

THIS DISPOSITION
IS NOT CITABLE AS
PRECEDENT OF
THE TTAB

Oral Hearing:
December 5, 2002

Mailed: April 8, 2002
Paper No. 20
CEW

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re AdobeAir, Inc.

Serial No. 75/690,915

Brian W. LaCorte of Gallagher & Kennedy for AdobeAir, Inc.

Benita P. Collier and Michael Baird, Trademark Examining
Attorney, Law Office 109 (Ronald R. Sussman, Managing
Attorney).

Before Cissel, Walters and Bucher, Administrative Trademark
Judges.

Opinion by Walters, Administrative Trademark Judge:

AdobeAir, Inc. has filed an application to register the
mark shown below on the Principal Register for "portable
evaporative air cooling units for domestic and commercial
use."¹

¹ Serial No. 75/690,915, filed April 26, 1999, in International
Class 11, based on use in commerce, alleging first use and use in
commerce as of March 1986.



The Trademark Examining Attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark WHISPERKOOL, previously registered for "wine cellar cooling units,"² that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs and an oral hearing was held. We reverse the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are

Applicant contended that the identified goods are properly classified in International Class 11, although the Examining Attorney classified the goods in International Class 21. In her brief, the Examining Attorney conceded that International Class 11 is the proper classification for these goods.

Applicant also requests that the classification of the goods in the cited registration be changed to International Class 21, which is inappropriate in the context of this ex parte appeal.

Additionally, the Examining Attorney's final action included a final requirement for an acceptable identification of goods. In its brief, applicant amended its identification of goods to adopt the proposed identification and this refusal was withdrawn.

² Registration No. 2,038,529 issued February 18, 1997, to Nordicorp, Inc., in International Class 11; and was transferred by assignment to Vinotheque Wine Cellars Corporation. [Sections 8 and 15 accepted and acknowledged, respectively.]

relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

Regarding the marks, the Examining Attorney contends that the marks are substantially similar because they are pronounced the same; they are visually similar; applicant's "WISPER" is merely a misspelling of the word "WHISPER" which appears in registrant's mark, and registrant's "KOOL" is merely a misspelling of the word "COOL" which appears in applicant's mark; and registrant's mark is registered in typed form, thus, encompassing a design element such as that shown in applicant's mark.

Regarding the goods, the Examining Attorney contends that both applicant's and registrant's goods are "cooling units that produce cool air and control room temperature"; and that applicant's broadly identified portable evaporative air cooling units encompass registrant's identified wine

cellar cooling units. The Examining Attorney contends, further, that, because applicant's identified goods encompass registrant's identified goods, the channels of trade and class of purchasers for the respective products are the same. In support of her position regarding the nature of the goods involved in this case, the Examining Attorney submitted excerpts of articles retrieved from the LEXIS/NEXIS database and excerpts of Internet websites. Finally, the Examining Attorney contends that confusion is likely and asks that any doubt be resolved in favor of the registered mark.

Applicant contends that the marks are different because they appear in different lettering styles with different spelling, and applicant's mark contains a distinctive design element.

Regarding the goods, applicant contends that the goods are entirely different; that registrant's product is a freon-based unit "used for the single purpose of chilling wine bottles in wine cellars," whereas applicant's product is "an evaporative cooler [that] require[s] dry air to be used in conjunction with evaporation of distilled water to produce cool air" and it "is a comfort control device used in residential and commercial settings"; and that, in fact, applicant's product cannot be used to cool a wine cellar

because of the low temperatures and humidity required to maintain a wine cellar.

Applicant contends, further, that the channels of trade and the purchasers of the respective products are different, alleging that its products are sold in home improvement centers, such as Home Depot, to all consumers, while registrant's product is sold to sophisticated wine connoisseurs as part of the careful and expensive purchase and construction of a wine cellar.

In support of its position, applicant submitted the affidavit of Lawrence Hansen, its vice president of research and development, and a copy of the file of the cited registration. Additionally, applicant contends that the evidence submitted by the Examining Attorney supports applicant's position.

We turn, first, to a determination of whether applicant's mark and the registered mark, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression. 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 impressions 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. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well settled that one feature of a mark may 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 National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

We agree with the Examining Attorney that the marks have the identical pronunciation and they are visually similar. There is no evidence in the record about the connotations of the marks, but the plain meanings of the words in the marks creates the suggestion that the products with which they are used reduce the temperature quietly, so the connotation of these visually and auditorily similar marks would be the same. The design element in applicant's mark is minimal, consisting of block-form letters with the words juxtaposed so that the "r" in "Wisper" forms a wavy line above the term "cool." Clearly, the word portion of applicant's mark is dominant, and the spelling differences between this mark and the registered mark are not significant. Further, registrant's mark is in typed form. We conclude that the overall commercial impressions of the

two marks, considered in their entirety, are substantially similar.

