

This Opinion is not a
Precedent of the TTAB

Mailed: December 4, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board

—
In re Brent Theyson

—
Serial No. 85663894

—
Matthew H. Swyers of The Trademark Company,
for Brent Theyson.

Karen K. Bush, Trademark Examining Attorney, Law Office 108,
Andrew Lawrence, Managing Attorney.

—
Before Bergsman, Greenbaum and Gorowitz,
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Brent Theyson (“Applicant”) seeks registration on the Principal Register of the mark CAOS (in standard characters) for “tequila” in International Class 33.¹

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, when used on or in connection with the identified goods, is likely to cause confusion with the standard character marks CHAOS ON THE ROCKS

¹ Application Serial No. 85663894 was filed on June 28, 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.

and CHAOS COCKTAILS, both for “alcoholic mixed beverages except beers” in International Class 33.²

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. Applicable Law

Our determination of the issue 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 Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905 (Fed. Cir. 2012); and *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or 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.”).

A. The Similarities and Dissimilarities Between the Marks

We begin by comparing Applicant’s mark CAOS with Registrant’s marks CHAOS ON THE ROCKS and CHAOS COCKTAILS in their entirety in terms of

² Reg. No. 4280432 for CHAOS ON THE ROCKS registered on January 22, 2013. Reg. No. 4335600 for CHAOS COCKTAILS registered on May 14, 2013 with COCKTAILS disclaimed. The registrations are owned by a single registrant.

sound, appearance, meaning and commercial impression. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). “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) (internal citation omitted). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Binion*, 93 USPQ2d 1531 (TTAB 2009); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). In this case, because the goods at issue are “tequila” and “alcoholic mixed beverages except beers,” the average purchaser is an ordinary consumer.

Our analysis cannot be predicated on dissection of the involved marks. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014). Rather, we are obliged to consider the marks in their entirety. *Id.* *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). Nonetheless, 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 a consideration of the marks in their entirety. *Stone Lion*, 110 USPQ2d at 1161. For instance, as our principal

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.” *See In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant argues that the differences in the marks in appearance and pronunciation are sufficient to distinguish them, and that the marks create different commercial impressions. The Examining Attorney focuses on the aural similarities between Applicant’s mark CAOS and the word CHAOS, which she contends is the most distinctive portion, and therefore the strongest source identifying element, of each of Registrant’s marks. The Examining Attorney also contends that the marks create similar overall commercial impressions.

In this case, we find that CHAOS is the dominant and most significant feature of Registrant’s marks CHAOS COCKTAILS and CHAOS ON THE ROCKS. We reach this conclusion not only because CHAOS appears first in each mark (*see Palm Bay*, 73 USPQ2d at 1692 (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label)), but also because it has stronger source-identifying significance than the other elements of Registrant’s marks. “Cocktail,” which is defined as “an iced drink of wine or distilled liquor mixed with flavoring ingredients,” is highly descriptive, if not generic, of Registrant’s identified “alcoholic mixed beverages except beers,” and appropriately has been disclaimed. Similarly, when referring to “a beverage, especially liquor or a cocktail” such as Registrant’s

identified goods, the idiom “on the rocks” means “with, or containing, ice cubes,” and therefore is descriptive of the manner in which Applicant’s identified goods may be served.³ Descriptive matter typically is less significant or less dominant when comparing marks. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (quoting *Nat’l Data Corp.*, 224 USPQ at 752 (the “descriptive component of a mark may be given little weight in reaching a conclusion on likelihood of confusion”)). *See also In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) (“Because ALE has nominal commercial significance, the Board properly accorded the term less weight in assessing the similarity of the marks under *DuPont*. As a generic term, ALE simply delineates a class of goods.”). Thus, although we recognize that Registrant’s marks include the terms COCKTAILS and ON THE ROCKS, we find that consumers are not likely to view these terms as source-distinguishing elements, but rather as the name of the goods (“cocktails”), or the manner in which the goods are served (“on the rocks”).

In addition, although Applicant’s mark is not identical in appearance to either of Registrant’s marks, all three marks are presented in standard character form, and

³ We take judicial notice of the definitions of “cocktail” and “on the rocks” from the *Merriam-Webster* online dictionary www.merriam-webster.com. 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). We note that the Examining Attorney submitted definitions of both terms with the May 1, 2014 Office Action. However, the definitions are from the British rather than American version of the *Collins English Dictionary* and therefore are of little probative value. *See, e.g., In re Heatcon, Inc.*, 1374 n.19 (TTAB 2015); *In re Manwin/RK Collateral Trust*, 111 USPQ2d 1311, 1313 n.18 (TTAB 2014).

