

This Opinion is not a
Precedent of the TTAB

Mailed: October 4, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Sergei Orel

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Serial No. 87545405

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Sergei Orel, Pro se,

Toby E. Bulloff, Trademark Examining Attorney, Law Office 119,
Brett J. Golden, Managing Attorney.

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Before Cataldo, Shaw and Goodman,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Sergei Orel (“Applicant”) seeks registration on the Principal Register of the mark ARATTA (in standard characters) for “Alcoholic beverages, except beer; Sparkling wines; Vodka; Wine” in International Class 33.¹

¹ Application Serial No. 87545405 was filed on July 27, 2017, based upon Applicant’s assertion of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

Page references to the application record refer to the online database of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal refer to the Board’s TTABVUE docket system.

The Trademark Examining Attorney has refused registration of Applicant's mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground that Applicant's mark is likely to cause confusion with the registered mark AURATA (standard characters) for the following International Class 33 goods: "grape wine; still wines; table wines; white wine; wine; wines."²

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

I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on 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, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). These factors, and the other relevant *DuPont* factors now before us, are discussed below. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010) ("Not all of the *DuPont* factors are relevant to every case, and

² Registration No. 4397256 issued September 3, 2013, Section 8 accepted and Section 15 acknowledged.

only factors of significance to the particular mark need be considered.”)); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”).

A. Similarity or Dissimilarity of the Goods, Channels of Trade and Classes of Purchasers

We begin with considering the similarity or dissimilarity of the goods, channels of trade and classes of purchasers. We must make our determinations under these factors based on the goods as they are recited in the application and cited registration. *See Octocom Systems Inc. v. Houston Computers Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.”); *Paula Payne Products Company v. Johnson Publishing Company, Inc.*, 177 USPQ 76, 77 (CCPA 1973).

Applicant’s identified goods are “Alcoholic beverages, except beer; Sparkling wines; Vodka; Wine.” Registrant’s identified goods are “grape wine; still wines; table wines; white wine; wine; wines.” Applicant’s “wine” is identical to Registrant’s “wine” and “wines,” and Applicant’s “Sparkling wines” are encompassed by and legally identical to Registrant’s “wine and wines.” The related nature of “vodka” and “wine” also is corroborated by the copies of use-based, third-party registrations submitted by the Examining Attorney. November 24, 2017 Office Action at TSDR 4-28. *See In re*

Aquamar, Inc., 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (citing *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988)) (third-party registrations may serve to suggest that the goods are of a type which may emanate from a single source). In any event, it is sufficient for a refusal based on likelihood of confusion that relatedness is established for any item encompassed by the recitation of goods in a particular class. *Tuxedo Monopoly, Inc. v. General Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

Because the goods are in part identical and legally identical as to wines and because there are no limitations as to channels of trade or classes of purchasers in the application and cited registration, we must presume that Applicant's and Registrant's wine (and sparkling wine) will be sold in the same channels of trade and will be bought by the same classes 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); *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); *See also Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003).

The Examining Attorney also submitted web pages from third-party websites showing combined winery and distillery businesses that offer for sale both types of products (distilled spirits and wine). November 24, 2017 Office Action at TSDR 29-65; August 13, 2018 Office Action at TSDR 2-39. This evidence corroborates a finding

that vodka, which is a distilled spirit, and wine move through similar trade channels and are available to the same purchasers.

In view of the above, the *DuPont* factors of the similarity of the goods, the channels of trade, and classes of purchasers strongly favor a finding of likelihood of confusion.

