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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Patron Spirits International AG

v.

Peter W. Noyes

Opposition No. 91215615

Bernard R. Gans and Jessica Bromall Sparkman of Jeffer Mangels Butler & Mitchell LLP for Patron Spirits International AG.

Peter W. Noyes, *pro se*.

Before Cataldo, Ritchie, and Adlin, Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

On March 28, 2013, Peter W. Noyes (“Applicant”) applied to register IT’S PIRATE TIME, in standard character form, for “distilled spirits,” in International Class 33, and “retail store services featuring rum and rum based products and also featuring branded merchandise including apparel and apparel accessories, housewares, jewelry, gift novelties, and office and

Opposition No. 91215615

stationery supplies,” in International Class 35.¹ On March 26, 2014, Patron Spirits International AG (“Opposer”), filed an opposition to the registration of Applicant’s mark on the ground that it is likely to cause confusion with Opposer’s marks. Specifically, Opposer asserted in its Notice of Opposition that it owns Registration No. 2727996 for PYRAT, in typed drawing form,² for “distilled spirits,” in International Class 33,³ and Registration No. 2058075 for PYRAT RUM, also in typed drawing form, for “rum,” in International Class 33.⁴

Applicant’s answer denies the salient allegations of the Notice, except that he admits that Opposer owns its pleaded registrations.

Both parties filed briefs, and Opposer filed a reply brief.

The Record

The record consists of the pleadings; the file of the involved application; and Opposer’s Notice of Reliance on status and title copies of its pleaded trademark registrations as well as excerpts from printed publications and Internet web pages; excerpts of Applicant’s written responses to Opposer’s discovery requests; and printouts of third-party registrations intended to show relatedness of the goods and services. The record also contains

¹ Application Serial No. 8588933, filed March 28, 2013, alleging a bona fide intent to use the mark in commerce.

² “Prior to November 2, 2003, ‘standard character’ drawings were known as ‘typed’ drawings. The mark on a typed drawing was required to be typed entirely in capital letters. A typed mark is the legal equivalent of a standard character mark.” TMEP § 807.03(i) (April 2016).

³ Registered June 17, 2003. Renewed.

⁴ Registered April 29, 1997. Renewed.

Opposition No. 91215615

Applicant's notice of reliance on Internet web pages and printouts of third-party registrations intended to show that Opposer's PYRAT mark is suggestive and thus not entitled to a broad scope of protection.

Standing and Priority

Standing is a threshold issue that must be proven in every *inter partes* case. *See Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) ("The facts regarding standing . . . must be affirmatively proved. Accordingly, [plaintiff] is not entitled to standing solely because of the allegations in its [pleading]."). To establish standing in an opposition, opposer must show both "a real interest in the proceedings as well as a 'reasonable' basis for his belief of damage." *See Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999).

As a result of Opposer's submission of status and title copies of its Registration Nos. 2727996 (PYRAT), and 2058075 (PYRAT RUM), Opposer has established its standing. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000). Likewise, because Applicant has not counterclaimed to cancel these registrations, priority is not at issue with respect to the marks and goods set out in the registrations. *King Candy Co. v. Eunice King's Kitchen*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974). We note further that Applicant conceded that Opposer has priority. *See* 4 TTABVUE 2-3. *See also* 23 TTABVUE 3-4.

Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the relevant, probative evidence in the record related to a likelihood of confusion. *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); *see also Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. *See Federated Foods, Inc. v. Fort Howard 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.”). We discuss the *du Pont* factors for which there is relevant argument and evidence. For purposes of our likelihood of confusion analysis, we focus on the most relevant pleaded registration, Registration No. 2727996 (PYRAT). That is, if we find a likelihood of confusion as to this pleaded registration, we need not find it as to the other. On the other hand, if we do not find likelihood of confusion with the mark in this registration, we would not find it as to the other pleaded registration. *See In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

The Goods and Services and Channels of Trade

The goods in Registration No. 2727996 are “distilled spirits.” The application also identifies “distilled spirits.” Thus the goods are identical. In addition, the application identifies, in another International Class, “retail store services featuring rum and rum based products ..., and Applicant admits that rum isa “distilled spirit.”⁵ Retail store services have frequently been found to be related to goods sold by those retail stores, in this case rum, a distilled spirit. *See, e.g., In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988) (BIGGS for retail grocery and general merchandise store services likely to be confused with BIGGS for furniture); *In re Thomas*, 79 USPQ2d 1021, 1024 (TTAB 2006) (“It is clear that consumers would be likely to believe that jewelry on the one hand and retail stores selling jewelry on the other emanate from or are sponsored by the same source if such goods and services are sold under the same or similar marks.”); *In re Peebles Inc.*, 23 USPQ2d 1795, 1796 (TTAB 1992) (“As we have said before there is no question that store services and the goods which may be sold in that store are related goods and services ...”); *see also* 4 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 24:25 (4th ed. updated September 2016) (“Where the services consist of retail sales services, likelihood of confusion is found when another mark is used on goods

Opposition No. 91215615

which are commonly sold through such a retail outlet.”). Since we thus find a relationship between Opposer’s “distilled spirits” on the one hand, and Applicant’s “retail store services featuring rum and rum based products” on the other hand, it is not necessary for us to find similarity with other services in that class. *See Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Apple Computer v. TVNET.Net, Inc.*, 90 USPQ2d 1393, 1398 (TTAB 2007).