“could be used in any typeface, color, or size, including the same stylization actually used or intended to be used by the other party, or one that minimizes the differences or emphasizes the similarities between the marks.” *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1823 (TTAB 2015) (citing *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011).

In terms of how each mark may be spoken, it has often been stated that there is no “correct” pronunciation of trademarks and that consumers may even pronounce a mark differently from that intended by the owner of the mark. *See, e.g., Viterra*, 101 USPQ2d at 1912; *Centraz Indus. Inc. v. Spartan Chem. Co.*, 77 USPQ2d 1698, 1701 (TTAB 2006). Applicant suggests that CAOS is pronounced “khaws.” However, because “chaos” is an actual word, and “caos” and “khaws” are not, we find that consumers are likely to perceive and pronounce CAOS as the word CHAOS, that is, as “kei,as.”⁴

We further find that the marks have similar connotations, and that they create the same commercial impressions. The word “chaos” is defined as “a situation in which everything is confused and in a mess.”⁵ To the extent that “chaos” is suggestive of losing control when drinking alcohol, this term has the same meaning with respect to the alcoholic beverages associated with all three marks. We simply are unpersuaded by Applicant’s unsupported assertions that the connotations of

⁴ www.Macmillandictionary.com attached to May 1, 2014 Office Action.

⁵ *Id.*

Applicant's mark CAOS and Registrant's marks CHAOS COCKTAILS and CHAOS ON THE ROCKS differ.

In view of the foregoing, we find that, when Applicant's mark and Registrant's marks are compared in their entireties, they are sufficiently similar in appearance, sound, connotation and commercial impression that, if used in connection with related goods, confusion would be likely to occur. As such, this *du Pont* factor favors a finding of likelihood of confusion.

B. Similarity of the Goods, Channels of Trade and Consumers

We next consider the goods, channels of trade and classes of consumers. We must make our determinations under these factors based on the goods as they are identified in the registrations and application. *See In re Dixie Rests.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). *See also Stone Lion*, 110 USPQ2d at 1161; *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

As an initial point, Applicant is correct in its observation that there is no *per se* rule that all alcoholic beverages are related; rather, we look to the record to make that determination.⁶ In this case, the record supports a finding that Applicant's

⁶ We note, however, that the Court of Appeals for the Federal Circuit and this Board repeatedly have held various alcoholic beverages to be related. *See, e.g., Chatam Int'l*, 71 USPQ2d at 1947-48 ("Indeed, the goods [tequila and beer or ale] often emanate from the same source because 'both are alcoholic beverages that are marketed in many of the same channels of trade to many of the same consumers.'") (quoting *Majestic Distilling*, 65 USPQ2d at 1204); *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261 (TTAB 2011) (wine related to beer); *Somerset Distilling Inc. v. Speymalt Whiskey Distribs. Ltd.*, 14 USPQ2d

“tequila” is sufficiently related to Registrant’s “alcoholic mixed beverages except beers,” that when sold under a similar mark, confusion is likely.

The record contains three examples of third-party Internet websites listing tequila as a common ingredient in many mixed alcoholic beverages such as the Margarita.⁷ Indeed, tequila is the primary ingredient of the Tequila Sunrise, a mixed alcoholic beverage defined in the *Merriam-Webster* online dictionary as “a cocktail consisting of tequila, orange juice, and grenadine.”⁸ In addition, the Examining Attorney submitted copies of six use-based third-party registrations which include “tequila” and “alcoholic mixed beverages except beer. Some examples are Reg. No. 4070482 for the mark TUKYS, Reg. No. 4306560 for the mark BACKSTAGE PASS, and Reg. No. 4473402 for the mark THE PROOF IS IN THE COCKTAIL!⁹ We find these registrations persuasive evidence that the identified goods are of a kind that may emanate from a single source under a single mark. *See In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). *See also In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

1539 (TTAB 1989) (Scotch whiskey, gin and vodka all closely related); *Bureau Nat’l Interprofessionnel Du Cognac v. Int’l Better Drinks Corp.*, 6 USPQ2d 1610 (TTAB 1988) (cola flavored liqueur related to brandy); *Monarch Wine Co., Inc., v. Hood River Distillers, Inc.*, 196 USPQ 855 (TTAB 1977) (whiskey related to wine).

