

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

**NOTICE OF ENTRY OF
JUDGMENT ACCOMPANIED BY OPINION**

OPINION FILED AND JUDGMENT ENTERED: 12/09/2014

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing en banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Regarding exhibits and visual aids: Your attention is directed Fed. R. App. P. 34(g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (The clerk deems a reasonable time to be 15 days from the date the final mandate is issued.)

FOR THE COURT

/s/ Daniel E. O'Toole

Daniel E. O'Toole
Clerk of Court

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

IN RE FRANCISCAN VINEYARDS, INC.

2014-1269

Appeal from the United States Patent and Trademark Office, Trademark Trial and Appeal Board in Opposition No. 91178682.

Decided: December 9, 2014

JOHN M. RANNELLS, Baker and Rannells, PA, of Raritan, New Jersey, for appellant.

Before LOURIE, CHEN, and HUGHES, *Circuit Judges*.

LOURIE, *Circuit Judge*.

Franciscan Vineyards, Inc. (“Franciscan”) appeals from the decision of the United States Patent and Trademark Office (“PTO”) Trademark Trial and Appeal Board (the “Board”) dismissing its opposition to an application filed by Domaines Pinnacle, Inc. (“Domaines Pinnacle”) to register a DOMAINE PINNACLE mark. *See Franciscan Vineyards, Inc. v. Domaines Pinnacle, Inc.*, No. 91178682, 2013 WL 5820844 (T.T.A.B. Oct. 16, 2013) (“*Opinion*”). Because the Board did not err in determining that Fran-

Franciscan failed to prove a likelihood of confusion between Franciscan's registered marks for use with wines and Domaines Pinnacle's requested mark for use with "apple juices and apple-based non-alcoholic beverages," we *affirm*.

BACKGROUND

Domaines Pinnacle, a Canadian corporation and producer of alcoholic ice apple wines, filed an intent-to-use application at the PTO, seeking to register a DOMAINE PINNACLE mark for "apple juices and apple-based non-alcoholic beverages." *Opinion* at *1. Franciscan opposed the registration, alleging that Domaines Pinnacle's mark would likely cause confusion with Franciscan's previously registered and used marks PINNACLES for "wine" and PINNACLES RANCHES for "wines." *Id.*

The Board evaluated the following *DuPont* factors: (1) the similarity or dissimilarity of the marks in their entireties ("the first *DuPont* factor"); (2) the similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use ("the second *DuPont* factor"); (3) the similarity or dissimilarity of established, likely-to-continue trade channels ("the third *DuPont* factor"); (4) the conditions under which and the buyers to whom sales are made ("the fourth *DuPont* factor"); (5) the fame of the prior mark ("the fifth *DuPont* factor"); (6) the number and nature of similar marks in use on similar goods ("the sixth *DuPont* factor"); and (7) the market interface between the applicant and the owner of a prior mark ("the tenth *DuPont* factor"). *Id.* at *3-8; *see also In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (listing factors relevant to likelihood of confusion determination).

The Board found that the first, third, and fourth *DuPont* factors favored a finding of likelihood of confusion, *Opinion* at *3-4, *6, but that the fifth, sixth, and

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tenth *DuPont* factors were neutral, *id.* at *4–5, *8. The Board, moreover, found that the second *DuPont* factor favored a finding of *no* likelihood of confusion. *Id.* at *6–8. Franciscan submitted evidence that the parties were competitors in Canada and that Franciscan’s parent company wholly owned three Canadian companies that sold wines and ciders. But the Board found Franciscan’s evidence insufficient to show that the goods at issue, *i.e.*, Franciscan’s wines and Domaines Pinnacle’s “apple juices and apple-based non-alcoholic beverages,” were related or that they would likely be seen by the same persons under circumstances that could give rise to confusion. *Id.* at *7.

Balancing the relevant *DuPont* factors, the Board reasoned that “the lack of evidence showing a relatedness of the goods outweigh[ed] the first, third, and fourth [*DuPont*] factors.” *Id.* at *8. The Board therefore concluded that Franciscan failed to prove its case and dismissed the opposition. *Id.* at *8–9.

