

This Opinion is not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re 10 Barrel Brewing, LLC
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Serial No. 86190248
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Andrew Roppel of Holland & Hart LLP,
for 10 Barrel Brewing, LLC.

Anne M. Farrell, Trademark Examining Attorney, Law Office 118,
Thomas G. Howell, Managing Attorney.

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Before Mermelstein, Wellington and Pologeorgis,
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

10 Barrel Brewing, LLC (“Applicant”) seeks registration on the Principal Register of the mark SWILL (in standard characters) for “beer” in International Class 32.¹

The Trademark Examining Attorney refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of

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¹ Application Serial No. 86190248 was filed on February 11, 2014, based upon Applicant’s allegation of use in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming May 2013 as both the date of first use and the date of first use in commerce.

likelihood of confusion with the mark SWELL SWILL (in standard characters) registered on the Principal Register for “wines” in International Class 32.²

When the refusal was made final, Applicant appealed. We affirm the refusal to register.

I. Analysis – Likelihood of Confusion

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 services. *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.”).

A. Comparison of the Marks

We first address 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

² Registration No. 4007300, registered on August 2, 2011.

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 quotation marks omitted).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, 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 entireties. *In re Nat’l Data*, 224 USPQ at 751.

Applicant’s mark is SWILL, and the cited mark is SWELL SWILL. Applicant has merely deleted the term SWELL from its mark. The Examining Attorney, however, has submitted evidence which demonstrates that the term SWELL is likely to be perceived as conceptually laudatory for the goods identified in the cited registration, and therefore a weak indicator of source. Specifically, the Examining Attorney has submitted a dictionary definition that defines the term SWELL as “stylish” or

“excellent.” *See* May 4, 2015, Office Action. As such, the term SWELL is less significant in terms of affecting the overall commercial impression of the cited mark, and renders the word SWILL the more dominant element.

Applicant argues, however, that confusion is unlikely because “the juxtaposition of the terms ‘swell’ and ‘swill’ in the Cited Mark SWELL SWILL produces an incongruity and incorporates alliteration that, when taken together, create a commercial impression that is different and distinguishable from Applicant’s mark SWILL.” Applicant’s Appeal Brief, pp. 2-3. In support, Applicant submitted a copy of dictionary definition showing that “swill” means “liquor or other alcohol of poor quality.”³ Applicant further maintains that this incongruity is further evidenced by the lack of a disclaimer of the descriptive term “swell” in the cited mark. *Id.* at 3. Additionally, Applicant contends that the effect of such an incongruity is that none of the parts of the mark is dominant; instead, the parts of the mark work together to create a meaning that is greater, and different, than the meaning of any individual part. *Id.*

We are not persuaded by Applicant’s arguments. Although the combination of the terms “SWELL” and “SWILL” may be incongruous, there is a very similar connotation in Applicant’s mark to the extent that both marks are characterizing their goods in a

³ Applicant submitted a copy of the dictionary definition with its appeal brief. The definition comes from the American Heritage Dictionary (5th ed. 2015). *See* Applicant’s Appeal Brief. Although the Board generally does not consider evidence submitted for the first time in an appeal brief, *see* Trademark Rule 2.142(d), the Board nonetheless takes judicial notice of the definition submitted by Applicant, particularly since it is appropriate matter for judicial notice and the Examining Attorney has not objected to it. *See In re Tokutake Indus. Co.*, 87 USPQ2d 1697, 1700 n.1 (TTAB 2008).

self-deprecating manner. While “swill” is defined to include both Applicant’s beer and Registrant’s wine to the extent that they may be of poor quality, consumers are likely to perceive the use of the term in both marks as a sarcastic or jestfully mocking reference to the goods. In other words, consumers would not believe that either entity would sincerely suggest that their goods are poor quality. The irony that an entity would identify its own beverage as “swill” is present in both marks. Indeed, the addition of the term SWELL in registrant’s mark may be understood as an accentuation of the ironical suggestion that its wine is “swill” or poor quality. In other words, any incongruity between the terms SWELL and SWILL does not detract from the marks’ overall similar connotations and commercial impressions.

Additionally, Applicant contends that the term SWILL is weak and therefore the cited mark should not be afforded a broad scope of protection. In support of this contention, Applicant has submitted a printout of a third-party registration containing the word “SWILL,” i.e., Registration No. 4361314 for the mark SIR REGINALD’S SWILL and design for “distilled spirits; vodka.”⁴ See August 5, 2014, Response to Office Action.

⁴ The Board notes that Applicant also submitted a copy of Registration No. 4254749 for the mark SWILLHOUSE SAINTS for “short-sleeved or long-sleeved T-shirts; pants; hats; jackets.” This registration is of no probative value since the goods identified therein differ from the goods at issue and thus does not show that the relevant wording, i.e., SWILL, is registered for use in connection with the goods identified in Applicant’s application or the cited registration. Similarly, Applicant’s submission of a pending application for the mark SWILL STREET for “distilled spirits” constitutes evidence only that the application was filed on a certain date; it is not evidence of use of the mark or its registrability. *Nike Inc. v. WNBA Enterprises LLC*, 85 USPQ2d 1187, 1193 n.8 (TTAB 2007).

The weakness of a particular mark is generally determined in the context of the number and nature of similar marks in use in the marketplace in connection with similar goods or services. *See Nat'l Cable Television Ass'n, Inc. v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 1579-80, 19 USPQ2d 1424, 1430 (Fed. Cir. 1991); *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973). Evidence of weakness consisting of a single third-party registration, such as the one submitted by Applicant in this case, is generally entitled to little weight in determining the strength of a mark, because such a registration does not establish that the mark identified therein is in use on a commercial scale in the marketplace or that consumers are accustomed to seeing it. *See AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (C.C.P.A. 1973); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009); *Richardson-Vicks Inc. v. Franklin Mint Corp.*, 216 USPQ 989, 992 (TTAB 1982).

