

This Opinion is not a  
Precedent of the TTAB

Mailed: May 11, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re 730 Rue Bienville, L.L.C.*

—  
Serial No. 86351471

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Mackenzie D. Rodriguez of Garvey, Smith, Nehrbass & North, L.L.C.  
for 730 Rue Bienville L.L.C.

Brian P. Callaghan, Trademark Examining Attorney, Law Office 108,  
Andrew Lawrence, Managing Attorney.

—  
Before Bergsman, Ritchie, and Goodman,  
Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

730 Rue Bienville L.L.C. (“Applicant”) seeks registration on the Principal Register of the mark shown below for services identified as “bar and restaurant services provided in a hotel,” in International Class 43:<sup>1</sup>

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<sup>1</sup> Application Serial No. 86351471 was filed on July 29, 2014, under Section 1(a) of the Trademark Act, alleging dates of first use and first use in commerce on December 18, 2012, and disclaiming the exclusive right to use the terms "EST. 1933" AND "LA LOUISIANE" apart from the mark as shown.



The description of the mark states:

The mark consists of a tan circle outlined in black with black block letters as follows inside the circle: the words "EST. 1933" in smaller font at the top of the circle, "21" in larger font below that with the word "THE" over the letters "ST" to the right of the "21" all over the word "AMENDMENT" in medium-sized font, and the words "LA LOUISIANE" at the bottom of the circle in smaller, black, script font. The color(s) tan and black is/are claimed as a feature of the mark.

The application further contains a translation statement: The English translation of "LA LOUISIANE" in the mark is "LOUISIANA."

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 that Applicant's mark, when applied to the identified services, so resembles the previously registered marks both owned by the same registrant, 21<sup>st</sup> AMENDMENT,<sup>2</sup> in standard character format, for "ale; beer," in International Class 32 and "restaurant services; brewpub services," in International Class 43, and for 21<sup>st</sup> AMENDMENT,

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<sup>2</sup> Registration No. 3443843, issued June 10, 2008. Sections 8 and 15 affidavit accepted and acknowledged.

and design,<sup>3</sup> as shown below, for “brewery services,” in International Class 40 and “full service restaurant services,” in International Class 42, as to be likely to cause confusion, mistake, or to deceive:



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 of the issue of likelihood of confusion is based on an analysis of all 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 Majestic Distilling Company, 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 and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). *See also In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). We consider the *du Pont* factors for which there were arguments and evidence. The others, we consider to be neutral.

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<sup>3</sup> Registration No. 2520791, issued December 18, 2001. Renewed.

For purposes of our likelihood of confusion analysis, we focus on Registration No. 3443843, for 21<sup>st</sup> AMENDMENT in standard character format, which we find to be the most relevant for our *du Pont* analysis. Accordingly, if we find a likelihood of confusion as to this cited registration, we need not find it as to the other. On the other hand, if we don't reach that conclusion, we would not find it as to the other cited registration. *See In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

#### Services/Channels of Trade

We consider first the similarity or dissimilarity of the services. Applicant identifies “bar and restaurant services provided in a hotel.” This is a subset of the “restaurant services” identified in the cited registration. The services thus overlap and are identical-in-part.

Because the services described in the application and in the cited registration are in part identical, we must presume that the channels of trade and classes of purchasers are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion). In short, what Registrant defines as a “restaurant services” may include venues that are restaurant services provided in hotels, and may include the same consumers as those of Applicant.

#### Strength of the Mark

Applicant argues that the shared term “21<sup>st</sup> AMENDMENT” is weak and that consumers will recognize subtle differences between the marks due to the number

and nature of similar marks in use on similar goods. *See Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015); *Promark v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1244 (TTAB 2015) (“Such third-party registrations and uses are competent to show that the common term has an accepted meaning in a given field and that marks containing the term have been registered and used for related goods because the remaining portions of the marks may be sufficient to distinguish the marks as a whole from one another.”).

