

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

Mailed: May 15, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Waiwera LLC*  
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Serial No. 86310144  
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Gene Bolmarcich of the Law Offices of Gene Bolmarcich,  
for Waiwera LLC.

Joanna Shanoski, Trademark Examining Attorney, Law Office 104,  
Chris Doninger, Managing Attorney.

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Before Wellington, Wolfson and Kuczma,  
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

Waiwera LLC (“Applicant”) seeks registration on the Principal Register of the  
mark GINGERELLA (in standard characters) for

Vodka, Gin, Rum in International Class 33.<sup>1</sup>

The Trademark Examining Attorney has refused registration of Applicant’s  
mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), citing the following  
registration as a bar to registration:

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<sup>1</sup> Application Serial No. 86310144 was filed on June 16, 2014, based upon Applicant’s  
allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the  
Trademark Act.

Registration No. 4483133

Mark: GINGERELLA (standard character)

For: Non-alcoholic ginger based carbonated soft drinks in Class 32<sup>2</sup>

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. Likelihood of Confusion

Our determination under § 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., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). Not all of the *duPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered. *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010). Therefore, we focus our analysis on those factors for which we have evidence or that have been argued by Applicant and the Examining Attorney: similarity of the marks and the relatedness of the goods. *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 USPQ2d 1557, 1560 (Fed. Cir. 2001) (“While it must consider each factor for which it has evidence, the [b]oard may focus its analysis on dispositive factors, such as similarity of the marks and relatedness of the goods.”).

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<sup>2</sup> Registration No. 4483133 issued on February 18, 2014, based on a request for extension of protection pursuant to § 66(a) of the Trademark Act, filed on April 25, 2013, of International Registration No. 1155658 issued on March 22, 2013.

A. Similarity of the Marks

In any likelihood of confusion determination, the marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *E.I. du Pont*, 177 USPQ at 567; *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). Similarity in any one of these elements may be sufficient to find the marks confusingly similar. *In re 1st USA Realty Professionals, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988).

Applicant's GINGERELLA mark is identical to registrant's GINGERELLA mark in appearance and sound. Additionally, the connotations and commercial impressions of the marks do not differ when considered in connection with Applicant's and registrant's respective goods.

Although the marks are identical, Applicant argues that the cited mark is so weak that it has a limited scope of protection for non-alcoholic beverages and this weakness does not extend to Applicant's mark for alcoholic beverages.<sup>3</sup> Applicant contends that GINGERELLA is comprised of:

“the generic word GINGER and the suffix ‘ella’, the definition of which Applicant requests the Board take judicial notice (see *Merriam-Webster Online* defining ‘ella’ as ‘little one resembling – often in generic names’ and *Dictionary.com* defining ‘ella’ as ‘a suffix used as ‘a formative in taxonomic names’ [especially genus names of bacteria: chorella; pasteurilla; salmonella.] (sic). Thus GINGERELLA is nothing more than the noun ‘ginger’ in a form that is common for nouns, denoting a diminutive version or ginger or a taxonomy for ginger.”<sup>4</sup>

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<sup>3</sup> Applicant's Appeal Brief, (“App. Appeal Brf.”) at 13 TTABVUE 4.

<sup>4</sup> App. Reply Brf. 16 TTABVUE 2-3.

Applicant thus concludes that GINGERELLA is highly suggestive and weak, and should not be protected beyond identical goods.<sup>5</sup>

At most, the registered mark is suggestive of a drink containing ginger or having a ginger flavor. Applicant's goods could, likewise, have a ginger flavor or ingredient, and thus the same suggestive connotation would apply to both marks. Additionally, GINGERELLA appears to be a play on the name of the main character from a famous fairy tale, "Cinderella." As such, it would also serve as a suggestive mark.

Even assuming that the GINGERELLA mark is weak, "likelihood of confusion is to be avoided, as much between 'weak' marks as between 'strong' marks, or as between a 'weak' and 'strong' mark." *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974). Moreover, in this case, Applicant's mark is identical to the cited mark.

Noting that the marks are identical, we next consider the similarity of the goods.

#### B. Similarity of Goods

In cases such as this, where Applicant's mark is identical to the cited registered mark, the degree of relatedness between the respective goods that is necessary to support a finding that the goods are related under the second *du Pont* likelihood of confusion factor is less than it would be if the marks were not identical; there need be only a viable relationship between the respective goods. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); *In re Davey Products Party*

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<sup>5</sup> App. Appeal Brf. 13 TTABVUE 4; App. Reply Brf. 16 TTABVUE 3.

*Ltd.*, 92 USPQ2d 1198, 1202 (TTAB 2009); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1636 (TTAB 2009); *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001).

Applicant's goods are "vodka, gin and rum," while registrant's goods are "non-alcoholic ginger based carbonated soft drinks." Applicant maintains that the parties' goods each occupies a "distinct niche" within the broader category of beverages and that the Examining Attorney has failed to demonstrate the goods are related for purposes of likelihood of confusion.<sup>6</sup>

In support of its position, Applicant first contends that the Examining Attorney relies "solely" on five<sup>7</sup> third-party registrations as evidence of the relatedness of the goods.<sup>8</sup> The Examining Attorney asserts that the four third-party registrations individually cover, under the same mark, "soft drinks" or "ginger beer," (a type of ginger based carbonated soft drink)<sup>9</sup> which may include registrant's "non-alcoholic ginger based carbonated soft drinks," and the "Vodka, Gin, Rum" liquors in Applicant's application. Standing alone, these four registrations are not sufficient to prove that the goods are related. However, the goods registered in these four registrations are consistent with the more compelling evidence discussed below showing that the goods are complementary.

