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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Industria Licorera Quezalteca, S.A.

Serial No. 77013941

Jason D. Voight of Hahn & Voight PLLC for Industria Licorera Quezalteca, S.A.

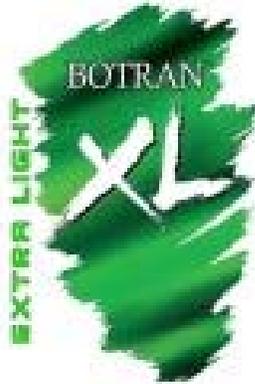
Nakia D. Henry, Trademark Examining Attorney, Law Office 111 (Craig D. Taylor, Managing Attorney).

Before Grendel, Holtzman and Rogers, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

An application has been filed by Industria Licorera Quezalteca, S.A. to register the mark shown below for goods ultimately identified as "distilled spirits, prepared alcoholic cocktail, rum and vodka" in Class 33.¹

¹ Application Serial No. 77013941, filed October 4, 2006, based on an allegation of first use and first use in commerce on October 4, 2006. EXTRA LIGHT is disclaimed. Applicant claims ownership of Registration Nos. 1294811 (BOTRAN for rum); 1658465 (BOTRAN for vodka); and 2692281 (BOTRAN SOLERA 1893 and design for rum). The application includes a description of the mark with color location and the statement "The color(s) green and white is/are claimed as a feature of the mark."



The trademark examining attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark, when applied to applicant's goods, so resembles the registered mark shown below for "whiskey and brandy" (in Class 33) as to be likely to cause confusion.²



When the refusal was made final, applicant appealed. Briefs have been filed.

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

² Registration No. 0860273; issued November 12, 1968; renewed.

the factors bearing on the likelihood of confusion issue. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, however, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods or services. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We turn first to the goods. Applicant's goods, as identified, include "distilled spirits" and "rum and vodka." Registrant's goods are identified as "whiskey and brandy." The goods are in part legally identical. We take judicial notice of the definition of "distilled spirits" as: "*also called **distilled liquor***, alcoholic beverage (such as brandy, whisky, rum, or arrack) that is obtained by distillation from wine or other fermented fruit or plant juice or from a starchy material (such as various grains) that has first been brewed. ...".³ (Italics and bold in original.) Applicant's broadly worded "distilled spirits" is deemed to encompass all distilled spirits including registrant's whiskey and brandy. In any event, rum, vodka,

³ Encyclopædia Britannica (2008) (Encyclopædia Britannica Online (www.eb.com)). The Board may take judicial notice of reference works, including online reference works which exist in printed format or have regular fixed editions. See In re Red Bull GmbH, 78 USPQ2d 1375, 1378 (TTAB 2006).

whiskey and brandy are all basic alcoholic beverages. They are inherently related goods.⁴

Absent any restrictions in the application or registration, we must presume that these alcoholic beverages are sold through all normal channels of trade for those goods and that they will reach all the usual purchasers, including ordinary purchasers. See *Canadian Imperial Bank v. Wells Fargo*, 811 F.2d 1490, 1 USPQ2d 1813, 1814-15 (Fed. Cir. 1987). In other words, we must presume there are no limits on the trade channels and classes of prospective purchasers for applicant's and registrant's alcoholic beverages. See *Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910 (TTAB 2000); and *In re Smith & Mehaffey*, 31 USPQ2d 1531 (TTAB 1994).

The Internet printouts submitted by the examining attorney from the retail websites www.goldrushliquors.com and www.missionliquors.com show that the involved goods can travel in the same channels of trade and prospective purchasers for the goods will be exposed to all the goods and their marks. To the extent the goods of applicant and registrant, for reasons already articulated, must be presumed to be legally identical, then the goods will end up being marketed to the same potential customers.

⁴ The third-party registrations submitted by the examining attorney to show the relatedness of the respective goods have not been considered. The registrations are not based on use in commerce and thus they are entitled to no probative weight. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

In addition prospective purchasers of multiple types of liquor, such as those who might be stocking a bar or who are planning to make certain mixed drinks would be potential customers for all the involved goods.

Furthermore, the ordinary purchaser of relatively low cost, frequently replaced, products such as alcoholic beverages are likely to be less careful in their purchasing decisions, and therefore more prone to confusion. See *Specialty Brands, Inc.*, 748 F.2d 669, 223 USPQ 1281 (Fed. Cir. 1984); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

We turn next to a consideration of the similarity or dissimilarity of the marks (shown below) in their entirety in terms of sound, appearance, meaning and commercial impression.