B. Similarity or Dissimilarity of the Marks

We next turn to the *DuPont* factor relating to the similarities and dissimilarities between Applicant's mark ARATTA (in standard characters) and Registrant's mark AURATA (in standard characters). Applicant submits that there are substantive differences in the marks making confusion unlikely. 8 TTABVUE 24. Applicant also argues that the Examining Attorney improperly dissected the mark by "focusing on the RATA or RATTA similarly sounding parts of the two marks only and ignoring the different elements of the cited mark and applied for mark." 8 TTABVUE 24. However, we do not find that the Examining Attorney has improperly dissected the marks. Rather, the Examining Attorney analyzed the marks as being "highly similar commercial impressions as they begin with "A" and end with "RATA/RATTA." November 24, 2017 Office Action at TSDR 1; August 13, 2018 Office Action at TSDR 1; 10 TTABVUE 4.

When we consider the similarities or dissimilarities between ARRATA and AURATA, we must compare the marks in their entireties as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1690 (Fed. Cir. 2005) (quoting *DuPont*, 177

USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d* mem., (Fed. Cir. Sept. 13, 2019). *Accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

Both Applicant’s and Registrant’s marks are in standard character form and are not limited to any particular manner of display. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011). (“[T]he registrant is entitled to depictions of the standard character mark regardless of font style, size, or color.”). Therefore, we are not persuaded by Applicant’s argument that the marks differ in appearance in that his mark is displayed in all capital letters while “Aurata is registered in the specific font and letter size and the mark protection is limited to that specific manner of appearance, Aurata.” 8 TTABVUE 8. Applicant also attempts to distinguish the marks by relying upon Registrant’s actual use of the mark, pointing to the green and golden beetles on the Registrant’s bottle label. 8 TTABVUE 2. However, we must compare the marks as depicted in the application and the cited registration, not as actually used. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018). Here, green or golden beetles are not a part of Registrant’s mark. Accordingly, Applicant’s arguments are unavailing. *In re Jump Designs, LLC* 80 USPQ2d 1370, 1376 (TTAB 2006).

We find that ARATTA and AURATA are very similar in appearance. Each mark consists of a three-syllable six letter word with a similar structure. Both marks begin and end with the letter “A,” and contain the letter combination “RAT” in the middle.

As to the pronunciation of the marks, Applicant acknowledges that there are “technical similarities in possible pronunciations,” but submits that the marks are pronounced differently. *Id.* at 20. However, it is well-settled that there is no correct pronunciation of a trademark. *See In re Belgrade Shoe*, 411 F.2d 1352, 162 USPQ 227, 228 (CCPA 1969); *In re Lebanese Arak Corp.*, 94 USPQ2d 1215, 1222 (TTAB 2010). Accordingly, it is possible the marks will be pronounced similarly with, at most, a slight variation in the first syllable of each mark. Although the differences in the spelling of ARATTA and AURATA could suggest very slight differences in pronunciation, the marks nevertheless are generally similar in pronunciation. We find ARATTA and AURATA are similar in sound.

As to connotation of Registrant’s mark, Applicant argues that the meaning of ARATTA is “a very old civilization and an ancient land,” while “the meaning of the mark Aurata is [derived from] the latin word ‘aurum’ for ‘gold,’ and the name of a multicolored beetle by the name of *Cetonia aurata*.”³ *Id.* at 9, 13. Applicant argues

³ Applicant unnecessarily incorporated into his brief the exhibits attached to his response to office action and request for reconsideration. May 24, 2018 Response to Office Action; February 13, 2019 Request for Reconsideration.

The Board discourages the practice of the submission of duplicative evidence. *In re SL&E Training Stable Inc.*, 88 USPQ2d 1216, 1220 n.9 (TTAB 2008) (attaching as exhibits to brief material already of record requires Board to determine whether attachments had been properly made of record and adds to the bulk of the file); *In re Thor Tech Inc.*, 85 USPQ2d 1474, 1475 n.3 (TTAB 2007) (attaching evidence from record to briefs is duplicative and is unnecessary).

that “the work ARATTA is familiar, as it refers to an ancient land, which is a known land in literature and history,” but at the same time asserts that the “the name is obscure, and ARATTA is NOT commonly identified with Ukraine.” (emphasis in original), *Id.* at 18. Applicant submits that the word “Aurata is unfamiliar, because it is a Latin term suggesting Gold and is a part of a Latin name of a beetle, which is only known to a very narrow group of people, i.e., naturalists or biologists.”⁴ *Id.* at 19.

