

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed:  
Jan. 31, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

---

Trademark Trial and Appeal Board

---

In re Phusion Projects, Inc.

---

Serial No. 77695481

---

Julia M. Chester of Sidley Austin LLP for Phusion Projects, Inc.<sup>1</sup>

Leslie L. Richards, Trademark Examining Attorney, Law Office 106 (Mary I. Sparrow, Managing Attorney)

---

Before Quinn, Grendel and Zervas, Administrative Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

Phusion Projects, Inc. (applicant) seeks registration on the Principal Register of the mark depicted below, for

---

<sup>1</sup> Applicant appointed Ms. Chester as its counsel for this application on December 15, 2010, after the briefing of this appeal. Applicant's prior counsel during prosecution of the application was Gerald E. Helget of Briggs and Morgan, P.A., who filed applicant's appeal brief and reply brief.

goods identified in the application as "high gravity lager beer."<sup>2</sup>



Applicant has disclaimed the exclusive right to use HIGH GRAVITY LAGER apart from the mark as shown.<sup>3</sup>

The Trademark Examining Attorney has issued a final refusal to register applicant's mark on the ground that applicant's mark, as applied to the goods identified in the application, so resembles the mark **EARTHQUAKE**, previously-registered on the Principal Register for goods identified in the registration as "wine,"<sup>4</sup> as to be likely to cause

---

<sup>2</sup> Serial No. 77695481, filed on March 20, 2009. The application is based on applicant's asserted bona fide intention to use the mark in commerce. Trademark Act Section 1(b), 15 U.S.C. §1051(b).

<sup>3</sup> The application includes the following "Description of Mark" statement: "The mark consists of the wording "EARTHQUAKE" with numerous lines criss-crossing through it and with the words "HIGH GRAVITY LAGER" above with the letters "i", "a" and "e" underlined." The application also states that color is not claimed as a feature of the mark.

<sup>4</sup> Reg. No. 3626974, issued on May 26, 2009.

confusion, to cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. 1052(d).<sup>5</sup>

Applicant has appealed the final refusal. The appeal is fully briefed.

After careful consideration of all of the evidence of record and all of the arguments presented by applicant and by the Trademark Examining Attorney (including any evidence and arguments not specifically discussed in this opinion), we affirm the refusal to register.

Our likelihood of confusion 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 the likelihood of confusion issue (the *du Pont* factors). See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir.

---

<sup>5</sup> The Trademark Examining Attorney also has based the Section 2(d) refusal on a second registration owned by the same registrant (Reg. No. 2870160, issued on August 3, 2004), which is of the mark EARTHQUAKE ZIN and design (ZIN disclaimed), for "wine." In deciding this appeal, we need only and shall only base our decision on the cited EARTHQUAKE word mark registration (Reg. No. 3626974). We need not find likelihood of confusion as to both of the cited registrations in order to affirm the Section 2(d) refusal. See *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010); *In re Davey Products Pty Ltd.*, 92 USPQ2d 1198, 1201 (TTAB 2009).

2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

As background for our findings and analysis with respect to the relevant *du Pont* factors in this case, we make the following initial findings of fact.

Applicant's mark includes the words "high gravity lager," and applicant's goods are identified in the application as "high gravity lager beer."

The evidence of record establishes that "lager" is a type of beer, defined in the online MSN Encarta® Dictionary as "a light-colored beer made with a low proportion of hops, usually stored for a period after brewing."<sup>6</sup>

The evidence of record also establishes that "high gravity beer" is a type of beer. When used in connection with beer,

High Gravity simply means specialty craft beers with an increased weight of sugar and gravity "pull" in the fermentation process. They are higher in alcohol because they contain more sugar and other ingredients at the start of the brewing process. High gravity beers are not crafted with the sole intent of a higher alcohol content. The higher percentage of alcohol is due to the different ingredients used because brewers are trying to create complex, flavorful and unique beers. High gravity beers are meant to be sipped and appreciated, even paired with foods like wine. They're more expensive than beers that are mass-produced, but with these beers it's about

---

<sup>6</sup> June 16, 2009 Office action.

quality, not quantity. ... Some of the styles of beer that are considered high gravity are already quite popular in the states, such as, India Pale Ale, bocks, imperial stouts, barley wine, and many Belgium beers to name a few.<sup>7</sup>

Based on this evidence, we find that "high gravity lager beer" is a type of beer, as is reflected in applicant's identification of goods. We find that the (disclaimed) wording HIGH GRAVITY LAGER in applicant's mark is a generic term as applied to applicant's "high gravity lager beer."