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<sup>6</sup> App. Appeal Brf. 13 TTABVUE 5.

<sup>7</sup> The Examining Attorney's Brief relies on four registrations. 15 TTABVUE 13.

<sup>8</sup> App. Appeal Brf. 13 TTABVUE 5.

<sup>9</sup> Ginger ale and ginger beer are commonly understood to be ginger based carbonated soft drinks. See Wikipedia® article regarding ginger ale (11/03/14 Final Office Action, pp. 24-27); website articles from [www.gingeraleauthority.com/ginger-ale-history/](http://www.gingeraleauthority.com/ginger-ale-history/) (11/3/04 Final Office Action, pp. 28-32) and <http://cookieandkate.com/2013/ginger-beer-concentrate/> (11/3/14 Final Office Action p. 48); and Wikipeida® articles about ginger ale and ginger beer (11/17/14 Denial of Request for Reconsideration, pp. 8-15).

The Examining Attorney's primary argument is that Applicant's and registrant's goods are complementary and commonly used together to prepare alcoholic cocktails. To show this, the Examining Attorney submits numerous articles from various websites showing the historical development of ginger based soft drinks, such as ginger ale, specifically noting that drier versions of ginger ale were developed during the prohibition era for the purpose of being used as an alcoholic beverage mixer.<sup>10</sup> Over the years, well-known cocktails have been made with ginger ale (and ginger beer), including the Moscow Mule, the Foghorn which was first introduced at the Waldorf-Astoria hotel, and the Dark 'N Stormy.<sup>11</sup>

The record also includes copies of numerous cocktail recipes for alcoholic drinks made with vodka, gin or rum, mixed with ginger based carbonated soft drinks, from a variety of websites.<sup>12</sup> Additionally, the producers of the ginger based carbonated soft drinks intentionally market their goods for the purpose of making cocktails by mixing their soft drinks with vodka, gin or rum.<sup>13</sup> This marketing which promotes mixing ginger based carbonated soft drinks with vodka, gin or rum to prepare

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<sup>10</sup> See website evidence including: Wikipedia® entry and articles about ginger ale at [http://en.wikipedia.org/wiki.Ginger\\_ale](http://en.wikipedia.org/wiki/Ginger_ale); [www.gingeraleauthority.com/ginger-ale-mixers/](http://www.gingeraleauthority.com/ginger-ale-mixers/) and [www.barmano.com](http://www.barmano.com) (11/17/14 Denial of Request for Reconsideration, pp. 8-11, 29-33 and 52-53).

<sup>11</sup> See [http://cocktails.about.com/od/cocktailrecipes/r/mscw\\_mule.htm](http://cocktails.about.com/od/cocktailrecipes/r/mscw_mule.htm), <http://cocktails.about.com/od/ginrecipes/r/Foghorn.htm>, (from 9/24/14 Office Action, pp. 9-12 and 23-25); and <http://www.blenheimgingerale.com/category/cocktails/> and <http://cookieandkate.com/2013/ginger-beer-concentrate/> (from 11/3/14 Final Office Action, pp.42-43, 44-45, 51).

<sup>12</sup> See attachments to 9/24/14 Office Action and 11/17/14 Denial of Request for Reconsideration.

<sup>13</sup> See attachments to 11/3/14 Final Office Action pp. 37-46 and 11/17/14 Denial of Request for Reconsideration pp. 35-37, 38-39, 99, 113-121.

alcoholic beverages, confirms the complementary relationship of such products in the minds of consumers. Applicant itself recognizes that “ginger ale and alcohol are often mixed to make cocktails.”<sup>14</sup>

Where the evidence shows that the goods at issue have complementary uses, and thus are often used together or otherwise purchased by the same purchasers for the same or related purposes, such goods have generally been found to be sufficiently related such that confusion would be likely if they are marketed under the same or similar marks. *See Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984) (holding bread and cheese to be related because they are often used in combination and noting that “[s]uch complementary use has long been recognized as a relevant consideration in determining a likelihood of confusion”); *In re Davia*, 110 USPQ2d 1810, 1816 (TTAB 2014) (the recipes submitted by the examining attorney show that pepper sauce and agave nectar are complementary since, in preparing certain foods and beverages, where the combination of sweet and hot flavors is common, pepper sauce and agave nectar are frequently blended together for flavor).<sup>15</sup>

### C. Conclusion

We have carefully considered all of the evidence, as well as all of the arguments related thereto, including any evidence and arguments not specifically discussed in

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<sup>14</sup> App. Appeal Brf. 13 TTABVUE 9.

<sup>15</sup> Exam. Atty. Brf. 15 TTABVUE 5.

this opinion. To the extent that any other *du Pont* factors for which no evidence or argument were presented may nonetheless be applicable, we treat them as neutral.

Based on the identity of the marks and the complementary relationship of the goods of Applicant and registrant, we find that purchasers familiar with registrant's non-alcoholic ginger based carbonated soft drinks offered under the mark GINGERELLA would be likely to mistakenly believe, upon encountering Applicant's mark GINGERELLA for vodka, gin and rum, that the goods originate from or are associated with or sponsored by the same entity.

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