The purchasers of Applicant’s and Registrant’s goods are the public at large. We agree that only a small segment of consumers would be likely to know the meaning of “aurata.” As to Applicant’s mark ARATTA, however, there is no evidence that the vast majority of consumers would be aware of ARATTA in literature as a Sumerian myth. Rather, the majority of consumers are likely to view either AURATA or ARATTA as invented terms. In short, we find that because it is unlikely that most consumers will know the meaning of either AURATA or ARATTA, the differences in connotations of the marks is not sufficient to distinguish them. As to commercial impression, although Applicant argues otherwise, we find the marks engender sufficiently similar commercial impressions given the similarities in sound and appearance.

Viewing the marks in their entirety, we find them to be extremely similar. In making this finding, we bear in mind that marks are to be considered in light of the fallibility of memory and not a side-by-side comparison. *In re St. Helena Hosp.*, 774

⁴ The Examining Attorney included a definition for “auratus” which means in Latin “gilded or golden.” March 8, 2019 Denial of Request for Reconsideration at TSDR 2-4.

F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (citation omitted); *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977). It is the similarity of the general overall commercial impression engendered by the marks which must determine whether confusion as to source or sponsorship is likely. The proper emphasis is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See e.g., Envirotech Corp. v. Solaron Corp.*, 211 USPQ 724, 733 (TTAB 1981). Here, for reasons discussed, we find the marks convey the same overall commercial impression. Therefore, this *DuPont* factor also favors a finding of likelihood of confusion.

C. Sophisticated Purchasers

Under the fourth *DuPont* factor, Applicant submits that “[s]ophisticated consumers purchasing expensive alcoholic drinks such as wine and others have learned to differentiate between the products bearing similar but not identical marks.” *Id.* at 22. However, Applicant has failed to submit evidence to support this contention.

Moreover, neither Applicant’s nor Registrant’s goods are restricted to any particular price point or consumer. When the goods are unrestricted, it is assumed that they are sold to all purchasers, including those purchasers exercising only ordinary care, and at all price points. *Bongrain Int’l (Am.) Corp. v. Moquet Ltd.*, 230 USPQ 626, 628 (TTAB 1986) (“wines” in goods identification “include wines of all types and price ranges” sold through “all of the customary channels of trade for wine,

including supermarkets, grocery stores, and gourmet shops” to “all potential purchasers thereof, including not only wine connoisseurs but also unsophisticated purchasers”). Also, we do not limit “our consideration of this factor to the more sophisticated purchasers within the classes of potential customers,” *Bd. of Regents, Univ. of Tex. Sys. v. S. Ill. Miners, LLC*, 110 USPQ2d 1182, 1193 (TTAB 2014), and must consider the degree of care that would be exercised by the least sophisticated consumer. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014) (precedent requires consumer care for likelihood-of-confusion decision to be based “on the least sophisticated potential purchasers”). As stated, there is no evidence that the least sophisticated potential purchasers of wine exercise particular care in purchasing the goods. Accordingly, we find this *DuPont* factor is neutral.

D. Third-party Use

Applicant also mentions in his brief that the Board gives weight to “widespread, significant and unrestrained use by third parties of marks containing elements in common with the marks subject of oppositions based on likelihood of confusion, to demonstrate that confusion is not, in fact, likely.” *Id.* However, there is nothing in the record to show that Registrant’s mark is entitled to a narrower scope of protection. We find this *DuPont* factor neutral.

II. Conclusion

We have considered all of the arguments and evidence of record, and all relevant *DuPont* factors. When we balance the *DuPont* factors, we conclude that confusion is

likely to occur between Applicant's mark and Registrant's mark in view of the similarity of the marks, the goods, the channels of trade and classes of purchasers.

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