Having made these initial findings with respect to applicant's goods and the significance of the words HIGH GRAVITY LAGER appearing in applicant's mark, we turn now to our findings and analysis with respect to the *du Pont* likelihood of confusion factors which are relevant to this case.

Initially, it is settled that "[i]n any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services." *In re Max Capital Group Ltd.*, *supra*, 93 USPQ2d 1243 at 1244. "While it must consider each factor for which it has evidence, the Board may focus

---

<sup>7</sup> Quoting from an August 3, 2007 internet article, "What is High Gravity Beer?". This article is from the website [www.associatedcontent.com](http://www.associatedcontent.com), attached to the June 16, 2009 Office action.

its analysis on dispositive factors, such as similarity of the marks and relatedness of the goods." *Han Beauty Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 USPQ2d 1557, 1559 (Fed. Cir. 2001). See also *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1357, 192 USPQ 24 (CCPA 1976).

We begin with the first *du Pont* factor, under which we determine the similarity or dissimilarity of applicant's mark and the cited registered mark when they are viewed in their entireties in terms of appearance, sound, connotation and overall commercial impression. See *Palm Bay Imports, Inc.*, *supra*, 73 USPQ2d 1689, 1692.

The test, under the first *du Pont* factor, 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 that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).<sup>8</sup>

---

<sup>8</sup> See also *In re Association of the United States Army*, 85 USPQ2d 1264, 1269 (TTAB 2007); *Fort James Operating Co. v. Royal Paper Converting Inc.*, 83 USPQ2d 1624, 1628-29 (TTAB 2007); *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1660 (TTAB 2002); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1468 (TTAB 1988).

Furthermore, although the marks at issue must be considered in their entirety, it is well-settled that one feature of a mark may be found to be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004); *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Applying these principles in the present case, we find as follows.

First, we find that the dominant feature in the source-indicating significance of applicant's mark is the word EARTHQUAKE. EARTHQUAKE obviously dominates the mark visually because it is depicted in lettering that is many times larger than the other wording in the mark, HIGH GRAVITY LAGER. Moreover, EARTHQUAKE is an arbitrary term as applied to applicant's goods, while, as noted above, the (disclaimed) term HIGH GRAVITY LAGER is generic as applied to applicant's "high gravity lager beer." HIGH GRAVITY LAGER merely informs purchasers what the goods are; it contributes essentially nothing to the mark's significance and function as a source-indicator for those goods. In a case very similar to the present case, the Federal Circuit

Court of Appeals (our primary reviewing court) found that "[b]ecause ALE [in the mark GASPAR'S ALE for "beer and ale"] has nominal commercial significance, the Board properly accorded the term less weight in assessing the similarity of the marks under *DuPont*. As a generic term, ALE simply delineates a class of goods." *In re Chatam Int'l Inc.*, *supra*, 71 USPQ2d 1944 at 1946.

In short, although we are considering applicant's mark in its entirety, we find for these reasons that EARTHQUAKE dominates applicant's mark and that it thus is entitled to greater weight in our comparison of applicant's mark and the cited registered mark under the first *du Pont* factor.

Comparing the marks in their entireties in terms of appearance, we note first that the cited registered mark EARTHQUAKE is registered in standard character form. Thus, it may be used and displayed by the registrant in any reasonable manner of stylization and lettering. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000). We find that such reasonable manners of stylization and lettering would include what we deem to be the minimally-stylized lettering in which the word EARTHQUAKE appears in applicant's mark. The two marks therefore are legally identical in terms of appearance to that extent. The two marks look dissimilar to the extent

that applicant's mark also includes the much smaller and minimally-stylized wording HIGH GRAVITY LAGER. However, we find that this dissimilarity is greatly outweighed by the visual prominence of the word EARTHQUAKE in applicant's mark. We find that the two marks are similar in terms of appearance when they are viewed in their entireties.

In terms of sound, we find that the marks are identical to the extent that the word EARTHQUAKE sounds the same in both marks, and to the extent that EARTHQUAKE is likely to be pronounced first in applicant's mark. The marks sound dissimilar to the extent that applicant's mark also includes the generic words HIGH GRAVITY LAGER. On balance, we find that these additional words in applicant's mark make the marks somewhat dissimilar in terms of sound, when they are considered in their entireties.

