

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Upslope LLC.

Serial No. 77650402

Craig Neugeboren of Neugeboren O'Dowd PC, for Upslope LLC.

Robin S. Chosid-Brown, Trademark Examining Attorney, Law Office
102 (Karen M. Strzyz, Managing Attorney).

Before Bucher, Cataldo, and Ritchie, Administrative Trademark
Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Upslope, LLC ("applicant") filed an application to register
the mark UPSLOPE BREWING COMPANY, in standard character format,
for services identified as "beer; beer, ale and lager," in
International Class 32.¹

The Trademark Examining Attorney refused registration of
applicant's mark under Section 2(d) of the Trademark Act of
1946, 15 U.S.C. §1052(d), on the ground that applicant's mark so

¹ Serial No. 77650402, filed January 15, 2009, pursuant to Section 1(b)
of the Trademark Act, 15 U.S.C. §1051(b), alleging a *bona fide* intent
to use in commerce, and disclaiming the exclusive right to use the
term "BREWING COMPANY" apart from the mark as shown.

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resembles the registered mark UPSLOPE, also in standard character format, for "wines" in International Class 33,² that when used on or in connection with applicant's identified goods, it is likely to cause confusion or mistake or to deceive.

Upon final refusal of registration, applicant filed a timely appeal. Both applicant and the examining attorney filed briefs. For the reasons discussed herein, the Board affirms the refusal to register.

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a 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 Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or 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"). We discuss each of the *du Pont* factors as to which

² Registration No. 3033867, issued December 27, 2005, under 1(a) of the Trademark Act, claiming dates of first use and first use in commerce on September 9, 2004.

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applicant or the examining attorney submitted argument or evidence.

The Marks

We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. The question 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 their entireties that confusion as to the source of the goods or services 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. *In re Jack B. Binion*, 93 USPQ2d 1531 (TTAB 2009); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

The cited registration consists solely of the word UPSLOPE. Applicant's mark incorporates this word and adds the descriptive and disclaimed term "BREWING COMPANY." We find the word UPSLOPE to be arbitrary for both the goods in the cited registration ("wines") and those in the application ("beer, ale and lager"). We therefore find UPSLOPE to be the dominant term in both marks. *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 750 (Fed. Cir. 1985) (descriptive or disclaimed matter is generally considered a less dominant portion of a mark). Therefore, we

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find that the similarities outweigh the differences of the marks as to their sight, sound, connotation, and commercial impression, and this *du Pont* factor weighs in favor of finding a likelihood of consumer confusion.

The Goods and Channels of Trade

Next we consider the similarities or dissimilarities of the goods. In doing so, we keep in mind that the test is not whether consumers would be likely to confuse the goods but rather would be likely to be confused as to their source. *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 unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992).

Applicant cited several cases for the point that alcoholic beverages such as "beer" and "wines" are not *per se* related. *Cf. In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059 (Fed. Cir. 2003) (requiring a showing of "something more" to find likelihood of confusion between beer and restaurant services); *See also In re Opus One Inc.*, 60 USPQ2d. 1812, 1813 (TTAB 2001) (finding restaurant services related to wine with identical mark and "something more"). We agree that this is not an absolute rule, and have accordingly considered the evidence in the record in undertaking our analysis in this case.

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To show the relatedness of the goods, the examining attorney submitted into the record numerous copies of use-based, third-party registrations identifying both "beer," as identified in the application and "wine" or "wines," as identified in the cited registration. These include, among others, Registrations No. 1286155, 1560079, 1553878, 1736692, 2304424, 2219064, and 2341577. Copies of use-based, third-party registrations may serve to suggest that the goods are of a type which may emanate from a single source. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993).

The examining attorney also submitted Internet evidence showing numerous third parties offering for sale both "beer" and "wine" on their websites. This is further evidence that consumers expect to find both "beer," as identified by applicant, and "wines," as identified by the cited registration, emanating from a common source.

Web excerpts include:

Gilly's Craft Beer & Fine Wine: Upcoming Events: 7/25
Snoqualmie (Washington State) Wine Tasting 1-4pm; 8/7
Newcastle Beer Tasting. www.gillysbfw.com.

Cork 57 Beer & Wine: At Cork 57, we offer both new world and old world wine treasures, as well as a large selection of specialty beers. www.cork57.com.

MAIN STREET BEER & WINE: Welcome to the MAIN STREET BEER AND WINE, Gaithersburg's friendliest one-stop neighborhood beer and wine store, conveniently located on Main Street in the Kentlands. We offer good prices and a great selection of Beer and Wine. www.mainstreetbeerandwine.com.

O'SHEA Brewing Company: Beer & Kegs; Kegerators; Home Brewing; Wine Making. www.osheabrewing.com.

VINE PARK: Beer Making; Recipes; Brew Club; Wine Making: Welcome to Vine Park: Vine Park is unique - the only brew-it-yourself-on-the-premises in the Midwest. Since 1995, Vine Park is still the Fun Place to Brew Your Own Beer & Make Your Own Wines! www.vinepark.com.

Saugatuck Brewing Company gets small winemaker license, to serve wine and hard cider: Wine will be flowing at the Saugatuck Brewing Company starting Friday. www.mlive.com May 1, 2009.

Accordingly, we find persuasive the evidence of record showing the close relatedness of "beer" to "wines," including via use-based third-party registrations and Internet content. This evidence is made even more compelling given the strong, arbitrary nature of registrant's mark and the high degree of similarity between the respective marks.

In the absence of specific limitations in the registration, we must presume that registrant's goods will travel in all normal and usual channels of trade and methods of distribution. *Squirtco v. Tomy Corporation*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983); see also *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992) (because there are no limitations as to channels of trade or classes of purchasers in either the application or the cited registration, it is presumed that the services in the registration and the application move in all channels of trade normal for those services, and that the

services are available to all classes of purchasers for the listed services). Since there are no limitations on the channels of trade in applicant's identification of goods either, we must make the same presumption with regard to applicant's goods.

In other words, there is nothing that prevents applicant from offering for sale its beer (once the goods are in use) through the same channels of trade and to the same consumers who purchase registrant's wines, and vice-versa. Accordingly, we find that these *du Pont* factors also weigh in favor of finding a likelihood of consumer confusion.

Consumer Sophistication

Applicant urges us to consider consumer sophistication, arguing that "due to the high price of UPSLOPE wines, the least sophisticated consumer is still far more discerning than the average beer consumer." (Appl's brief at 6). To the extent applicant is attempting to use information from the record to show that the registrant's goods are expensive and that therefore its consumers are sophisticated, that is not particularly useful to our analysis. Rather, we are bound by the parties' respective descriptions of goods. *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("[t]he authority is legion that the question of registrability of an applicant's mark must be

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decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed." [citations omitted]).

Indeed, the record shows glasses of wine being offered for sale for as little as \$5.50. *see www.upstreambrewing.com*. For goods in this price range, consumers often make impulse decisions, and may not stop to think about the difference between the marks. In any event, as identified in the involved application and registration, neither applicant's nor registrant's goods are limited to expensive beers and wines that would be purchased by discerning consumers after much deliberation, and we will not consider such limitations in our analysis herein. Accordingly, we deem this *du Pont* factor to weigh in favor of a finding a likelihood of consumer confusion.

Conclusion

In summary we have carefully considered all of the evidence of record pertaining to the *du Pont* likelihood of confusion factors, as well as applicant's arguments with respect thereto. We conclude that there is a likelihood of confusion between applicant's UPSLOPE BREWING COMPANY mark for "beer; beer, ale and lager" and the registered mark UPSLOPE for "wines."

Decision: The refusal to register is affirmed.