of a term pursuant to a requirement by the Examining Attorney is a concession that the term is at best merely descriptive. *See In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2014 n.4 (TTAB 1988) (“By its disclaimer of the word LITE, applicant has conceded that the term is merely descriptive as used in connection with applicant's goods.”) (citing *State Oil Refining Corp. v. Quaker Oil Corp.*, 161 USPQ 547 (TTAB 1969), *aff'd*, 453 F.2d 1296, 172 USPQ 361 (CCPA 1972)).

⁶ October 14, 2017 Office Action, TSDR 20.

⁷ April 10, 2017 Office Action, TSDR 15.

In addition, registrant's mark may be displayed in the same lettering style as Applicant's mark. Registrant's mark is a standard character mark and standard character marks may be displayed in any lettering style; the rights reside in the wording or other literal element and not in any particular display or rendition. *See In re Viterra Inc.*, 101 USPQ2d at 1909; *In re Mighty Leaf Tea*, 94 USPQ2d at 1260.

Applicant argues that "IRON BALLS is suggestive and therefore (although of course protectable) is not deserving the utmost protection. It is well known that having 'balls' is a euphemism for being strong, and the phrase IRON BALLS only ups the ante."⁸ Applicant does not identify what feature of beer IRON BALLS is suggestive of and hence we do not give much credence to this argument. In any event, the term IRON BALLS has the same meaning in both Applicant's and registrant's marks.

In view of the foregoing, we find Applicant's and registrant's marks to be similar in appearance, sound, meaning and commercial impression when the marks are considered in their entireties. The dominant wording of Applicant's mark is the entirety of registrant's mark and the additional characteristics of Applicant's mark do little to change the similar appearance, sound, meaning and commercial impression caused by this shared wording.

This *du Pont* factor weighs in favor of a finding that confusion is likely.

⁸ 16 TTABVUE 4.

B. The Goods, Trade Channels and Classes of Purchasers

Goods need not be identical or competitive in order to support a finding of likelihood of confusion. “Likelihood of confusion can be found if the respective products are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.” *Coach Servs. Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1722 (internal quotation marks omitted). The issue is not whether purchasers would confuse the respective goods, but rather whether there is a likelihood of confusion as to the source of these goods. *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

Applicant acknowledges that the goods are “somewhat related” because they are both alcoholic beverages.⁹ In addition, the record contains the following:

- Third- party registrations showing that a single mark has been registered for both gin and beer, including:¹⁰

Registration No. 1560079 for JINRO;¹¹

Registration No. 3981731 for VIRINS;¹²

Registration No. 4301733 for MALT LIFE;¹³

⁹ 16 TTABVUE 4.

¹⁰ Use-based, third-party registrations may have some probative value to the extent they may serve to suggest that the goods and services are of a kind that emanate from a single source. *See In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

¹¹ April 10, 2017 Office Action, TSDR 75.

¹² *Id.*, TSDR 77.

¹³ *Id.*, TSDR 83.

Registration No. 4951746 for 16 HOBBS TAVERN & BREWING CO. and design;¹⁴

Registration No. 4721168 for MCGARGLES IRISH FAMILY BREWERS NEVER ESTABLISHED and design;¹⁵

Registration No. 5018633 for ANGELICUS;¹⁶

Registration No. 2350261 for BINNY'S BEVERAGE DEPOT;¹⁷ and

Registration No. 4144520 for UNLEASH THE CARBON WITHIN.¹⁸

● Internet evidence, including the following, demonstrating:

Treaty Oak: the mark “Treaty Oak” is used for both gin and beer;¹⁹

Warfield Distillery & Brewery: “Warfield” is used for both gin and beer;²⁰

Bent Brewstillery: the mark “Bent Brewstillery” and the same logo are used for both gin and beer;²¹

New Holland Brewing: the mark “New Holland” is used for both gin and beer;²² and

Dogfish Head Distilling Co.: the mark “Dogfish Head” and the shark design logo are used for both gin and beer.²³

¹⁴ *Id.*, TSDR 86.

¹⁵ *Id.*, TSDR 89.

¹⁶ *Id.*, TSDR 92.

¹⁷ May 6, 2018 Office Action, TSDR 74.

¹⁸ April 10, 2017 Office Action, TSDR 80.

¹⁹ *Id.*, TSDR 34 (<http://treatyoakdistilling.com>).

²⁰ *Id.*, TSDR 48-50 (<https://www.warfielddistillery.com>).

²¹ *Id.*, TSDR 57-60 (<http://www.bentbrewstillery.com>).

²² *Id.*, TSDR 64-67 (<http://newhollandbrew.com>).

²³ *Id.*, TSDR 68-72 (<https://www.dogfish.com/distillery>; <https://www.dogfish.com/brewery>).

We find that the evidence in the record, including the evidence set forth above, establishes a commercial relationship between Applicant's and registrant's goods. The evidence also demonstrates an overlap in their trade channels (which include brewpubs and restaurants)²⁴ and purchasers (who are adult members of the general public who consume alcohol).

Applicant argues that the "USPTO has approved and registered many marks for beer and gin containing similar/identical wording filed by unrelated companies," and that "the craft beer and spirits industry is brand intensive with extensive common use by manufacturers of identical/similar terms to brand their goods."²⁵ In support, Applicant provided TSDR printouts of the following registrations:

²⁴ *See, e.g.*, October 1, 2017 Office Action, TSDR 31-43.

²⁵ 16 TTABVUE 4.

