

**This Opinion is Not a
Precedent of the TTAB**

Mailed: October 27, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re DNA Consulting LLC
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Serial No. 85574196
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Brian S Mencher and Vidal C. Maurrasse of Beame & Mencher LLP,
for DNA Consulting LLC.

Christopher Law,¹ Trademark Examining Attorney, Law Office 103,
Michael Hamilton, Managing Attorney.

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Before Taylor, Wellington and Ritchie,
Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

DNA Consulting LLC (“Applicant”) seeks registration on the Principal Register
of the mark THE CELBRITY SOUR (in standard characters) for

Alcoholic beverages, namely, pre-mixed alcoholic cocktails
in International Class 33.²

At the request of the Examining Attorney, the word SOUR was disclaimed.

¹ Emily K. Carlsen was the Examining Attorney responsible for this application prior to May 22, 2013, when the application was assigned to Christopher Law.

² Application Serial No. 85574196 was filed on March 20, 2012, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act 15 U.S.C. §1051(b).

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 THE CELEBRITY SOUR, when used on or in connection with Applicant's goods, so resembles the mark in U.S. Registration No. 3183662, CELEBRITY CELLARS (in standard characters), CELLARS disclaimed,³ for, in relevant part, "wine" in International Class 33 as to be likely to cause confusion, mistake or to deceive.⁴

When the refusal was made final, Applicant appealed and requested reconsideration three times. The Examining Attorney denied all three requests, and this appeal ultimately resumed. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We first consider the second *du Pont* factor regarding the similarity/dissimilarity between the goods. It is well settled that the goods of Registrant and Applicant need

³ Registered December 12, 2006; Section 8 Affidavit accepted, Section 15 Affidavit acknowledged.

⁴ The mark in U.S. Registration No. 3789187, **СЕЛЕБРИТИ** (which transliterates and translates to "CELEBRITY") initially also was cited as a Section 2(d) bar to registration. However, the Examining Attorney, in the Office Action issued January 3, 2013, withdrew the refusal based on that mark.

not be identical or competitive, or even be offered through the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective goods of Registrant and Applicant are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993). The issue here, of course, is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of these goods. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

In making our determination regarding the relatedness of the goods, we must look to the goods as identified in the application and the cited registration. *See Octocom Sys., Inc. v. Houston Computer Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). Applicant's goods are identified as "[a]lcoholic beverages, namely, pre-mixed alcoholic cocktails" and Registrant's goods are identified as "wine." The Examining Attorney has supported the position that the goods are related with various use-based, third-party registrations showing that both pre-mixed alcoholic drinks and wine may emanate from a common source under a single mark. These registrations are as follows:

Registration No. 3418911 for the mark TWIN SHOT for, inter alia, “pre-mixed alcoholic cocktails” and “wines”;

Registration No. 3524912 for the mark COMANDON for, inter alia, “pre-mixed alcoholic beverages” and “wines”;

Registration No. 3890461 for the mark CABRON for, inter alia, “pre-mixed alcoholic liquor cocktails” and “wine”;

Registration No. 3228666 for the mark PIZZA RED for, inter alia, “pre-mixed alcoholic cocktails” and “wine and wine-based beverages”; and



Registration No. 3418911 for the design mark  for, inter alia, “pre-mixed alcoholic cocktails” and “wines.”

While these registrations are admittedly not evidence of use in commerce, they are sufficient to suggest that these goods are ones which might be provided by a single entity and offered to the public under the same mark. *In re Albert Trostel & Sons Co.*, 29 USPQ2d at 1785-1786; *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

The Examining Attorney has also made of record from various websites, e.g, www.canellaspa.it, www.lulub.com, <http://shinnygirlcocktails.com/the-cocktails> and www.arbormist.com, web pages showing that the same entity provides goods of a type identified in Applicant’s application and the cited registration under the same mark. For example, Canella features a pre-mixed alcoholic beverage, namely a Bellini, and sparkling wines both under the mark CANELLA; Lulu B. features alcoholic beverages, such as a Cran Cosmo, Mojito and Chocolate Martini as well as wines, including, pinot noir, chardonnay and pinot grigio under the mark LULU B.;

Arbor Mist features pre-mixed frozen cocktails, including, daiquiri and piña colada as well as wines, namely, pinot noir, chardonnay and pinot grigio under the mark ARBOR MIST; and Skinny Girl features ready-to-serve cocktails such as mojito, cosmo and piña colada, as well as wines, namely moscato, California rose and California red under the mark SKINNY GIRL.

