Mailed: December 8, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Ram's Gate Winery, LLC
v.
Opal Moon Winery, LLC

Opposition No. 91221205
to application Serial No. 86269296

Charmaine Stainbrook of Stainbrook & Stainbrook LLP for Ram's Gate Winery, LLC.

Robert L. Taylor of JG PC Business & Corporate Law for Opal Moon Winery, LLC.

Before Cataldo, Ritchie and Pologeorgis,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Opposer, Ram's Gate Winery, LLC, has filed a notice of opposition to application Serial No. 86269296[1] owned by Applicant, Opal Moon Winery, LLC, for the mark RAM HORN, in standard characters, for goods identified as "wine" in International Class 33.[2]

[1] Filed on May 1, 2014, seeking registration on the Principal Register based upon Applicant's allegation of its bona fide intent to use the mark in commerce in connection with the identified goods.

[2] 1 TTABVUE 1-7.

Opposer asserts a claim of likelihood of confusion with three pleaded registrations, including Registration No. 4074683[3] for the mark RAM'S GATE in standard characters, for goods identified as "wine, sparkling wine" in International Class 33.[4] Applicant, in its answer, denied the salient allegations in the notice of opposition.[5]

The Record

The record includes the pleadings and, pursuant to Trademark Rule 2.122(b)(1), the file of Applicant's involved application.

Opposer's Evidence

Opposer introduced the following evidence by notice of reliance:[6]

1. Printed copies of its three pleaded registrations showing their current status and title to Opposer;
2. A printed copy of the statement of use and specimen of use from the file of the application underlying Opposer's pleaded Registration No. 4074683;
3. A printed copy of excerpts from a response to Office action and specimens of use from the file of the application underlying Opposer's pleaded Registration No. 4519981; and
4. A printed copy of the specimen of use from the file of the application underlying Opposer's Registration No. 4422392.

Applicant's Evidence

---

[3] Issued on December 20, 2011.

[4] 1 TTABVUE 8-16.

Opposer also pleads ownership of Registration No. 4519981, issued on April 29, 2014 for the mark RAM'S GATE and the design of a ram's head for "wine;" and Registration No. 4422392, issued on December 3, 2013 for the mark RAM'S GATE WINERY SONOMA and the design of a ram's head for "winery services." However, as discussed below, we focus our analysis on Opposer's pleaded Registration No. 4074683.

[5] 4 TTABVUE 1-5.

[6] 7 TTABVUE 1-29.

Applicant introduced the following evidence by notice of reliance:[7]

1. Printed copies of the registration certificate and documents from the file of the application underlying third-party Registration No. 3807445 for the mark RAMSPUR in standard characters for "wine;" and
2. Printed copies of pages from the Internet website of third-party Ramspur Winery (entity related to the owners of Registration No. 3807445), displaying the URL and date upon which the website was accessed.[8]

Standing and Priority

Standing is a threshold issue that must be proven in every *inter partes* case. *See Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) ("The facts regarding standing . . . must be affirmatively proved. Accordingly, [plaintiff] is not entitled to standing solely because of the allegations in its [pleading]."). To establish standing in an opposition, an opposer must show both "a real interest in the proceedings as well as a 'reasonable' basis for his belief of damage." *See Ritchie v. Simpson,* 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999).

In this case, Opposer made of record with its notice of opposition and notice of reliance copies of its pleaded registrations showing their current status and title to Opposer. In view thereof, Opposer has established its standing. In addition, priority is not in issue with respect to the marks and the goods and services set out in its pleaded registrations. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55

[7] 8 TTABVUE 1-24.

[8] The address listed for the owners of third-party Registration No. 3807445 and the address listed on the Internet webpage for Ramspur Winery are the same.

USPQ2d 1842, 1844 (Fed. Cir. 2000); *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Opposer must establish that there is a likelihood of confusion by a preponderance of the evidence. In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). Varying weights may be assigned to each *du Pont* factor depending on the evidence presented. *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011). These evidentiary factors "may play more or less weighty roles in any particular determination." *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687-88 (Fed. Cir. 1993). The relevant *du Pont* factors in the proceeding now before us are discussed below.