TRADEMARK	REGISTRATION NO.	GOODS
BOXER	4184670	BEER
BOXER'S REVENGE	4432608	BEER
BOXER GIN	5244795	GIN
BOISE BREWING	4736894	BEER
OLD BOISE GIN	5123301	GIN
WARRIOR	2729466	HOPS FOR BEER
STONE WARRIOR	4778700	BEER
WARRIOR SPIRIT	5228365	GIN and other spirits
UNION STATION	1918251	BEER
UNION HORSE	5162578	GIN and other spirits
ELEPHANT	0906899	BEER
ELEPHANT GIN	4616425	GIN
ARCANE	1105171	BEER and alcoholic beverages
ARCANE DISTILLING	4965638	GIN and distilled spirits
ELK BREWING	5165959	BEER
OLD ELK	5210680	GIN and other spirits
DRY DOCK BREWING	3784350	BEER
DRY CITY BREW WORKS	4692980	BEER
DRY TOWN	5205856	GIN and other spirits
BEAVER BEER	2364789	BEER
FRISKY BEAVER	5196735	GIN and other spirits
NEW WORLD LAGER	3790764	BEER
NEW WORLD DISTILLERY	5142139	GIN and other spirits

This evidence does not rebut the Examining Attorney's evidence showing a relationship between the goods. First, the registrations containing the term BOISE, likely a geographically descriptive term, are not probative - one is on the Supplemental Register (where geographically descriptive marks may be registered), and the other contains a disclaimer of BOISE GIN. Second, there are other elements to each of the remaining marks which may have been significant in the determination to register them, and the application records for the registrations are not in the present evidentiary record so we have no information on why the later registrations registered in view of the earlier registrations. Third, the mere fact that some goods

are not included in a registration's identification of goods does not establish that the owner of the mark has not registered the mark for those goods in another registration since, for example, the registrant may have begun using the mark on those goods at a later date. Fourth, the law recognizes that trademark owners have different marks that are used as a house mark, a mark for a line of products, and a mark for specific items. It is, therefore, to be expected that many registrations for marks would not cover all of a trademark owner's goods and services. The fact that Applicant was able to find and submit registrations for beer and gin with common terms does not rebut the Examining Attorney's evidence showing the existence of third-party registrations using the same marks on a variety of items, including Applicant's and registrant's goods. Therefore, while Applicant's evidence provides some indication that there are some trademarks that are not registered for beer and gin, it does not rebut the Examining Attorney's evidence that the goods are related. In addition, there is longstanding, well-settled precedent holding that the Board is not bound by prior decisions of examining attorneys, and that each case must be decided on its own merits and on the basis of its own record, in accordance with relevant statutory, regulatory and decisional authority. *See, e.g., In re Int'l Flavors & Fragrances Inc.*, 183 F.3d 1361, 51 USPQ2d 1513 (Fed. Cir. 1999).

The *du Pont* factor regarding the relatedness of the goods, and the factors regarding purchasers and trade channels, favor a finding of likelihood of confusion.

C. Purchaser Sophistication

Applicant argues that consumers of craft beer and spirits are educated and sophisticated.²⁶ Registrant's identification is not limited to craft beer; registrant's goods are considered to include all types of beer sold through all normal channels of trade. *See In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1959 n.4 (TTAB 2016) (“[b]ecause the respective identifications include ‘beer’ without any limit regarding a particular price point, we must treat the goods as including inexpensive as well as more costly beers, and therefore presume that purchasers for ‘beer’ include ordinary consumers who may buy inexpensive beer on impulse.”) (citing *Stone Lion*, 110 USPQ2d at 1163-64, which recognized Board precedent requiring consideration of the “least sophisticated consumer in the class.”). Applicant offers no comment or evidence regarding those who consume non-craft beers. Further, Applicant's evidence from “Entrepreneur” entitled “Craft Brewers: This Is What Your Customers Want” in support of its argument is not particularly persuasive. It states in relevant part:

Craft drinkers are experimenters and nonlinear explorers who jump from one new beer or spirits or hard cider to another without an obvious, discernable progression, according to Demeter Group Investment Bank. Their omnivorous tendency tracks styles rather than brands. They're pushing the overall market toward a style-first identity - they overwhelmingly favor hoppy IPA beers - and away from the brand-first identity that has long dominated beer consumption. The extremists among them drive the development of new breweries with their willingness to try every new beer they find.²⁷

²⁶ 16 TTABVUE 5.

²⁷ October 10, 2017 Office Action, TSDR 13.

In any event, even sophisticated purchasers are not immune from source confusion, especially in cases such as the instant one involving very similar marks and closely related goods. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (citing *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) (“Human memories even of discriminating purchasers...are not infallible.”)) The *du Pont* factor regarding purchaser sophistication is neutral in our analysis.

D. Additional Argument

Applicant argues that Applicant and registrant are not in competition because Applicant makes gin in Thailand and “hopes” to import its gin into the United States, whereas registrant makes beer in Texas and “[i]t is not clear that Registrant sells its product outside of Texas.”²⁸ Applicant essentially argues that its activities are geographically separate from those of registrant. Because Applicant seeks a geographically unrestricted registration and the owner of a registration without specified limitations enjoys a presumption of exclusive right to nationwide use of the registered mark under Trademark Act Section 7(b), 15 U.S.C. §1057(b), regardless of its actual extent of use, Applicant’s argument is not persuasive.

E. Conclusion

We have considered all of the evidence in the record and the arguments of the Examining Attorney and Applicant, including evidence and arguments not

²⁸ 16 TTABVUE 5.

specifically addressed in this decision. In view of the similarity of the marks, the relatedness of the goods, and the overlapping purchasers and trade channels, and because Applicant has not demonstrated any weakness in registrant's mark, we conclude that confusion is likely between Applicant's mark for gin and registrant's mark for beer.

Decision: The refusal to register is affirmed.