Turning to consider the goods involved in this case, we note that the question of likelihood of confusion must be determined based on an analysis of the goods recited in applicant's application vis-à-vis the goods recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Further, it is a general rule that the goods in question need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods are related in some manner or that some circumstances surrounding their marketing are such that the marks used on the goods would be likely to be seen by the same persons under circumstances which could give rise to a mistaken belief that the goods originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

The evidence in the application is directed primarily to the relationship, if any, between the respective goods and the nature of the trade channels and purchasers. Thus, a review of this evidence is appropriate at this point.

Mr. Hansen, in his declaration, described applicant's product, how it operates, and stated that it is used in warm, dry climates to cool spaces; that an evaporative cooler do not maintain a constant temperature and cannot control humidity and, thus, cannot be used in conjunction with a wine cellar. He stated that applicant's products are sold in retail establishments such as Home Depot, Wal-Mart and Sears.

The file of the cited registration includes, as a specimen of use, a brochure/installation guide about registrant's wine cooling units. The brochure/installation guide includes, *inter alia*, the following statements:

Fact: Temperature and humidity play a critical role in the maturation of fine wines. Experts agree that wines age best at 55° to 65°F combined with a relative humidity range of 50% to 70%. Temperature stability is the key factor.

Fact: Standard refrigeration equipment (refrigerators and air conditioners) is not designed for wine storage. These devices are designed to quick-chill and completely dehydrate, despite their temperature setting. ... Refrigerators and air conditioners cannot be adjusted to operate at temperature and humidity levels conducive to the proper aging of fine wines without having completely redesigned refrigerant systems. This is not an owner-adjustable problem.

Conclusion: Serious wine collectors must employ specialized equipment that maintains proper temperature and humidity balance.

...

Wine Storage Experts

Nordicorp's [registrant] 14-plus years of research and development have brought to life many impressive wine storage products. Included in this list are the two most celebrated systems: the Vinothèque® self-contained wine cellar and the WhisperKool® cellar cooling system. No expense has been spared in producing these masterpieces. If you are one of the lucky few who will have the opportunity to own one of these fabulous products, we salute you! You have urged us on, ever motivating us to continue in our quest for the perfect wine cellar.

The articles excerpted from the LEXIS/NEXIS database pertain to wine cellars, including cooling units for wine cellars. The excerpts from the Internet are from web sites devoted to wine collection and wine cellars, including information about cooling units for wine cellars. It is clear from this information that wine cellars, and the components thereof, appeal to a specialized group of wine enthusiasts who collect and store wine; that building a wine cellar is expensive; that the cooling unit is a significant component of a wine cellar; that a wine cooling unit has a single purpose of maintaining the proper temperature and humidity for wine storage in a dedicated enclosed space; and that the cost of wine cooling units varies, but ranges from several hundred dollars (registrant's lowest priced unit is quoted in one excerpt as \$700) to thousands of dollars (e.g.

\$25,000). One web site includes a bulletin board where participants discussed the merits of various brands of wine cooling units. It would appear from this evidence that great care is taken in the purchase of a wine cooling unit.

It is clear from the evidence that applicant's evaporative air cooling unit is very different from a wine cooling unit; and that the products are not interchangeable.³ Further, the evidence in the record indicates that wine cooling units are available from wine specialists rather than through retailers who sell room air cooling devices, such as Sears or Home Depot.

It is true that the wine enthusiasts who are the purchasers of registrant's wine cooling units may also be purchasers of applicant's products. However, there is absolutely no evidence in the record that these two very different products ever come from the same source. Thus, we cannot conclude that relevant purchasers of either product would believe that such products, even if identified by the same or similar marks, would come from a single source or sponsor.

Therefore, we conclude that despite the substantial similarity in the commercial impressions of applicant's mark and registrant's mark, the Examining Attorney has not

³ There is one note on an Internet bulletin board about wine cooling units where an individual indicated that he had used a room air conditioner successfully to cool and store wine; but it appeared to be an isolated reference to such a situation.

Serial No. 75/690,915

established that their contemporaneous use on the very different goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

Decision: The refusal under Section 2(d) of the Act is reversed.