We focus our likelihood of confusion analysis on only one of Opposer's marks inasmuch as this mark is the most similar to Applicant's mark: Registration No. 4074683, for the mark RAM'S GATE in standard characters for "wine, sparkling wine" in International Class 33. If we find that there is a likelihood of confusion with this mark, there is no need for us to consider the likelihood of confusion with Opposer's other marks including the wording RAM'S GATE with a design and/or

additional wording. Conversely, if we find there is no likelihood of confusion with this RAM'S GATE mark, we would find no likelihood of confusion with the other marks as they incorporate RAM'S GATE as part thereof. *See In re Max Capital Group Ltd.,* 93 USPQ2d 1243, 1245 (TTAB 2010).

The similarity or dissimilarity of the goods, trade channels and classes of consumers

We first consider the *du Pont* factors regarding the similarity or dissimilarity of the parties' respective goods, their channels of trade and classes of consumers. In making our determination, we must look to the goods as identified in the involved application and Opposer's registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014), quoting *Octocom Sys., Inc. v. Houston Computers Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). Likelihood of confusion must be found if there is likely to be confusion with respect to any goods that comes within the identification of goods in the application and Opposer's registration. *See Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

As indicated above, Applicant's goods are "wine" without restriction as to type, origin or price. Applicant's "wine" is identical to the similarly unrestricted "wine" identified in Opposer's registration. Furthermore, because Applicant's "wine" does not include any limitations as to type, it must be presumed to include Opposer's more narrowly identified "sparkling wine," and thus is legally identical thereto. *See e.g., In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986) (where both

applicant's and registrant's goods were identified as "wine" without limitation, applicant may not attempt to distinguish its wine with extrinsic evidence of higher quality and price).

Given the identity of the goods, we presume that the goods travel through all usual channels of trade and are offered to all normal potential purchasers. *See In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011); *In re Smith & Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994). *See also 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 addition, Applicant concedes that "the goods are effectively the same, and for the purposes of this proceeding, there are no legally relevant differences in the channels of trade."[9]

The identity of the goods, trade channels and purchasers are *du Pont* factors that weigh heavily in favor of a finding of a likelihood of confusion.

Consumer sophistication and market interface

Opposer relies upon decisions from the Federal Circuit, other Courts and this tribunal finding that wine is an ordinary consumer item that may be purchased on

[9] 10 TTABVUE 10.

impulse, *see. e.g., In re Bercut-Vandervoort & Co.*, 229 USPQ at 765, in support of its position that "'lack of consumer sophistication significantly enhances the likelihood of confusion between the two [wine] products.'"[10] *E & J Gallo Winery v. Consorzio del Gallo Nero*, 20 USPQ2d 1579, 1584 (N.D. Cal. 1991). Applicant argues that "[t]here is no evidence regarding [consumer sophistication] in this case, the burden of producing evidence is on the Opposer, and at best, this factor should be considered neutral."[11]

As discussed above, the parties' goods are broadly identified without limitation as to type, origin or price. As such, there is nothing in either party's identification of goods to suggest that the wines and sparkling wines at issue are expensive or available only to discerning purchasers. As a result, the parties' goods are presumed to include wines and sparkling wines at all price points, including inexpensive wines that may be subject to casual or impulse purchase. And even sophisticated purchasers are not necessarily knowledgeable in the field of trademarks or immune from source confusion. *See In re Decombe*, 9 USPQ2d 1812, 1814-1815 (TTAB 1988). *See also In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), citing *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) ("Human memories even of discriminating purchasers...are not infallible."). Moreover, the applicable standard of care is that of the least sophisticated consumer. *Alfacell Corp. v. Anticancer, Inc.*, 71 USPQ2d

[10] 9 TTABVUE 14-5.

[11] 10 TTABVUE 19.

1301, 1306 (TTAB 2004). This *du Pont* factor weighs slightly in favor of a finding of likelihood of confusion.

Actual confusion

Neither party has alleged any instances of actual confusion by consumers as to the source of the goods. But proof of actual confusion is not necessary to show a likelihood of confusion, and its absence is not dispositive. *See Weiss Assocs. Inc. v. HRL Assocs. Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1843 (Fed. Cir. 1990); *Giant Food Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983). This *du Pont* factor is neutral.