Franciscan appealed to this court; we have jurisdiction under 28 U.S.C. § 1295(a)(4)(B).

DISCUSSION

We review the Board’s legal conclusions without deference and its factual findings for substantial evidence. *In re Pacer Tech.*, 338 F.3d 1348, 1349 (Fed. Cir. 2003). Likelihood of confusion is a question of law based on underlying findings of fact. *In re Chatam Int’l, Inc.*, 380 F.3d 1340, 1342 (Fed. Cir. 2004). We assess a likelihood of confusion based on the factors set forth in *DuPont*. 476 F.2d at 1361. “The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus . . . on dispositive factors, such as similarity of the marks and relatedness of the goods.’” *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164–65 (Fed. Cir. 2002) (quoting *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1336 (Fed. Cir. 2001)).

Franciscan argues that the Board overlooked evidence relating to the second *DuPont* factor, namely that Franciscan's wines and Domaines Pinnacle's "apple juices and apple-based non-alcoholic beverages" were related goods. According to Franciscan, when evaluating the second *DuPont* factor, the Board failed to take into account its own findings regarding the third and fourth *DuPont* factors. Franciscan also argues that the Board failed to follow *In re Jakob Demmer KG*, 219 U.S.P.Q. 1199 (T.T.A.B. 1983) to generally deem wines and non-alcoholic beverages related goods. Franciscan faults the Board for not taking judicial notice of the dictionary definitions of "wine" and "cider," and urges this court to take such judicial notice. Finally, Franciscan asserts that the Board incorrectly evaluated the fifth *DuPont* factor concerning the fame of its registered marks.

We conclude that the Board did not err in determining that there was no likelihood of confusion between Franciscan's previously registered marks for use with wines and Domaines Pinnacle's requested mark for use with "apple juices and apple-based non-alcoholic beverages" because Franciscan failed to present evidence to show that the goods at issue were related.

Franciscan presented testimony to the Board that the parties were competitors in Canada and that Franciscan's parent company owned three Canadian companies that sold wines and ciders. The Board correctly noted, however, that this evidence pertains to Canadian entities and is insufficient "to show that [Domaines Pinnacle's] and [Franciscan's] identified goods are related in some manner" or that the goods are marketed such that "they would be likely to be seen by the same persons under circumstances which could give rise to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods." *Opinion* at *7.

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Moreover, we agree with the Board that *Jacob Demmer* does not control in this case. *Id.* at *6. In *Jacob Demmer*, the Board affirmed the examining attorney's refusal to register similar marks for "wines" and "apple cider." *Jacob Demmer*, 219 U.S.P.Q. at 1200. In doing so, the Board took judicial notice of the dictionary definitions of "cider" and "wine" and found the goods at issue there to be related. *Id.* at 1201. As the Board correctly noted here, however, *Jacob Demmer* involved an *ex parte* appeal, in which the Board generally adopts a "more permissive stance with respect to the admissibility and probative value of evidence" than it does in an *inter partes* proceeding, in which the burden is on the opposer to introduce evidence that the goods are related. *Id.* at *7 (citing T.T.A.B. Manual of Procedure § 1208 (3d ed. rev. 2 June 2013)). The Board thus did not err in refusing to adopt a general rule that cider and wine are *per se* related or to take judicial notice of the dictionary definitions of "wine" and "cider" in this case.

We have considered Franciscan's remaining arguments but find them unpersuasive. We therefore conclude that substantial evidence supports the Board's factual findings underlying the relevant *DuPont* factors and that the Board did not err in determining, based on the record evidence, that there was no likelihood of confusion.

CONCLUSION

For the foregoing reasons, we *affirm* the decision of the Board dismissing Franciscan's opposition.