The Examining Attorney also introduced drink recipes taken from various websites to show that the goods are similar and complementary in that wine can be used as an ingredient in pre-mixed alcoholic cocktails. In this regard in terms of purpose or function, consumers would likely consume pre-mixed alcoholic cocktails under similar circumstances. For example, the websites Yummly (www.yummly.com) features a recipe for “Red Wine Punch” that includes red wine and margarita mix; Drink Mixer (www.drinks.mixer.com) features a recipe for “80’s Wine Cooler” that includes wine, soda and fruit juices; Avalon Wine.com (www.avalonwine.com/champagne-cocktail-recipe.php) includes a “Champagne Cocktail” recipe made with champagne, angostura bitters and sugar cube; and Bon Appetit (<http://prod.bonappetit.com/recipes>) features a recipe for “Cava Sangria” which includes a bottle of brut cava, orange liqueur and rose water.

Based on the nature of the goods, the third-party registrations and Internet evidence, we conclude that Applicant’s pre-mixed alcoholic cocktails are closely related to Registrant’s wine, such goods all being alcoholic beverages that are often sold by the same source and under the same mark, and complementary in that they may be used alone or together to make unique cocktails.

Applicant concedes that the parties' respective goods may be somewhat related by virtue of their classification as alcoholic beverages, but argues that the Examining Attorney has overstated their similarity and has submitted insufficient evidence to support a likelihood of confusion. For reasons stated, we disagree.⁵ Applicant also asserts that "there are no existing registered marks containing the word 'Cellar' that also include any of the following words within their mark descriptions: 'cocktail,' 'sour,' or 'mixed,' ... [whereas] Applicant has cited numerous examples of registrations for 'CELLAR'-based marks that are limited exclusively to 'wine.'"⁶ Br. p. 4. This, Applicant asserts evidences a general understanding that wine and pre-mixed sour cocktails are not closely related" Br. p. 6. The Examining Attorney responded that he had no opportunity to make such evidence of record because Applicant did not raise this argument until its brief. While the argument could have been raised sooner, the absence of such evidence does not diminish our finding that the goods are related; the record clearly supports such a finding. Last, Applicant, asserting that there is no *per se* rule that mandates all alcoholic beverages be deemed similar goods, questions the probative value of the cases cited by the Examining Attorney wherein other alcoholic beverages were found to be similar. Although we appreciate the value of precedential decision, we recognize

⁵ Moreover, Applicant is simply mistaken in its assertion that the Examining Attorney failed to include third-party registrations showing that both pre-mixed alcoholic beverages and wine emanate from a common source under a single mark. Further, as set out with particularity above, the Examining Attorney included both third-party registrations and Internet evidence to support his position that the goods are related.

⁶ As noted, *infra*, the word "CELLAR" has descriptive significance in relation to wine. As such, it is not surprising that numerous marks for "wine" include this term.

that each case must be decided on its own facts. *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). We accordingly have based our findings regarding the relatedness of the goods on the facts and evidence herein.

We note next that in the absence of any limitations in the application as to channels of trade and classes of purchasers, we must presume that Applicant's pre-mixed alcoholic cocktails will travel in all the normal trade channels for such goods, such as the same package stores, bars or restaurants in which Registrant's wine is or will be sold, and to all normal classes purchasers for such goods, including ordinary consumers frequenting those package stores, bars and restaurants. *See In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). We thus find that, at a minimum, the channels of trade and the classes of purchasers overlap.

With respect to the Examining Attorney's contention that absent restrictions in the Cited Mark's registration, the goods are presumed to travel in the same channels of trade, Applicant argues:

[T]he Cited mark's registration is indeed restricted – namely to “Wine.” Applicant's Mark is limited to “pre-mixed alcoholic cocktails.” Therefore it cannot be concluded that both goods necessarily travel within the same channels of trade, especially given that wines and spirits are oftentimes not sold in the same retail space.