Applicant also cites to certain decisions issued by the Board, by the Board's reviewing court, and various district courts for the proposition that marks which share a common element have nonetheless been found sufficiently different to avoid consumer confusion. We note, however, that the Board must decide each case on its own merits and assess each mark on the record of public perception submitted with each application. *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). Applicant's cases certainly do not suggest that marks which share a common element are always sufficiently different to avoid confusion. Accordingly, the

decisions cited by Applicant do not bind the Board regarding the marks at issue in this particular case. *Id.* (“Even if some prior registrations had some characteristics similar to Nett Designs’ applications, the PTO’s allowance of such prior registrations does not bind the Board or this court.”).

Because Applicant’s mark and the cited mark are similar in connotation and commercial impression, and because both marks share the common term SWILL, we find that consumers are likely to view Applicant’s SWILL mark as a variation of the cited mark SWELL SWILL. Therefore, we find Applicant’s mark to be highly similar to the cited mark.

The first *du Pont* factor thus supports a finding that confusion is likely.

B. Comparison of the Goods, Trade Channels and Consumers

Next we compare Applicant’s and Registrant’s respective goods as they are identified in the application and the cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

The respective goods need only be “related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source.” *Coach Servs., Inc.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). *See also On-line Careline Inc. v. America Online*

Inc., 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984). The issue here 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).

To show that the involved goods are related, the Examining Attorney submitted numerous copies of use-based third-party registrations showing that the same entity has registered a single mark for identifying both "beer," as identified in the application, and "wine," as identified in the cited registration. These include Registration Nos. 3099373, 3396347, 3522339, 3685473, 3771079, 3975642, 3994422, 4136155, 4225891, and 4380436.⁵ Although such registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have some probative value to the extent that they serve to suggest that the goods listed therein are of a kind which may emanate from a single source under a single mark. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988).

The Examining Attorney also submitted the following Internet evidence showing third-parties producing and offering for sale beer and wine under the same mark:⁶

- Excerpt from <http://www.corcoranvineyards.com> showing beer and wine produced and offered under the same mark and marketed and sold to the same class of purchasers.

⁵ See Office Action dated May 20, 2014.

⁶ See Final Office Action dated May 4, 2015.

- Excerpt from www.2witcheswinebrew.com showing beer and wine produced and offered under the same mark and marketed and sold to the same class of purchasers
- Excerpt from www.wagnerbrewing.com and www.wagnervineyards.com showing beer and wine produced and offered under the same mark and marketed and sold to the same class of purchasers; and
- Excerpt from www.oldnorthernstatewinery.com showing beer and wine produced and offered under the same mark and marketed and sold to the same class of purchasers.

As this evidence demonstrates, some breweries or wineries offer both wine and beer under the same mark. This constitutes further evidence that consumers may expect to find both Applicant's and Registrant's goods as identified in the involved application and cited registration as emanating from a common source, and as such, the goods are closely related. Thus, the second *du Pont* factor also weighs in favor of finding a likelihood of confusion.

Next we consider established, likely-to-continue channels of trade, the third *du Pont* factor. Because the identifications in the application and registration for the mark have no restrictions on channels of trade, we must presume that the goods travel in all channels of trade appropriate for such goods, and to all the usual customers of them. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981) (citing *Kalart Co., Inc. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139 (CCPA 1958)). Regardless of the channels of trade actually utilized by Applicant and Registrant, it is common knowledge that both beer and wine can be purchased in liquor stores, online retailers, as well as certain supermarkets. As such, the third *du Pont* factor regarding the

similarity or dissimilarity of established, likely to continue trade channels also favors a finding of likelihood of confusion.

We also note that beer and wine are general consumer products sold to adult members of the general public. *See In re Kyselá Pere et Fils Ltd.*, 98 USPQ2d 1261, 1266-67 (TTAB 2011). As such, the class of purchasers of Applicant's goods and Registrant's goods are identical, or overlap significantly.

We finally turn to the fourth *du Pont* factor, the conditions under which and buyers to whom sales are made, i.e., "impulse" vs. careful, sophisticated purchasing. Applicant contends that purchasers of the types of goods identified in its application are particularly sophisticated and not prone to impulse purchases. *See Applicant's August 5, 2014, response to Office Action.*

While some of the prospective consumers of Applicant's and Registrant's goods may indeed be highly educated and relatively knowledgeable about and exercise some degree of care in their purchasing decisions, this does not mean that all customers for the goods as identified in the application and cited registration are knowledgeable and careful. Because these items, as identified, may be inexpensive and purchased by the public at large, we must assume that the purchasers include casual consumers purchasing relatively inexpensive items. That being said, even assuming that the prospective purchasers are sophisticated and knowledgeable about alcoholic beverages it does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. *See, e.g., Stone Lion*

Capital Partners, 110 USPQ2d at 1163. This fourth *du Pont* factor is therefore neutral.

To the extent that there are any other relevant *du Pont* factors, we treat them as neutral.

II. Conclusion.

Based on all evidence and arguments bearing on the *du Pont* factors, including the evidence and arguments that we have not specifically discussed herein, we conclude that Applicant's mark, as used in connection with the goods identified in the application, so resembles the cited mark as to be likely to cause confusion or mistake, or to deceive under Section 2(d) of the Trademark Act.

Decision: The refusal to register Applicant's SWILL mark is affirmed.