Applicant argues that the marks feature numerous and significant differences. In particular, applicant notes that registrant's mark contains "what appear to be lions and a coat of arms" whereas applicant's mark contains a "ragged patch design" which appears in the color green; that the letters XL are

arranged vertically in the registration whereas they appear horizontally in the application; and that the style of the letters is different in that applicant's letters feature a "distinctive ragged style," whereas in registrant's mark the letters have "a classic or Roman style." Applicant also points out that its mark contains word elements consisting of its house mark BOTRAN and the term EXTRA LIGHT, that do not appear in registrant's mark. Citing *In re TSI Brands Inc.*, 67 USPQ2d 1657 (TTAB 2002), applicant argues that XL may be perceived as standing for EXTRA LIGHT and that the disclaimed wording EXTRA LIGHT therefore forms a significant part of the mark. In addition, applicant argues that "there is no absolute rule that no one has the right to incorporate the total mark of another as a part of one's own mark."

In comparing the marks we must keep in mind that similarity is not an absolute matter but instead is a matter of degree, and when marks would appear on legally identical or closely related goods, the degree of similarity between the marks necessary to support a finding of likelihood of confusion declines. *Century 21 Real Estate v. Century Life*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

We must also consider that the test under this 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 impressions 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 (TTAB 1975). In addition, while marks must be compared in their entireties, "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 *National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applying the above principles in this case, when we compare applicant's and registrant's marks in their entireties as used on legally identical goods, we find that while there are clearly differences between them, the similarities of the marks outweigh their differences.

We begin by noting that the shared literal term, XL, is a significant component of both applicant's and registrant's marks, albeit even more significant in registrant's mark. We recognize that in analyzing composite "letter" marks, it is important to consider both the literal and visual elements of the marks. See In re *Electrolyte Laboratories, Inc.*, 913 F.2d 930, 16 USPQ2d

1239, 1240 (Fed. Cir. 1990) ("the nature of stylized letter marks is that they partake of both visual and oral indicia. ... [A] stylized letter design cannot be treated simply as a word mark"). Where the letters in a mark are so highly stylized that they are essentially design elements incapable of being spoken, the analysis would turn primarily on the basis of the visual similarity of the marks. See *Textron Inc. v. Maquinas Agricolas "Jacto" S.A.*, 215 USPQ 162 (TTAB 1982). That is not the situation here. In this case, the letters XL are easily recognizable in both applicant's and registrant's marks. The design of the letters is not so extreme or striking that it overwhelms the underlying letters, making them virtually unrecognizable or subordinate to the design. Compare, e.g., *Georgia-Pacific Corp. v. Great Plains Bag Co.*, 204 USPQ 697 (CCPA 1980); *In re Burndy Corporation*, 133 USPQ 196 (CCPA 1962); and *In re Johnson Products Co., Inc.*, 220 USPQ 539 (TTAB 1983). In fact, the stylization of XL is not particularly distinctive or memorable in either mark. Registrant's mark uses a common, Roman block style lettering, and the "ragged style" of the letters in applicant's mark is barely noticeable.

Thus, while "there is no general rule as to whether letters or design will dominate in composite marks" (*Electrolyte Laboratories* at 1240), we find that the letters in this case form the dominant portion of registrant's mark and this portion is

entitled to greater weight in our analysis. While the design surrounding the letters is visually a prominent feature of registrant's mark, it is not so clear what the design represents, and as the only literal portion of registrant's mark, purchasers will rely upon the term XL alone, in calling for or referring to the registrant's whiskey and brandy. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987) (the word portion of a composite word and design mark is generally accorded greater weight because it would be used to request the goods). As for applicant's mark, the letters XL are dominant in that they are the largest and "dead center" in the mark, therefore serving as the visual focal point.

We also point out that the letters, XL, at least on this record, appear to be arbitrary with no meaning at all in relation to registrant's goods. In addition, there is no evidence that XL is commonly used by others in the field, and the examining attorney states that there are no other registered marks containing XL for similar goods.⁵ As a result, registrant's mark

⁵ Applicant, in its response dated February 23, 2007, listed several third-party registrations which allegedly contain the term XL. Applicant argues that these registrations "coexist on the register in the same class of goods," without identifying the goods or the class for which they are registered. Although this evidence is not properly of record since printouts of the registrations were not provided, the examining attorney did not object to the evidence on that basis, and so we have considered the evidence for whatever probative value it may have. That said, however, this evidence is of no probative value. While the registrations are all "in the same class," as applicant states, that class happens to be Class 25 for clothing, goods that are

which prominently features this term must be considered a strong mark entitled to a broad scope of protection.⁶ See *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) ("VEUVE is arbitrary term as applied to sparkling wines, and thus is conceptually strong as trademark"); and *In re Wilson*, 57 USPQ2d 1863 (TTAB 2001).

The arbitrary term XL is the only literal portion of registrant's mark, and it is a strong component of applicant's mark. Thus, the marks when spoken are similar in sound. The additional terms BOTRAN and EXTRA LIGHT in applicant's mark are not sufficient to overcome this similarity. Where, as here, the shared part of the marks is identical and arbitrary in nature, purchasers familiar with the registrant's mark are likely to assume that the house mark BOTRAN simply identifies what had

not similar to alcoholic beverages. Accordingly, this evidence is irrelevant to our analysis.