Strength of Opposer's Mark and Number and Nature of Similar Marks in Use on Similar Goods

Regarding the strength of the RAM'S GATE mark, Opposer does not assert that it is famous. Rather, Opposer argues that its mark is arbitrary as applied to its goods, that such marks are entitled to a broad scope of protection, and that as a result, "this du Pont factor should weigh in favor of a finding of likelihood of confusion or at a minimum should be considered as neutral."[12] Applicant argues that "with zero evidence, this factor is neutral."[13]

In assessing the overall strength of Opposer's RAM'S GATE mark, we consider both the inherent strength of the term RAM'S GATE based on the nature of the term itself and its commercial strength, based on the marketplace recognition value of the mark. *See Tea Board of India v. Republic of Tea Inc.,* 80 USPQ2d 1881, 1899

[12] 9 TTABVUE 15.

[13] 10 TTABVUE 10.

(TTAB 2006). There is nothing inherent in the term RAM'S GATE to suggest a connection with Opposer's "wine" and "sparkling wine." Furthermore, there is nothing in the record to support a finding that RAM'S GATE suggests a connection with Opposer's wine products. As such, RAM'S GATE appears to be arbitrary and inherently strong as applied to Opposer's goods. Opposer acknowledges there is no evidence of record with regard to the mark's commercial strength.

Applicant argues at some length that third-party Registration No. 3807445 for the mark RAMSPUR in standard characters for "wine" mitigates against a finding of likelihood of confusion. In that regard, Applicant makes the following argument:

> Applicant is not attempting to assert that Opposer's mark is weak. Rather, Applicant is not [arguing] that RAMSPUR is similar to RAM'S GATE, but that it is different from RAM'S GATE in the same manner that RAM HORN is different from RAM'S GATE, to establish that there is no likelihood of confusion between Opposer's mark and Applicant's mark. While it is the case that *Du Pont* factor 6 is generally used to show strength or weakness of the mark, Applicant is using the RAMSPUR registration and use not to show weakness, but to show no likelihood of confusion. …
> Here, the combination of the third party registration prior in time to Opposer that has nearly identical differences with Opposer'[s] mark as Applicant's mark and evidence and evidence [sic] of commercial use makes the RAMSPUR mark relevant and probative. It is no surprise that Opposer did not address a meaningful question -- why would RAM HORN create a likelihood of confusion with RAM'S GATE, especially based on the claim of the dominant RAM overshadowing the rest, when there is a presumption that RAM'S GATE did not create a likelihood of confusion with RAMSPUR, for the same goods/channels of trade?[14]

[14] *Id*. at 21-2.

Neither party introduced any other evidence addressing the strength of Opposer's RAM'S GATE mark or the number and nature of similar marks in use on similar goods.

It has often been said that the "existence of [third party] registrations is not evidence of what happens in the market place or that customers are familiar with them." *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973). *See also Jack Wolfskin Ausrustung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015). Nonetheless, third-party registrations can be used to "show the sense in which a mark is used in ordinary parlance." *Juice Generation, Inc. v. GS Enters. LLC*, 115 USPQ2d 1671, 1674 (Fed. Cir. July 20, 2015); *In re Box Solutions Corp.*, 79 USPQ2d 1953, 1955 (TTAB 2006). In this case, Applicant has introduced evidence of the registration and use of a single third-party registration. The existence of a single registration for RAMPSPUR for "wine" is insufficient to persuade us that Opposer's RAM'S GATE mark is entitled to such a narrow scope of protection as to permit registration of a confusingly similar mark for related goods. *Cf. Jack Wolfskin,* 116 USPQ2d at 1136 (third-party weakness evidence characterized as "voluminous"). Furthermore, on this record we are not privy to the circumstances giving rise to the registration of the third-party RAMSPUR mark or, for that matter, Opposer's subsequently registered RAM'S GATE mark. Finally, as has often been said, we simply are not bound by the decisions of examining attorneys. The Board must make its own findings of fact, and that duty may not be delegated by adopting the

conclusions reached by an examining attorney. *In re Cordura Rests., Inc.*, 119 USPQ2d 1832 (Fed. Cir. 2016); *In re Nett Designs, Inc.*, 57 USPQ2d 1564 (Fed. Cir. 2001); *In re Sunmarks, Inc.*, 32 USPQ2d 1470 (TTAB 1994).

Based on the evidence of record, we find that Opposer's RAM'S GATE mark is an arbitrary and strong mark and entitled to a concomitantly broad scope of protection. This *du Pont* factor weighs in favor of a finding of likelihood of confusion.