While Applicant is correct that the identifications in its application and the cited registration differ as to the goods listed therein, neither identification includes language limiting the trade channels in which the goods are available or, for that matter, the consumers to whom the goods are promoted and sold.

We turn then to a consideration of the first du Pont factor, the similarity or dissimilarity of the marks. In making our determination, 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 Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005), quoting *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567. “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

We find that Applicant’s THE CELEBRITY SOUR mark is substantially similar to the cited CELEBRITY CELLARS mark. Although we must compare the marks in their entireties, one feature of a mark may be more significant than another and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985) (“There 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 entireties. Indeed, this type of analysis appears to be unavoidable.”). For instance, as our primary reviewing court has observed, “[t]hat a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of the mark.” *In re National Data Corp.*, 224 USPQ at 751.

In this case, the mark in the cited registration consists of two words, the first being the word CELEBRITY, which appears to have no particular meaning in connection with the recited goods. The second word, CELLARS, is merely descriptive in relation to Registrant’s identified goods as it is defined, in relevant part, as “a wine cellar”⁷ or a stock of wines.”⁸ As previously noted, there are numerous registrations of record for marks that include the term “Cellar” for “wine,” with that term disclaimed. As such, the term CELLARS would not be looked to by consumers as source identifying. Accordingly, the dominant and distinguishing portion of the cited mark is the term CELEBRITY.

Applicant’s mark consists of the wording THE CELEBRITY SOUR. The word SOUR in applicant’s mark also has been disclaimed, as it merely describes one of the four basic taste sensations and, especially as regards alcoholic beverages, “a

⁷ The American Heritage Dictionary of the English Language (www.ahdictionary.com/search.html?q+cellar). The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

⁸ Merriam-Webster Online Dictionary (www.merriam-webster.com/dictionary/cellar).

cocktail made of liquor (especially whiskey or gin) mixed with lemon or lime juice and sugar,”⁹ e.g., a whiskey sour, and likewise would not be looked upon as a source-identifying element. In addition and contrary to Applicant’s assertion, the addition of the definite article “THE,” at the beginning of its mark fails to distinguish Applicant’s mark from the cited mark. *See In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009) (“The addition of the word ‘The’ at the beginning of the registered mark does not have any trademark significant.”); *In re The Place Inc.*, 76 USPQ2d 1467, 1468 (TTAB 2005) (definite article THE is a non-distinctive term that adds no source-indicating significance to the mark as a whole); *In re Narwood Prods., Inc.*, 223 USPQ 1034, 1034 (TTAB 1984) (noting the insignificance of the word “the” in comparison of THE MUSIC MAKERS and MUSICMAKERS).

For these reasons, even though Applicant’s and Registrant’s marks contain different wording, because of the descriptive nature of the term SOUR in Applicant’s mark and the word CELLARS in the registered mark, as well as the non-source-identifying significance of the article “the” in Applicant’s mark, and the lesser weight to which these terms are entitled as we compare the marks in their entireties, Applicant’s mark and the registered mark are substantially similar in sound, appearance, connotation and commercial impression. We are not persuaded by Applicant’s argument that the commercial impression of the marks differ. As stated, the word “CELEBRITY” is arbitrary as it regards alcoholic beverages and, given the complementary and related nature of the goods, it is highly likely that

⁹ www.vocabulary.com/dictionary/sour, attached to the May 30, 2012 Office Action.

purchasers of wine who are familiar with Registrant's mark may view Applicant's mark as a variant thereof, and that such mark identifies a signature wine-based cocktail.

Thus, the factor of the similarity of the marks strongly favors a finding of likelihood of confusion.

Last, Applicant argues that evidence shows that consumers of alcoholic beverages have a level of sophistication that enables them to distinguish between small differences in marks, even when the goods are identical. As support for its position, Applicant has made of record with its July 2, 2013 Request for Reconsideration various registrations showing marks sharing identical "dominant elements" for alcoholic beverages, and other registrations purportedly evidencing that "consumers are able to readily distinguish between goods¹⁰ of this kind, even when the goods are identical – e.g., THE CHOCOLATE CELLAR (Registration No. 4186268) and CHOCOLATE BLOCK (Registration No. 2974033), both for "wine(s)."¹¹ Br. p. 8. Other examples include:¹²

¹⁰ We presume Applicant meant to use the word "marks" here.