⁶ Applicant argues that registrant's mark is not famous, claiming that its Internet search revealed no reference to registrant or its products. Applicant printed out one page of results for each of its three different search strategies. Although this evidence is untimely, having been submitted for the first time with applicant's appeal brief, the evidence is considered properly of record because there has been no objection by the examining attorney. However, the evidence is of no persuasive value for any number of reasons, not the least of which is the fact that applicant's search strategies were too broad. Had applicant enclosed the search terms in quotes, applicant may have retrieved more relevant, albeit possibly undesired, results. In any event, the lack of fame of the cited mark does not weigh in applicant's favor. This *du Pont* factor, as is normally the case in *ex parte* proceedings, must be treated as neutral. See *In re Thomas*, 79 USPQ2d 1021 (TTAB 2006). However, the strength of registrant's mark weighs in favor of finding likelihood of confusion.

previously been an anonymous source for the goods. See *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1364 (TTAB 2007). Cf. *Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d 1313 (TTAB 2005). Furthermore, the descriptive wording EXTRA LIGHT in applicant's mark, which simply provides information about the goods, is of little, if any, source-distinguishing effect.

Applicant has detailed the various differences between the marks in appearance; however there are also important similarities. Both marks have a generally rounded appearance and XL is featured in large and prominent letters in the center of each mark. The letters are clearly the focal point of both marks due to their size and placement relative to the other elements in the marks, and they immediately catch the eye. The wording BOTRAN and EXTRA LIGHT in applicant's mark is subordinate matter. Those words appear in much smaller lettering than XL and they are not nearly as visible as the letters. From a distance, applicant's mark could be read simply as "XL." The design elements in the marks are visually less significant as well, serving more as a framework or background for the display of the letters XL. Neither the different orientation of the letters nor the different style of the letters are features that are likely to be noticed or remembered by purchasers when seeing these marks at separate times. Furthermore, the green background in applicant's mark is not a distinguishing feature, particularly

considering that registrant's mark is not limited to any particular color and may be displayed in any color, including green.

Although it is not clear, as applicant claims, that the design in registrant's mark represents lions and a coat of arms, registrant's mark does present a more formal image than applicant's mark, which has a more contemporary look. Nevertheless, in view of the prominence and significance of XL in both marks and the similar impressions that both marks convey, they may be perceived by purchasers encountering these marks on the identical alcoholic beverages simply as different versions of the same mark, one more modern than the other, or that they identify different alcoholic beverages from the same source.

The marks as a whole convey essentially the same arbitrary meanings. There is no evidence that XL stands for EXTRA LIGHT, as applicant contends, or that it would be perceived as such by consumers. The additional words may add to the meaning of applicant's mark, providing information about a characteristic of the goods (EXTRA LIGHT) and the source of the goods (BOTRAN), but they do not create a new or different meaning that would distinguish the marks.

When the marks are viewed in their entirety, and considering that the marks will be used on identical products, we find that the marks are similar enough in sound, appearance,

meaning and commercial impression as to be likely to cause confusion.

The cases relied on by applicant, including *TSI Brands* and *Electrolyte Laboratories*, are not persuasive of a different result. While the cited cases provide guidelines and principles for analyzing composite "letter" marks, which we have applied here, those cases involved entirely different marks, and they do not require us to conclude that the composite marks in this case are not similar.

For example, in *TSI Brands* involving the marks



(applicant's mark) and



(registrant's

mark), both for clothing, the Board found that one of the marks (registrant's) was so "highly stylized" and integrated into the design that it was essentially a "design" mark, whereas in the present case, the letters in both marks are primarily literal elements. In *TSI*, the marks conveyed different meanings in that the letters AK in applicant's mark stood for the wording "American Khakis," unlike the present case where the letters must be presumed to convey the same meanings in both marks. In *TSI*, the marks were visually dissimilar because letters in applicant's mark were subordinate matter serving as background for the words AMERICAN KHAKIS, being superimposed over the letters, and also in view of the overall "linearity" of applicant's mark in contrast

to the circular design of registrant's mark. This is unlike the present case where the overall shapes of the marks are similar, and all the other elements of both marks are subordinate to the letters. The *Electrolyte* case is distinguishable on its facts, as well, particularly in view of our finding that the stylization of the letters is not a significant feature of either mark in this case.

As a final point, the asserted absence of actual confusion does not, as applicant seems to claim, weigh in favor of applicant. We have no information regarding the nature or extent of applicant's and registrant's use or whether a meaningful opportunity for actual confusion ever existed. See *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768 (TTAB 1992). Thus, we consider this factor to be neutral. See *Blue Man Productions Inc. v. Tarmann*, 75 USPQ2d 1811 (TTAB 2005).

In view of the foregoing, and because similar marks are used on identical goods, we find that confusion is likely.

To the extent that there is any doubt on the issue of likelihood of confusion, it is settled that such doubt must be resolved in favor of the prior registrant. In *re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993).

Decision: The refusal to register under Section 2(d) of the Trademark Act is affirmed.