The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression

We next consider the marks, comparing them for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *See Palm Bay Imports Inc.*, 73 USPQ2d at 1692. Similarity in any one of these elements is sufficient to support a determination of likelihood of confusion. *See Krim-Ko Corp. v. The Coca-Cola Co.,* 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion"); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988) ("In appropriate cases, a finding of similarity as to any one factor (sight, sound or meaning) alone 'may be sufficient to support a holding that the marks are confusingly similar.'") (citations omitted)).

Because the goods, as discussed above, are virtually or legally identical, the degree of similarity between the marks necessary to find likelihood of confusion declines. *Bridgestone Americas Tire Operations LLC v. Federal Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012); *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012); *Century 21 Real Estate*

Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 1034 (1992).

In this case, Opposer's mark is RAM'S GATE. Applicant's mark is RAM HORN. The parties' marks are similar to the extent that both Opposer's mark and Applicant's mark begin with the nearly identical term RAM'S and RAM. The marks differ to the extent that in Opposer's mark, the wording RAM'S modifies GATE and in Applicant's mark, the wording RAM modifies HORN. There is little, if any, trademark significance in the apostrophe letter "s" in Opposer's mark. *See Winn's Stores, Inc. v. Hi-Lo, Inc.,* 203 USPQ 140 (TTAB 1979) ("little if any trademark significance can be attributed to the apostrophe and the letter 's' in opposer's mark" WINN'S when compared to applicant's mark WIN-WAY). *See also Calvin Klein Industries Inc. v. Calvins Pharmaceuticals Inc.,* 8 USPQ2d 1269, 1271 (TTAB 1988) (the addition of the letter "s" at the end of applicant's mark CALVINS does little distinguish it from opposer's mark CALVIN); *In re Curtice-Burns, Inc.,* 231 USPQ 990, 992 (TTAB 1986) (McKENZIE'S and McKENZIE are nearly identical). When used in connection with wines, RAM'S or RAM are equally arbitrary, and thus they engender the same commercial impression.

We find that the wording RAM'S or RAM in the parties' marks is the dominant feature thereof. This is because the term RAM'S or RAM modifies the term that follows and denotes, respectively, a gate for a ram or the horn of a ram. It is a well-established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood 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 a consideration of the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). In addition, the significance of RAM'S or RAM in the parties' marks is reinforced by its location as the first portion thereof. *Presto Products Inc. v. Nice-Pak Products, Inc.,* 9 USPQ2d 1895, 1897) TTAB 1988) ("It is often the first part of a mark which is most likely to be impressed in the mind of a purchaser and remembered."). *See also Century 21 Real Estate Corp. v. Century Life of America,* 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers must first notice the identical lead word).

Based upon the above analysis, we find that Opposer's RAM'S GATE mark is relatively similar to RAM HORN in appearance and, to a lesser extent, in sound. Recognizing the obvious differences between the last term in the marks, we find that the similarities, particularly in appearance, outweigh the differences, and that the marks convey similar commercial impressions. Put another way, we find that consumers viewing Applicant's RAM HORN mark would believe that Opposer established this mark to denote a different variety of wine, but nonetheless pointing to the same source as its RAM'S GATE mark.

Similarity in any one of the elements of sound, appearance, meaning, or commercial impression is sufficient to support a determination of likelihood of confusion. *See Krim-Ko Corp. v. The Coca-Cola Co.,* 156 USPQ at 526 ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause

confusion"); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988) ("In appropriate cases, a finding of similarity as to any one factor (sight, sound or meaning) alone 'may be sufficient to support a holding that the marks are confusingly similar.'") (citations omitted)).

In view of the foregoing, we find that Applicant's RAM HORN mark is overall more similar to Opposer's registered RAM'S GATE mark than dissimilar. This *du Pont* factor weighs in favor of a finding of likelihood of confusion.

Balancing the factors

After considering all of the applicable *du Pont* factors, we find that Applicant's mark, RAM HORN, for wine is likely to cause confusion with Opposer's RAM'S GATE mark, for virtually and legally identical goods that move through the same channels of trade to the same classes of ordinary consumers. We further find these factors outweigh the registration and use by a single third party of the mark, RAMSPUR, for identical goods.

Decision: The opposition is sustained and registration to Applicant is refused.