⁷ www.drinks.seriously.com (“10 Awesome Tequila Cocktails To Make At Home”), www.drinks.mixer.com (“Tequila based short-drink recipes”), and www.allrecipes.com (“Tequila Drinks”), attached to May 1, 2014 Office Action.

⁸ As with “cocktail” and “on the rocks,” we also have taken judicial notice of this dictionary definition. *Red Bull*, 78 USPQ2d at 1377.

⁹ Attached to November 12, 2014 Final Office Action.

The record also contains three examples of on-line liquor stores (Mission Liquors, Worldwide Wine & Spirits, and Virginia.gov ABC Fine Wines & Spirits) that sell tequila and prepared cocktails, including cocktails containing tequila.¹⁰ This evidence supports a finding that the respective goods are related products that will be encountered by the same consumers in the same stores. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69 (TTAB 2009).

Moreover, because there are no limitations or restrictions as to trade channels or classes of purchasers in the respective identifications of goods, we presume that the goods are or would be marketed in all normal trade channels for such goods and to all normal classes of purchasers of such goods. *Stone Lion*, 110 USPQ2d at 1161. *See also Coach Servs.*, 101 USPQ2d at 1723 (absent limitation “goods are presumed to travel in all normal channels ... for the relevant goods.”). The trade channels for both Applicant’s and Registrant’s goods would include online and “brick and mortar” liquor stores, bars and restaurants, and the alcoholic beverages sections of retail outlets. The relevant class of consumers for both goods includes aficionados as well as ordinary consumers who consume alcoholic beverages. *See Somerset Distilling*, 14 USPQ2d at 1542. The evidence from the three third party commercial Internet websites mentioned above confirms that retail liquor stores sell both tequila and alcoholic mixed beverages. Accordingly, we find that the “tequila” identified in the application and the “mixed alcoholic beverages except beers”

¹⁰ Attached to March 5, 2015 Denial of Request for Reconsideration.

identified in the registrations travel in the same channels of trade and are offered to the same classes of consumers. *See Anderson*, 101 USPQ2d at 1920.

Applicant attempts to distinguish the goods identified in the application and registrations by arguing and relying on evidence that Applicant's identified goods are "pure, unadulterated blue agave tequila," while Registrant's identified goods are "low calorie, low carb' vodka cocktail[s], which mix[] vodka with fruit and low calorie sweeteners."¹¹ However, what Applicant and Registrant actually offer under their respective marks is not relevant. We are bound by the identifications of goods in the application and registrations, respectively, and cannot limit the goods to what Applicant's evidence shows them to be. *Stone Lion*, 110 USPQ2d at 1162; *see also In re Thor Tech Inc.*, 90 USPQ2d 1634, 1637-38 (TTAB 2009) ("we must also analyze the similarity or dissimilarity and nature of the goods based on the description of the goods set forth in the application and the registration at issue ... we may not limit or restrict the trailers listed in the cited registration based on extrinsic evidence").

Applicant's arguments regarding purportedly different trade channels, methods of marketing, and consumers for Applicant's and Registrant's identified goods fail for the same reasons. Additionally, we note that in arguing that the trade channels are different, Applicant actually posits that both are sold in retail stores: "The Applicant's CAOS branded premium tequila is sold in retail stores ... the trade

¹¹ 4 TTABVUE 14.

channels of the goods of the cited marks are presumably through its website or in some retail stores.”¹²

Based upon the evidence of record, we find that consumers would believe that Applicant’s “tequila” is closely related to Registrant’s “alcoholic mixed beverages except beers,” and that both types of goods may emanate from a common source.

In view of the above, the *du Pont* factors of the similarity of the goods and the channels of trade favor a finding of likelihood of confusion.

II. Conclusion

We have carefully considered all evidence of record and Applicant’s arguments, even if not specifically discussed herein, as they pertain to the relevant *du Pont* factors. We treat as neutral any *du Pont* factors for which there is no evidence or argument of record.

Because the marks are similar, the goods are related and the channels of trade and consumers overlap, we find that confusion is likely between Applicant’s mark CAOS, and Registrant’s marks CHAOS COCKTAILS and CHAOS ON THE ROCKS.

Decision: The refusal to register under Section 2(d) is affirmed.

¹² 4 TTABVUE 14.