In terms of connotation, we find that the word EARTHQUAKE, which dominates applicant's mark and is the entirety of the cited registered mark, has the same arbitrary meaning in both marks, i.e., a seismic event known as an earthquake. The marks differ in connotation to the extent that applicant's mark adds the generic wording HIGH GRAVITY LAGER, which, however, merely names applicant's goods. We find that this point of difference in meaning is greatly outweighed by the presence in both

marks of the arbitrary word EARTHQUAKE. We therefore find that the marks have similar connotations when compared in their entireties.

Likewise in terms of overall commercial impression, we find that the presence of the arbitrary word EARTHQUAKE in both marks, as the dominant feature of applicant's mark and as the entirety of the cited registered mark, greatly outweighs any dissimilarity between the marks which might result from the mere addition of the generic wording HIGH GRAVITY LAGER to applicant's mark. As noted above, this generic wording adds essentially nothing to the source-indicating significance of the mark; it merely identifies what the goods are. It is the arbitrary word EARTHQUAKE in both marks that will be perceived and recalled by purchasers as the indicator of the source of the goods. We find that the marks, as applied to the goods as they are identified in the application and the cited registration, respectively, have similar overall commercial impressions when considered in their entireties.

When we consider the marks in their entireties in terms of appearance, sound, connotation and overall commercial impression, we find them to be highly similar. Applicant essentially has appropriated the registrant's entire arbitrary mark EARTHQUAKE and has merely added to it

the generic term HIGH GRAVITY LAGER. This does not suffice to distinguish the two marks.<sup>9</sup> The marks might have differences when viewed side-by-side, but as noted above, that is not the test under the first *du Pont* factor. We find that any dissimilarities between the marks which arise from the presence in applicant's mark of the generic and disclaimed wording HIGH GRAVITY LAGER are greatly outweighed by the basic and overriding similarity of the marks which arises from the presence in both marks of the arbitrary word EARTHQUAKE, which is the dominant feature in applicant's mark and the entirety of the cited registered mark.

For these reasons, we find that applicant's mark and the cited registered mark are highly similar. We find that this similarity of the marks under the first *du Pont* factor weighs heavily in support of an ultimate conclusion that confusion is likely.

The second *du Pont* factor requires us to determine the similarity or dissimilarity of applicant's goods and the

---

<sup>9</sup> "While not ignoring the caveat that marks must be considered in their entireties when evaluating the chances of their being confused in the marketplace, where a newcomer has appropriated the entire mark of a registrant, and has added to it a non-distinctive term, the marks are generally considered to be confusingly similar." *In re Denisi*, 225 USPQ 624 at 624 (TTAB 1985) (addition of PIZZA to PERRY'S in PERRY'S PIZZA mark for pizza restaurant services failed to distinguish that mark from registered PERRY'S mark for restaurant services).

registrant's goods as they are identified in the application and in the cited registration, respectively. Applicant's goods are identified as "high gravity lager beer." The goods identified in the cited registration are "wine."

Under the second *du Pont* factor, it is not necessary that the respective goods be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. That is, the issue is not whether consumers would confuse the goods themselves, but rather whether they would be confused as to the source of the goods. The goods need only be sufficiently related that consumers would be likely to assume, upon encountering the goods under similar marks, that the goods originate from, are sponsored or authorized by, or are otherwise connected to the same source. See *In re Rexel Inc.*, 223 USPQ 830, 831 (TTAB 1984).<sup>10</sup>

The Trademark Examining Attorney has submitted printouts of numerous use-based third-party registrations which include both wine and beer in their identifications

---

<sup>10</sup> See also *Black & Decker Corp. v. Emerson Electric Co.*, 84 USPQ2d 1482, 1492 (TTAB 2007); *In re Wilson*, 57 USPQ2D 1863, 1866-67 (TTAB 2001); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991).

of goods.<sup>11</sup> These registrations have probative value to the extent that they suggest that beer and wine are goods which could be marketed by a single source under a single mark. See *In re Association of the United States Army*, *supra*, 85 USPQ2d 1264, 1270; *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, *supra*, 6 USPQ2d 1467, 1470 n.6.

The Trademark Examining Attorney also has submitted<sup>12</sup> printouts from the websites of several wineries which demonstrate that wineries across the country are opening their own microbreweries and brewing and selling a variety of craft beers along with their wines, including high gravity beers such as India Pale Ale, imperial stout, and barley wine.<sup>13</sup>

Finally, the similarity between wine and high gravity beers is demonstrated even more clearly by the 2007 article quoted above at the beginning of our discussion, which states that "[h]igh gravity beers are meant to be sipped and appreciated, even paired with foods like wine."

