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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Fast Forward Brands, LLC
v.
Houdini, Inc.

Opposition No. 91188001
to application Serial No. 77504664
filed on June 20, 2008

Stephen L. Baker and Moira J. Selinka of Baker and Rannells
for Fast Forward Brand, LLC.

Edward R. Schwartz of Christie, Parker & Hale for Houdini,
Inc.

Before Quinn, Taylor and Wolfson, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

Houdini, Inc. filed, on June 20, 2008, an intent-to-use
application to register the mark CLOUDBANKS (in standard
characters) for "wine" in International Class 33.

Fast Forward Brands, LLC opposed registration under
Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on
the ground that applicant's mark, when used in connection
with applicant's goods, so resembles opposer's previously
used and registered mark FOGBANK (in standard characters)

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for "wine" in International Class 33,¹ as to be likely to cause confusion.

Applicant, in its answer, admitted that the goods are identical (¶ 10), but otherwise denied the salient allegations of likelihood of confusion.

The record consists of the pleadings; the file of the involved application; a status and title copy of opposer's pleaded registration, dictionary definitions, applicant's responses to two of opposer's discovery requests, articles retrieved from the NEXIS database, and excerpts from a printed publication, all introduced by way of opposer's notices of reliance; and excerpts from dictionaries made of record in applicant's notice of reliance. Both parties filed briefs.

Opposer has established its standing to oppose registration of the involved application. In particular, opposer has properly made its pleaded registration of FOGBANK of record and essentially has shown that it is not a mere intermeddler. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

¹ Registration No. 3344856, issued November 27, 2007.

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Priority is not in issue in view of opposer's ownership of a valid and subsisting registration. *King Candy, Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

The only issue for us to decide is likelihood of confusion. Our determination 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, however, 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).

We first turn to consider the goods. It is well settled that the question of likelihood of confusion must be determined based on an analysis of the goods recited in applicant's application vis-à-vis the goods identified in opposer's registration. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992). Where the goods in the application at issue and/or in the pleaded registration are broadly identified as to their nature and type, such that there is an absence of any

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restrictions as to the channels of trade and no limitation as to the classes of purchasers, it is presumed that in scope the identification of goods encompasses not only all the goods of the nature and type described therein, but that the identified goods are offered in all channels of trade which would be normal therefor, and that they would be purchased by all potential buyers thereof. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

Both opposer and applicant have identified their goods as "wine." Thus, the goods are legally identical for purposes of our likelihood of confusion analysis, a point conceded by applicant. We presume that the parties' wines travel in the same trade channels (e.g., liquor stores, wine shops, supermarkets selling alcoholic beverages, and the like) and are bought by the same purchasers, including ordinary consumers. Given the absence of any limitation in the respective identifications of goods relating to cost, we must assume that opposer's and applicant's wines include wines that are relatively inexpensive. As such, they may be subject to purchases made with nothing more than ordinary care.

The identity between the goods, and the overlap in trade channels and purchasers weigh heavily in favor of a finding of likelihood of confusion. Likewise, the fact that

inexpensive wine may be subject to an impulse purchase favors a finding of likelihood of confusion.

We next turn to consider the *du Pont* factor of the similarity/dissimilarity between the marks. The crux of this litigation centers on this factor, and the parties have focused their attention on it. We must compare the marks, FOGBANK and CLOUDBANKS, in their entireties as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). 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 in terms of their overall commercial impression that confusion as to the source of the goods and/or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Finally, where, as in the present case, the marks are used on identical goods, the degree of similarity between the marks that is necessary to support a finding of likely confusion declines. *Century 21 Real Estate Corp. v. Century*

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Life of America, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

The record includes the following dictionary definition of "fog":

A thick cloud of tiny water droplets suspended in the atmosphere at or near the earth's surface that obscures or restricts visibility (to a greater extent than mist; strictly, reducing visibility to below 1 km).
(The New Oxford American Dictionary (2001))

The word "cloud" is defined as follows:

A fog or mist or haze suspended, generally at a considerable height, in the air; also, the material of which these masses are composed.
(Webster's New International Dictionary of the English Language (2d ed. unabridged 1953))

The word "bank" is defined, in relevant part, as follows:

A mound or pile esp. of earth, but also of sand, clouds etc.
(The New Lexicon Webster's Dictionary (1987))

A long pile or heap; mass: *a bank of earth; a bank of clouds.*
(Webster's Encyclopedic Unabridged Dictionary (2001))

A mound, pile, or ridge raised above the surrounding level: as a: a piled up mass of cloud or fog.
(Merriam-Webster Online Dictionary (2010))

A slope, mass, or mound of a particular substance: *a bank of clouds.*
(Oxford Dictionaries Online (2010))

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Applicant has filed pages from two dictionaries showing the absence of any listing for "cloudbanks." (Webster's Third New International Dictionary and Merriam-Webster Online Dictionary).

Also of record are excerpts from a printed publication, namely, the book Clouds by Eric M. Wilcox published in 2008.

The following passages appear in the book:

[A] stratus cloud can be stirred into action on occasion. Stratus at ground level, for example - which we know as fog - is often described as "rolling in," though its motion is best observed from above. (p. 45).

Although rising air is responsible for the formation of most clouds, this is not always so - one exception to this rule is fog. Foggy air remains at ground level, rather than rising, and cools by another process, such as making contact with a cooling surface below. (p. 153).