AFFIRMED

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FOR THE FEDERAL CIRCUIT

Questions and Answers

**Petitions for Panel Rehearing (Fed. Cir. R. 40)
and
Petitions for Hearing or Rehearing En Banc (Fed. Cir. R. 35)**

Q. When is a petition for panel rehearing appropriate?

A. Petitions for panel rehearing are rarely considered meritorious. Consequently, it is easiest to first answer when a petition for panel rehearing is not appropriate. A petition for panel rehearing should not be used to reargue issues already briefed and orally argued. If a party failed to persuade the court on an issue in the first instance, they do not get a second chance. This is especially so when the court has entered a judgment of affirmance without opinion under Fed. Cir. R. 36, as a disposition of this nature is used only when the appellant/petitioner has utterly failed to raise any issues in the appeal that require an opinion to be written in support of the court's judgment of affirmance.

Thus, as a usual prerequisite, the court must have filed an opinion in support of its judgment for a petition for panel rehearing to be appropriate. Counsel seeking panel rehearing must be able to identify in the court's opinion a material error of fact or law, the correction of which would require a different judgment on appeal.

Q. When is a petition for rehearing en banc appropriate?

A. En banc decisions are extraordinary occurrences. To properly answer the question, one must first understand the responsibility of a three-judge merits panel of the court. The panel is charged with deciding individual appeals according to the law of the circuit as established in the court's precedential opinions. While each merits panel is empowered to enter precedential opinions, the ultimate duty of the court en banc is to set forth the law of the Federal Circuit, which merits panels are obliged to follow.

Thus, as a usual prerequisite, a merits panel of the court must have entered a precedential opinion in support of its judgment for a petition for rehearing en banc to be appropriate. In addition, the party seeking rehearing en banc must show that either the merits panel has failed to follow decisions of the Supreme Court of the United States or Federal Circuit precedential opinions, or that the

merits panel has followed circuit precedent, which the party seeks to have overruled by the court en banc.

Q. How frequently are petitions for panel rehearing granted by merits panels or petitions for rehearing en banc granted by the court?

A. The data regarding petitions for panel rehearing since 1982 shows that merits panels granted some relief in only three percent of the petitions filed. The relief granted usually involved only minor corrections of factual misstatements, rarely resulting in a change of outcome in the decision.

En banc petitions have been granted less frequently. Historically, the court has initiated en banc review in a few of the appeals decided en banc since 1982.

Q. Is it necessary to have filed either of these petitions before filing a petition for certiorari in the U.S. Supreme Court?

A. No. All that is needed is a final judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

INFORMATION SHEET

FILING A PETITION FOR A WRIT OF CERTIORARI

There is no automatic right of appeal to the Supreme Court of the United States from judgments of the Federal Circuit. You must file a petition for a writ of certiorari which the Supreme Court will grant only when there are compelling reasons. (See Rule 10 of the Rules of the Supreme Court of the United States, hereinafter called Rules.)

Time. The petition must be filed in the Supreme Court of the United States within 90 days of the entry of judgment in this Court or within 90 days of the denial of a timely petition for rehearing. The judgment is entered on the day the Federal Circuit issues a final decision in your case. [The time does not run from the issuance of the mandate, which has no effect on the right to petition.] (See Rule 13 of the Rules.)

Fees. Either the \$300 docketing fee or a motion for leave to proceed in forma pauperis with an affidavit in support thereof must accompany the petition. (See Rules 38 and 39.)

Authorized Filer. The petition must be filed by a member of the bar of the Supreme Court of the United States or by the petitioner representing himself or herself.

Format of a Petition. The Rules are very specific about the order of the required information and should be consulted before you start drafting your petition. (See Rule 14.) Rules 33 and 34 should be consulted regarding type size and font, paper size, paper weight, margins, page limits, cover, etc.

Number of Copies. Forty copies of a petition must be filed unless the petitioner is proceeding in forma pauperis, in which case an original and ten copies of the petition for writ of certiorari and of the motion for leave to proceed in forma pauperis. (See Rule 12.)

Where to File. You must file your documents at the Supreme Court.

**Clerk
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543
(202) 479-3000**

No documents are filed at the Federal Circuit and the Federal Circuit provides no information to the Supreme Court unless the Supreme Court asks for the information.

Access to the Rules. The current rules can be found in Title 28 of the United States Code Annotated and other legal publications available in many public libraries.