

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

Mailed: February 20, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Roberto Oreste Antonio Busnelli*  
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Serial No. 85830131  
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for Roberto Oreste Antonio Busnelli.

Frank Lattuca, Trademark Examining Attorney, Law Office 109,  
Dan Vavonese, Managing Attorney.

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Before Quinn, Lykos, and Hightower,  
Administrative Trademark Judges.

Opinion by Hightower, Administrative Trademark Judge:

Applicant Roberto Oreste Antonio Busnelli seeks registration on the Principal Register of the mark FINCA AUREA, in standard characters and with FINCA disclaimed, for (as amended) “wine” in International Class 33.<sup>1</sup> The application includes the following translation statement: “The English translation of FINCA AUREA in the mark is GOLDEN VINEYARD.”

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<sup>1</sup> Application Serial No. 85830131, filed January 23, 2013, based on Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). Specifically, registration has been refused on the ground that Applicant's mark, as applied to the goods identified in the application, so resembles the mark AUREA, previously registered in standard characters on the Principal Register for "Grape wine; Red wine; White wine; Wine; Wines" in International Class 33,<sup>2</sup> as to be likely to cause confusion, to cause mistake, or to deceive.

After the Examining Attorney made the refusal final, Applicant appealed. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (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, 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.").

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<sup>2</sup> Registration No. 3540772, issued December 2, 2008; Section 8 declaration accepted August 18, 2014. The registration includes the following translation statement: "The foreign wording in the mark translates into English as GOLDEN."

We first address the similarity of the goods and channels of trade, the second and third *du Pont* factors, respectively. Applicant's goods are "wine." The goods identified in the cited registration are "Grape wine; Red wine; White wine; Wine; Wines." We find that Applicant's goods and registrant's goods are legally identical; in particular, both include "wine," and Applicant's "wine" necessarily encompasses each of the more specifically identified types of wine in the cited registration.

Because there are no limitations as to channels of trade or classes of purchasers in the description of goods in the cited registration, we presume that the registrant's goods move in all channels of trade normal for such goods and are available to all potential classes of ordinary consumers. *See Citigroup Inc. v. Capital City Bank Group, 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). Moreover, because the wines described in the application and the cited registration are legally identical, we must presume that the channels of trade and classes of purchasers are the same. *See American Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011); *see also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion).

In our likelihood of confusion analysis, these findings under the second and third *du Pont* factors strongly support a conclusion that confusion is likely.

We turn next to the *du Pont* likelihood of confusion factor focusing on “the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 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).

Because the similarity or dissimilarity of the marks is determined on the marks in their entirety, our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); 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.”). On the other hand, 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. *In re Nat’l Data*, 224 USPQ at 751. The focus is on the recollection of the average purchaser, who normally retains a

general rather than a specific impression of trademarks. *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1430 (TTAB 2013).

When, as here, marks would appear on goods that are identical in part, “the degree of similarity necessary to support a conclusion of likely confusion declines.” *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007).

The cited mark is AUREA, translated into English as GOLDEN. Applicant’s mark is FINCA AUREA, translated into English as GOLDEN VINEYARD, with FINCA disclaimed.

Applicant’s mark FINCA AUREA begins with a term not included in the cited mark, which somewhat lessens the similarity between the marks. *See, e.g., Century 21 Real Estate Corp.*, 23 USPQ2d at 1700 (stating that consumers will first notice the identical lead word on encountering the marks); *Presto Prods. Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (stating that “it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”). However, Applicant has disclaimed the exclusive right to use FINCA, the lead term in his mark. “Finca” is translated by Applicant as “vineyard,” a term highly descriptive in association with wine.<sup>3</sup> It is well-settled that disclaimed, descriptive matter may have less significance in likelihood of confusion

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<sup>3</sup> The Examining Attorney made of record an English translation of “finca” meaning “property, land, real estate” or “country house, country estate.” May 13, 2013 Office Action at 2 (from the online Collins Spanish-English Dictionary, collinsdictionary.com).

determinations. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on likelihood of confusion.’”) (quoting *In re Nat’l Data*, 224 USPQ at 752); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression”).

Moreover, Applicant’s mark incorporates the registrant’s entire mark, heightening the similarity between the two. *See, e.g., Wella Corp. v. California Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (CALIFORNIA CONCEPT and surfer design for men’s cologne, hair spray, conditioner and shampoo likely to cause confusion with CONCEPT for cold permanent wave lotion and neutralizer); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (VANTAGE TITAN confusingly similar to TITAN for medical diagnostic apparatus); *In re Riddle*, 225 USPQ 630, 632 (TTAB 1985) (RICHARD PETTY’S ACCU TUNE for automotive service centers confusingly similar to ACCU-TUNE for automotive testing equipment).

In his appeal brief, Applicant makes arguments based on the file history of the cited registration.<sup>4</sup> Applicant, however, made neither the file history nor the two registrations he references of record. It is well-established that the Board does not take judicial notice of records residing in the Patent and Trademark Office. *See, e.g.,*

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<sup>4</sup> *See* Appeal Brief at 7-9, 4 TTABVUE at 8-10.

*In re Sela Prods., LLC*, 107 USPQ2d 1580, 1583 (TTAB 2013); *In re Jonathan Drew Inc.*, 97 USPQ2d 1640, 1644 n.11 (TTAB 2011); *Beech Aircraft Corp. v. Lightning Aircraft Co.*, 1 USPQ2d 1290, 1293 (TTAB 1986) (stating that “we do not take judicial notice of application and registration files that reside in the Patent and Trademark Office on the basis of their mere identification in briefs”). Furthermore, it has been noted many times that we must decide each case on its own facts. *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“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 Datapipe, Inc.*, 111 USPQ2d 1330, 1336 (TTAB 2014).

For all of the reasons discussed above, we find Applicant’s mark, considered in its entirety, to be similar to the cited mark. Therefore, the first *du Pont* factor supports a finding that confusion is likely.

We have considered the evidence of record as it pertains to the relevant *du Pont* factors. To the extent that any other *du Pont* factors for which no evidence was presented by Applicant or the Trademark Examining Attorney may nonetheless be applicable, we treat them as neutral. In view of our findings that the marks are similar and the goods are identical and move in the same channels of trade and to the same customers, we find that Applicant’s mark is likely to cause confusion with the mark in cited Registration No. 3540772 when used in association with wine.

**Decision:** The refusal to register Applicant’s mark is affirmed.