As for the channels of trade, where the goods are identical, it is presumed that the channels of trade are the same as well. *In re Viterro 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).⁶ As for the services, neither Opposer’s identification of goods nor Applicant’s identification of services include any limitations as to channels of trade or classes of consumers, and their goods and services are therefore presumed to move in all normal channels of trade for those goods and services and to be available to all classes of consumers. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *see also Stone Lion Capital*

⁵ 16 TTABVUE 58.

Partners, LP v. Lion Capital LLP, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (“Even assuming there is no overlap between Stone Lion’s and Lion’s current customers, the Board correctly declined to look beyond the application and registered marks at issue. An application with ‘no restriction on trade channels’ cannot be ‘narrowed by testimony that the applicant’s use is, in fact, restricted to a particular class of purchasers.’”). Accordingly, we must presume that Opposer’s distilled spirits may be sold through retail outlets like Applicant’s, and to the same consumers.

These factors weigh in favor of finding a likelihood of confusion.

The Marks

We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imports*, 73 USPQ2d at 1692. In comparing the marks, we are mindful that the test 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. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average

⁶ This was also admitted by Applicant in Requests for Admission Nos. 15 and 16. *See* 16 TTABVUE 58.

Opposition No. 91215615

consumer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Opposer's mark is PYRAT. Opposer included a definition of PYRAT as an alternate spelling of "pirate":

Pirate: Also *pyrat*: 1. One who robs and plunders on the sea, navigable rivers, etc., or cruises about for that purpose; one who practices piracy; a sea-robber.⁷

Other sources confirm this understanding of "PYRAT" as an alternate spelling of "pirate," particularly in historical texts:

Wikipedia: Piracy: Did you know . . . that in the Golden Age of Piracy, the word "pirate" was often spelled 'pyrate' or 'pyrat'? <http://en.wikipedia.org>; 16 TTABVUE 139.

Historic Print (L): The battel between the Spaniards and the pyrats or buccaniers before the Citty of Panama [sic]; by Library Images; Source: Library of Congress; Date: 1648. [Amazon.com](http://amazon.com); 16 TTABVUE 124.

A true relation, of the lives and deaths of two most famous English pyrats, Pursar, and Clinton who lived in the reigne of Queene Elizabeth [sic]. Together . . . particular actions of their takings (1639) By Thomas Heywood. [Amazon.com](http://amazon.com); 16 TTABVUE 128.

P132-133 Nola Pyrate Week: Take What Ye Can, Give Something Back: . . . While we insist on spelling it PYRATE, ye may see Pirate, Pyrat, Pyraat or other variations. <http://nolapyrateweek.com>. 16 TTABVUE 132-133.

Piracy, Then & Now: . . . In the Golden Age of Piracy, spelling was a haphazard kind of thing, and the word was often spelled

⁷ *Oxford English Dictionary*. 16 TTABVUE 113.

Opposition No. 91215615

with a ‘y’. So there was a time when the word *Pirate* was spelled *Pyrate, Pirate, Pyrat, or Pirat*.
<http://pirates.hegwisch.net/piracy>. 16 TTABVUE 142.

Applicant’s mark is IT’S PIRATE TIME. While the sight and sound are somewhat different to the extent Applicant’s mark includes two additional terms and has a different spelling of the term PYRAT/PIRATE, we find that the commercial impression is quite similar in that the dominant term in Applicant’s mark is the same as Opposer’s mark and consumers could perceive Applicant’s mark as a reference to Opposer’s goods, exclaiming that it is time for Opposer’s PYRAT, which would likely be pronounced the same as “pirate.” *See In re Teradata Corp.*, 223 USPQ 361, 362 (TTAB 1984) (noting that there is no “correct” way to pronounce a trademark). This is especially so since the goods are identical and the services relate to those same goods. Alternatively, consumers could perceive Applicant’s mark as a variation of Opposer’s, or a slogan developed by Opposer in connection with its mark.

Accordingly, we find that the relatively minor dissimilarities in sight and sound are outweighed by similarities in connotation and commercial impression, and this *du Pont* factor also weighs in favor of finding likelihood of confusion.

Strength of the Mark

Opposition No. 91215615

Applicant alleges that the term “pirate” – or *pyrat* – is weak and suggestive in that it is often associated with rum, and that consumers will therefore recognize subtle differences between the marks due to widespread third-party use of the term. *See 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, 1675 (Fed. Cir. 2015); *Promark v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1244 (TTAB 2015) (“Such third-party registrations and uses are competent to show that the common term has an accepted meaning in a given field and that marks containing the term have been registered and used for related goods because the remaining portions of the marks may be sufficient to distinguish the marks as a whole from one another.”).