---

<sup>11</sup> Jan. 15, 2010 final Office action.

<sup>12</sup> Jan. 15, 2010 final Office action.

<sup>13</sup> The 2007 article about high gravity beers, quoted above at the beginning of our discussion, specifically identifies these types of beers as high gravity beers.

Based on this evidence, we find that applicant's and the registrant's goods, as they are broadly-identified in the application and the cited registration, respectively, are similar and related for purposes of the second *du Pont* factor. See *In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719 (TTAB 1992) (finding, based on similar evidence, that "beer" and "sweet wine" are related).

This is especially so given the very high degree of similarity between applicant's and the registrant's respective EARTHQUAKE marks. It is settled that "... the greater the degree of similarity in the marks, the lesser the degree of similarity that is required of the products or services on which they are being used in order to support a holding of likelihood of confusion. ... If the marks are the same or almost so, it is only necessary that there be a viable relationship between the goods or services in order to support a holding of likelihood of confusion." *In re Concordia Int'l Forwarding Corp.*, 222 USPQ 355 at 356 (TTAB 1983).<sup>14</sup> We find that the requisite degree of relatedness of the goods has been established in this case.

---

<sup>14</sup> See also *In re Iolo Technologies LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010); *In re Davey Products Pty Ltd.*, *supra*, 92 USPQ2d 1198, 1202; *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001).

Applicant argues that beer and wine are not related under the second *du Pont* factor because they are specifically different products, and that the only thing they have in common is that they are both alcoholic beverages.

Beer and wine obviously are different products which are unlikely to be confused with each other. However and as noted above, the issue under the second *du Pont* factor is not whether purchasers are likely to confuse the goods, but rather whether they are likely to be confused as to the source of the goods if the goods were to be marketed under confusingly similar marks. In this case, we find that the evidence discussed above establishes that beer and wine are sufficiently related that such source confusion is likely.

As for applicant's contention that the only thing that beer and wine have in common is that they both are alcoholic beverages, the Board and the Federal Circuit repeatedly have found that different types of alcoholic beverages are related for purposes of the second *du Pont* factor, even though their only point of commonality is that they contain alcohol, and even though they are distinguishable from each other and would not be confused for each other. See, e.g., *In re Chatam Int'l Inc.*, *supra*, 71 USPQ2d 1944 (beer and ale related to tequila); *In re*

*Majestic Distilling Co., supra*, 65 USPQ2d 1201 (malt liquor related to tequila); *In re Sailerbrau Franz Sailer, supra*, 23 USPQ1d 1719 (beer related to sweet wine); *Somerset Distilling, Inc. v. Speymalt Whiskey Distribs. Ltd.*, 14 USPQ2d 1539 (TTAB 1989) (scotch whiskey related to distilled gin and vodka); *Shieffelin & Co. v. Molson Cos.*, 9 USPQ2d 2069 (TTAB 1989) (brandy related to malt liquor, beer and ale). While there is no *per se* rule that alcoholic beverages are related under the second *du Pont* factor, see *In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009), we find that the evidence of record in the present case establishes that wine and beer (including high gravity beer) are related goods under the second *du Pont* factor.

Applicant argues that the goods in this case are unrelated because the high gravity lager beer it actually sells in the marketplace is dissimilar and unrelated to the wine that the registrant actually sells in the marketplace. Applicant asserts (although without evidence) that its actual beer is very inexpensive, sold by the can (at \$1.25 per can) primarily to lower-class purchasers who buy the high-alcohol beer for "a quick cheap high." Conversely, applicant contends, the registrant's website (which is of record) shows that registrant's wines cost up to thirty

dollars and are marketed to more affluent wine drinkers who buy wines to be sipped and savored along with good food.

This argument is unavailing. In comparing the goods under the second *du Pont* factor, "...it is the identification of goods that controls, not what extrinsic evidence may show about the specific nature of the goods. ... An applicant may not restrict the scope of the goods covered in the cited registration by argument or extrinsic evidence." *In re La Peregrina Ltd.*, 86 USPQ2d 1645 at 1647 (TTAB 2008). In this case, because the respective goods are identified broadly in the application and in the cited registration, we presume that they encompass all goods of the nature and type identified. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993).<sup>15</sup> We find, for the reasons discussed above, that the respective goods as they identified in the application and in the cited registration are similar and related.<sup>16</sup>

---

<sup>15</sup> See also *Octocom Systems Inc. v. Houston Computers Services Inc.*, 918 F2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009); *In re La Peregrina Ltd.*, *supra*, 86 USPQ2d 1645, 1647; *In re Association of the United States Army*, *supra*, 85 USPQ2d 1264, 1270-71.