¹¹ The other two CHOCOLATE-formative marks are CHOCOLATE BAR (Registration No. 3932899) for "formula wine that meets the definitions of 'other wine' and 'special natural wine', as those terms are defined in Title 27 of the U.S. Code of Federal Regulations ..." and CHOCOLATE BOX (Registration No. 3602783) for "wine." We find that these two marks have distinct unitary commercial impressions.

¹² Applicant also made of record additional third-party registration with its November 4, 2013 Request for Reconsideration. As regards those submissions, we do not find the Arbor-formative marks (i.e., ARBOR CREST, BEL ARBOR AND CA ARBOR (CA disclaimed)) as similar to one another as we do the marks at issue here. We also find that the term "SKINNY" in the Skinny-formative marks (i.e., FRESH AND SKINNY (Supplemental Register), IVANA B SKINNY, SKINNY TINIS (SKINNY disclaimed), SKINNY VINE, SKINNYGIRL AND SKINNY BITCH) has, unlike the common term "CELEBRITY" in this case, some descriptive significance in relation to the identified wine and alcoholic

- BARREL RANCH (Registration No. 4023995) for “wine,” BARREL THIEF (Registration No. 3274348) for “wine,” FOX BARREL (Registration No. 4206051) for “hard cider” and FOUR BARREL (Registration No. 3705748) for “wine.”
- GOLD TOP (Registration No. 4256356) for “alcoholic cider,” GOLD BRICK (Registration No. 4180588) for “alcoholic beverages except beers,” GOLD LEAF (Registration No. 4115996, GOLD disclaimed) for “brandy spirits” and GOLD VINE (Registration No. 4086535) for “wine.”
- FAMOUS (Registration No. 3763739) for “vodka,” THE FAMOUS GROUSE (Registration No. 1462166) for “scotch,” and THE FAMOUS GATE (Registration No. 1970419) for “wine.”

First, we do not find the CHOCOLATE-formative and BARREL-formative marks as similar to one another as we do Applicant’s mark and the cited registered mark. In addition, the terms “GOLD” and “FAMOUS,” common to the marks in the other two sets of registrations, are somewhat laudatory terms whereas the term “CELEBRITY” in this case is arbitrary for the identified goods. Moreover, the Board is not bound by the prior decisions of other Examining Attorney’s in allowing marks for registration. As just stated, each case must be decided on its own facts. *See In re Nett Designs*, 57 USPQ2d at 1566, (“Even if some prior registrations had some characteristics similar to [applicant’s] application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”); *In re Merrill Lynch, Pierce, Fenner & Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987). In view of the foregoing, we are obligated to assess, and have assessed, the registrability of

beverages, or is used in combination with other matter resulting in unique or unitary marks.

Applicant's mark on its own merits and not simply based on the existence of other registrations.

With regard to sophisticated consumers in general, we point out that even they can be confused as to source where, as here, the marks are substantially similar and the goods related. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) *citing Carlisle Chemical 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."). *See also Refreshment Machinery Inc. v. Reed Industries, Inc.*, 196 USPQ 840, 843 (TTAB 1977) (selling to a sophisticated purchaser does not automatically eliminate the likelihood of confusion because "[i]t must also be shown how the purchasers react to trademarks, how observant and discriminating they are in practice, or that the decision to purchase involves such careful consideration over a long period of time that even subtle differences are likely to result in recognition that different marks are involved").

After careful consideration of the arguments and the evidence of record, even if not particularly addressed herein, we conclude that with substantially similar marks used on similar goods in overlapping channels of trade, purchasers familiar with Registrant's wine, sold under the mark CELEBRITY CELLARS would be likely to believe, upon encountering Applicant's mark THE CELEBRITY SOUR for pre-mixed alcoholic beverages, that the goods originate from or are associated with or sponsored by the same source.

Decision: The refusal to register Applicant's mark THE CELEBRITY SOUR under Section 2(d) of the Trademark Act is affirmed.