Another cloud feature that is particularly familiar to coastal residents is fog, a type of stratus cloud that forms at the Earth's surface. (p. 156).

Opposer introduced eleven other excerpts from printed publications to show that "fog" and "cloud," and "fogbank" and "cloudbank" are sometimes used interchangeably, and have the same or similar connotation and commercial impression.

Examples include the following:

When Monday's unseasonably warm front passed over this cool water, the humid air condensed into dense sea fog, Bragaw said. These low-lying clouds billowed

onshore throughout the afternoon,
blanketing the barrier island.
(Florida Today, Dec. 15, 2009)

The trade winds were funneling moist sea
air steadily up the steep mountainside,
where it was condensing into a solid,
vertically moving cloudbank. We never
found out what it hid, but through it
came the sound of a waterfall. I thrust
my head out into the fog and inhaled.
(St. Louis Post-Dispatch, Jan. 1, 1989)

Like an avalanche of mist, a fogbank
spills off the hillside as we climb
above the Killik River in Alaska's Gates
of the Arctic National Park, cutting off
our vision as surely as a shroud.
Moments ago we could see for miles; now,
it seems we have stepped into a cloud.
(National Parks, June 22, 2008)

Technically, fog is condensed water
vapor comprised of tiny water droplets
about 1/10,000th of an inch in diameter
in cloudlike masses that lie close to
the ground and limit visibility to less
than about 1,100 yards.
(Rocky Mountain News, Sept. 19, 1996)

A large cloudbank was parked over the
area yesterday afternoon, leading to
speculation that the pilot might have
suffered "spatial disorientation" from
the fast-arriving fog and simply was
unable to tell up from down.
(City News Service, March 17, 2004)

The marks FOGBANK and CLOUDBANKS are somewhat different
in appearance and sound. The meaning of the words "fog" and
"cloud" forms the heart of opposer's case. As to meaning,
there may be a distinction between the technical meanings of
the two words "fog" and "cloud." However, we are primarily
concerned with the meaning of the marks to the prospective

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purchasing public (in this case, ordinary consumers of wine), and not to meteorologists. Accordingly, as shown by the dictionary entries, which show that "fog" is a type of "cloud," and the interchangeability of the words in actual language, we believe that the popular or ordinary meanings of the words "fog" and "cloud" (and "fogbank" and "cloudbanks") are very similar, although there are technical distinctions between the two words. The ordinary meaning and usage of the two words are so close as to render the marks similar in the minds of ordinary consumers, who are not likely to be experts in meteorological terms. See *Hancock v. The American Steel & Wire Co. of New Jersey*, 203 F.2d 737, 97 USPQ 330, 332-33 (CCPA 1953) (TORNADO and CYCLONE are distinct in technical meanings; however, in view of their substantially identical meaning, the marks are confusingly similar inasmuch as the court is primarily concerned with the meaning of marks to members of the public at large who are prospective purchasers of the goods, and not to meteorological experts). See also *Spice Islands, Inc. v. Frank Tea & Spice Co.*, 505 F.2d 1293, 184 USPQ 35, 37-38 (CCPA 1974) (SPICE TREE and SPICE ISLANDS convey "the same idea, same mental reaction, and same meaning"); *Lone Star Mfg. Co. v. Bill Beasley, Inc.*, 498 F.2d 906, 182 USPQ 368, 369 (CCPA 1974) (FROSTY AIR and FROSTEMP convey "the same idea, same mental reaction, and same meaning"); *Beacon-*

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Morris Corp. v. International Tel. & Tel. Corp., 463 F.2d 1097, 175 USPQ 16, 17 (CCPA 1972) (DUO-FLO and TWIN FLOW are "essentially identical in meaning"); and *Procter & Gamble Co. v. Conway*, 419 F.2d 1332, 164 USPQ 301, 304 (CCPA 1970) (MISTER STAIN and MISTER CLEAN are similar in meaning; "[a] designation may well be likely to cause purchaser confusion as to the origin of goods because it conveys, as used, the same idea, or stimulates the same mental reaction, or in the ultimate has the same meaning").

We find that the substantially similar meaning between "fog" and "cloud," and "fogbank" and "cloudbanks," outweighs any differences in appearance and sound. The marks FOGBANK and CLOUDBANKS are similarly constructed; both begin with words having very similar meanings, followed by the identical word "bank" or "banks." The plural form of applicant's mark is not a basis upon which consumers would be expected to distinguish the marks. See *In re Pix of America, Inc.*, 225 USPQ 691, 692 (TTAB 1985). In sum, the marks engender overall commercial impressions that are similar.

The similarity between the marks FOGBANK and CLOUDBANKS weighs in favor of a finding of likelihood of confusion.

We conclude that consumers familiar with opposer's wine sold under the mark FOGBANK would be likely to mistakenly believe, upon encountering applicant's mark CLOUDBANKS for

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wine, that these identical goods originated with or are somehow associated with or sponsored by the same entity.

Lastly, to the extent that any of the points argued by applicant raises a doubt about our finding of a likelihood of confusion, we resolve that doubt, as we must, in favor of opposer as the prior user and registrant. *See Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 395 (Fed. Cir. 1983).

Decision: The opposition is sustained, and registration to applicant is refused.