In particular, Applicant argues in its brief that “the wording ‘21<sup>st</sup> Amendment’ is currently being used in relation to bar and restaurant services, liquor stores, breweries and/or other alcohol-based businesses.” 7 TTABVUE 5-6. In this regard, Applicant submitted web evidence indicating a bar with the name 21<sup>st</sup> Amendment, and design, in Boston, Massachusetts; a bar named 21<sup>st</sup> Amendment, in Fayetteville, Arkansas; a bar named 21<sup>st</sup> Amendment, and design, in Indianapolis, Indiana; a bar named The 21<sup>st</sup>, in Lockport, New York; a bar named Roosevelt’s 21<sup>st</sup>, and design, in Bethlehem, Pennsylvania; and the 21<sup>st</sup> Amendment Bar and Grill, in Washington, D.C.; and Amendment XXI and design, a website advertising “Hand-crafted cocktails,” in Huntsville, Alabama. Applicant also submitted evidence of a number of liquor stores named 21<sup>st</sup> Amendment.

As explained on one website, the Twenty-first Amendment to the United States Constitution repealed years of prohibition on drinking alcohol:

BEHIND THE NAME: From 1920 to 1933 the manufacturing, transportation, importing, exporting and sale of alcohol was illegal or restricted by the 18<sup>th</sup> Amendment. This caused an explosion of crime and competition, which overloaded our courts and prisons. People were outraged. During the 1932 Presidential Election, Franklin Delano Roosevelt made his platform about repealing Prohibition and in doing so, won by a landslide. On December 5, 1933 the 21<sup>st</sup> Amendment was ratified and made alcohol legal again.  
<http://roosevelts21st.com>

Based on this evidence, we agree that the term “21<sup>st</sup> Amendment” is somewhat suggestive of the bar and brewpub services at issue in this proceeding. However, the evidence presented is not overwhelming evidence of the weakness of the mark in the cited registration. *Compare Anthony’s Pizza & Pasta Int’l Inc.*, 95 USPQ2d 1271 (TTAB 2009) (evidence of dozens of uses of shared term). We find this sixth *du Pont* factors weighs slightly against finding a likelihood of confusion.

#### The Similarity/Dissimilarity of the Marks

We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). In comparing the marks, we are mindful that the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the services offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d mem.*, No. 92-1086 (Fed. Cir. June 5, 1992).

The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

When, as here, the services at issue are identical in part, the degree of similarity between the marks which is required to support a finding of likelihood of confusion is less than if the services were not identical. *In re Viterra Inc.*, 101 USPQ2d at 1912. The mark in the cited registration is 21<sup>st</sup> AMENDMENT, in standard character format. Applicant's mark is THE 21<sup>st</sup> AMENDMENT EST. 1933 La. Lousiane, and design, as shown below:



The wording "Est. 1933" and "La Louisiane" is descriptive and disclaimed. While it contributes to the commercial impression of the mark, since the mark in the cited registration is registered in standard character form, it may be displayed variably as well. *See Citigroup v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011) ("If the registrant complies with Section 2.52 of the Rules of

Practice in Trademark Cases and obtains a standard character mark without claim to ‘any particular font style, size or color,’ the registrant is entitled to depictions of the standard character mark regardless of style, size, or color, not merely ‘reasonable manners’ of depicting its standard character mark.”). In this regard, we note that the term “21<sup>st</sup> AMENDMENT” constitutes the dominant portion of both marks and that Applicant’s incorporation of the article “the” has no trademark significance. *See In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (“in articulating reasons for reaching a conclusion on the issue of confusion, 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.”); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009) (“[t]he addition of the word “The” at the beginning of the registered mark does not have any trademark significance.”). Although we have found 21<sup>st</sup> AMENDMENT to be somewhat weak, this term, which constitutes the entirety of the mark in the cited registration, is displayed in full in Applicant’s mark as well. *Compare Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 116 USPQ2d at 1131 (marks incorporate different paw print designs); quoting *Juice Generation, Inc. v. GS Enters. LLC*, 115 USPQ2d at 1672 (mark not exact and services didn’t overlap).

In considering the marks in their entireties, we find differences in sight and sound to be outweighed by similarities in commercial impression. We thus find that this *du Pont* factor, too, weighs in favor of finding a likelihood of confusion.

## II. Conclusion on Likelihood of Confusion

On the balance, considering all of the arguments and evidence of record as they pertain to the relevant *du Pont* factors, we find that the services are in-part identical and would therefore travel through the same channels of trade, and that although the term “21<sup>st</sup> AMENDMENT” is somewhat weak, and considering this in light of our precedent, the commercial impression of the marks is similar. Thus, in considering the marks as a whole, there is a likelihood of confusion.

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