Specifically, Applicant points to a number of websites that use the term “pirate” in a suggestive or descriptive manner in reference to rum. A number of these include references to brands that do not appear to be sold in the United States, however. Most of the others are either recipes including rum that incorporate the term “pirate” in the name, or are discussions about pirates drinking rum. Some examples include the following:

Pirates: Stevenson shows pirates simultaneously as brutal and romantic. He also provides some of the best-known pirate clichés, right down to the parrot perched on Long John Silver’s shoulder. Stevenson gets it mostly correct as his pirates lust for money, rum, and glory, all while freely indulging their anger and pompous brutality.

Drunkard.com; Attached to 20 TTABVUE 20.

History: Did pirates really drink a lot of rum?: In every movie, cartoon, comic or any other fictional sources I have read or watched that involves sea pirates, it is always shown that their favorite beverage is rum.

History.stackexchange.com; Attached to 20 TTABVUE 40.

Alcoholic Spirits: pirates & rum: . . . Thanks to Captain Billy Bones in the book, *Treasure Island*, the alcoholic beverage most associated with pirates is rum.

<http://pirates.hegewisch.net>; Attached to 20 TTABVUE 48.

The Pirate Empire: Authentic Pirate Rum Drinks: Spring is finally starting to show up in my part of the world, and everyone is preparing for festivals, outdoor parties and nights under the stars. For those of us who enjoy pirating, it helps to have some rum available.

<http://thepirateempire.blogspot.com>; Attached to 20 TTABVUE 52.

A Pirates Life for Me: Margaritas and Rum on the River: theriverdeck.com; Attached to 20 TTABVUE 134.

Applicant also relies on third-party registrations from the USPTO electronic database system, TESS, only two of which are “live.” These are PIRATE AND PARROT (and design), Registration No. 417073, for “rum”; and PIRATES OF THE MISSISSIPI, Registration No. 4686707, for alcoholic beverages including distilled spirits.

Evidence of extensive registration and use of a term by others *as a mark* can be “powerful” evidence of weakness. *See Jack Wolfskin*, 116 USPQ2d at 1136; *Juice Generation*, 115 USPQ2d at 1674. However, in *Juice Generation* there were at least twenty-six relevant third-party uses or registrations of record, *see* 115 USPQ2d at 1672 n. 1, and in *Jack Wolfskin*, there were at

Opposition No. 91215615

least fourteen, 116 USPQ2d at 1136 n. 2. By comparison, Applicant has produced at best a couple of actual uses, which is not persuasive that the mark is diluted or weak. Thus, while PYRAT/PIRATE may be suggestive in regard to rum, it is not so weak on this record as to be afforded such a limited scope of protection as Applicant seeks. To the extent that consumers will look to slight differences in the marks, as noted above, they are likely to perceive Applicant's ITS PIRATE TIME as a variation of or otherwise related to Registrant's PYRAT mark.

Opposer, on the other hand, would have us consider the commercial strength of its mark. In particular, Opposer asserts that the PYRAT mark is "well known."⁸ Fame, where it exists, plays a dominant role assessing likelihood of confusion. *Kenner Parker Toys Inc. v. Rose Arts Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992). But Opposer only submitted a number of advertisements containing its PYRAT mark, and some examples of media coverage of the mark on npr.org, adweek.com, and others.⁹ There is no evidence of the extent of consumer exposure, nor any sales or advertising figures, much less any context that can be used for comparisons within the industry.¹⁰

⁸ 22 TTABVUE 12.

⁹ 17 TTABVUE.

¹⁰ The information that Opposer points to in Exhibit 33 is unhelpful on this point, and also is not testimony, but rather is a printed publication admissible only for consumer perception, not truth of the matter. *See Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010).

Opposition No. 91215615

Overall, we find both the conceptual and commercial strength of the mark to be neutral.

Consumer Sophistication

Although there is evidence of record that rum and distilled spirits may cost up to hundreds of dollars per bottle, and may involve sophisticated consumers, we must look at the identification of goods and services in assessing the range of prices, which could also include very inexpensive products. *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 the sales of goods are directed.”) (citations omitted). Since rum and distilled spirits may be inexpensive, impulse purchases, we find that this factor favors a finding of likelihood of confusion. *See Stone Lion Capital*, 110 USPQ2d at 1163 (affirming that TTAB properly considered all potential purchasers for recited services, including both sophisticated and unsophisticated investors, since precedent requires consumer care for likelihood-of-confusion decision be based “on the least sophisticated potential purchasers”).

Conclusion

Considering all of the arguments and evidence of record as they pertain to the relevant *du Pont* factors, in comparing Opposer's Mark in Registration No. 2727996 (PYRAT) to Applicant's mark, IT'S PIRATE TIME, we conclude that the parties' goods are identical and the goods and services are related, and are likely to be marketed through the same channels of trade to unsophisticated consumers, and that the marks are similar and convey a similar commercial impression. Accordingly, we find a likelihood of confusion.

DECISION: The opposition is sustained as to Registration No. 2727996.