<sup>16</sup> More specifically in this regard, the 2007 article quoted above at the start of our discussion shows that high gravity beers include craft beers that, like wine, are meant to be sipped and savored and paired with foods. For that reason and to that extent, the broadly-identified "high gravity lager beer" in applicant's application clearly is similar to the registrant's broadly-identified "wine." Moreover and conversely, even if we

In summary, and for all of the reasons discussed above, we find that applicant's goods as they are identified in the application, and the registrant's goods as they are identified in the cited registration, are similar and related. This similarity of the goods under the second *du Pont* factor supports an ultimate conclusion that confusion is likely.

Under the third *du Pont* factor, we compare the trade channels in which and the classes of purchasers to whom the goods, as they are identified in the application and in the cited registration, respectively, are or would be marketed. Given the absence of any restrictions or limitations as to trade channels or classes of purchasers in the respective identifications of goods, we presume that the goods are or would be marketed in all normal trade channels for and to all normal classes of purchasers of such goods, regardless of what might be their actual trade channels and classes of

---

were to ignore this evidence and assume that "high gravity lager beer" by its nature is limited to inexpensive beer which is purchased for "a quick cheap high," there are no limitations as to the broadly-identified "wine" in the cited registration, so we presume that the registrant's wines would include wines of all types and prices. See *In re Opus One Inc.*, *supra*, 60 USPQ2d 1812, 1817; *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764-65 (TTAB 1986). Such wines would include very inexpensive wines that, like applicant's asserted high-alcohol beer, could be purchased by lower-class purchasers looking for "a quick cheap high." Either way, applicant's attempt to distinguish the respective goods based on their asserted actual natures fails.

purchasers. See *Packard Press Inc. v. Hewlett-Packard Co.*, 227 F.2d 1352, 56 USPQ2d 1351, 1355 (Fed. Cir. 2000); *Octocom Systems Inc. v. Houston Computers Services Inc.*, *supra*, 16 USPQ2d 1783, 1787.<sup>17</sup> We find that in view of the similarities between beer and wine discussed above, the normal trade channels and classes of purchasers for these goods likewise would tend to be similar. Such trade channels would include, e.g., liquor stores and supermarkets. See *In re Sailerbrau Franz Sailer*, *supra*, 23 USPQ2d 1719, 1720. We find that the similarity of trade channels and purchasers under the third *du Pont* factor supports an ultimate conclusion that confusion is likely.

Under the fourth *du Pont* factor (conditions of purchase), we find that beer and wine are ordinary consumer items, not necessarily expensive, that would be purchased by ordinary consumers who would exercise only a normal degree of care in purchasing the goods. There is no evidence in the record to the contrary. We find that the

---

<sup>17</sup> See also *In re Big Pig Inc.*, 81 USPQ2d 1436, 1438 (TTAB 2006); *In re Continental Graphics Corp.*, 52 USPQ2d 1374, 1377 (TTAB 1999); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994); *In re Melville Corp.*, *supra*, 18 USPQ2d 1386, 1388.

conditions of purchase under the fourth *du Pont* factor support an ultimate conclusion that confusion is likely.<sup>18</sup>

Considering and weighing all of the evidence of record as it pertains to the relevant *du Pont* factors in this case, and based especially on our findings under the key first and second *du Pont* factors that the marks are highly similar and that the goods are similar and related, we conclude that a likelihood of confusion exists. We have considered all of applicant's arguments to the contrary, but we are not persuaded by them. To the extent that any doubts might exist as to our conclusion that confusion is likely, we resolve such doubts, as we must, against applicant. See *In re Davey Products Pt. Ltd.*, *supra*, 92 USPQ2d 1198, 1208; *In re Association of the United States Army*, *supra*, 85 USPQ2d 1264, 1275; *In re Opus One*, *supra*, 60 USPQ2d 1812, 1822.

Decision: The refusal to register is affirmed.

---

<sup>18</sup> At best this factor is neutral; it certainly does not weigh in applicant's favor, on this record.