

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

Mailed: July 30, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Empire Wineries, LLC

Serial No. 77071981

Scott W. Petersen of Holland & Knight for Empire Wineries,
LLC.

Aretha Sommerville, Trademark Examining Attorney, Law
Office 107 (J. Leslie Bishop, Managing Attorney).

Before Hairston, Taylor and Bergsman, Administrative
Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Empire Wineries, LLC dba Empire Winery and Distillery
has filed an application to register on the Principal
Register the mark LEMONELA (in standard character format)
for "liqueurs" in Class 33.¹

The examining attorney has refused registration under
Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on

¹ Application Serial No. 77071981 filed December 27, 2006 and
asserting August 16, 2006 as the date of first use and first use
of the mark in commerce.

the ground that applicant's mark is confusingly similar to the registered mark LEMONEL (in standard character format) for "distilled spirits, distilled spirits containing fruit; liqueurs, lemon liqueurs," in Class 33.²

After the refusal was made final, applicant requested reconsideration of the refusal, which was denied on December 2, 2006. Applicant subsequently appealed. Both applicant and the examining attorney filed briefs.³ For the reasons discussed below, we affirm the refusal to register.

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or

² Registration No. 3231111 issued April 17, 2007.

³ The evidence attached to applicant's brief is the same as that previously submitted. Accordingly, it is already of record as part of the application file, and its submission was unnecessary. See *ITC Entertainment Group Ltd. v. Nintendo of America Inc.*, 45 USPQ2d 2021, 2022-23 (TTAB 1998) (submission of duplicative papers is a waste of time and resources, and is a burden upon the Board).

services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We first consider the goods. It is well settled 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 identified in the cited registration. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n. 4 (Fed. Cir. 1993); and *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992). Where the goods in the application at issue and/or in the cited registration are broadly identified as to their nature and type, such that there is an absence of any restrictions as to the channels of trade and no limitation as to the classes of purchasers, it is presumed that in scope the identification of goods encompasses not only all the goods of the nature and type described therein, but that the identified goods are offered in all channels of trade which would be normal therefore, and that they would be purchased by all potential buyers thereof. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). In the present case, the identified goods of applicant and those of the cited registrant have an identical item in common (i.e., liqueurs), and the additional goods in the cited registration (i.e., distilled

spirits, distilled spirits containing fruit and lemon liqueurs) are otherwise closely related alcoholic beverages.

Applicant argues that the identification in the cited registration "qualifies" the goods by adding "containing fruit," while its identification has no such limitation. We note, however, that although the identification in the registered mark includes certain spirits and liqueurs containing fruit, as applicant acknowledges in its reply brief, "the word 'liqueurs' is admittedly used." (Reply brief, p. 2). In addition, as identified, applicant's liqueurs could encompass those containing fruit.

Thus, we must presume that both applicant's goods and registrant's goods will be sold in the same channels of trade and will be bought by the same classes of purchasers. See *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); and *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994).

In view of the above, the *du Pont* factors of the similarity of the goods and the channels of trade strongly favor a finding of likelihood of confusion as to the cited registration.

We now turn to a consideration of the marks, keeping in mind that when marks would appear on identical goods, as

they do here in part, the degree of similarity necessary to support a conclusion of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). In determining the similarity or dissimilarity of marks, we must consider the marks in their entireties in terms of sound, appearance, meaning and commercial impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). 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 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). That is, the purchaser's fallibility of memory over a period of time must be kept in mind. See *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); and *Spoons Restaurant Inc. v. Morrison Inc.*, 23 USPQ2d 1735 (TTAB 1991); *aff'd unpub'd* (Fed. Cir., June 5, 1992).

Applicant's mark is LEMONELA and the cited mark is LEMONEL. We find these marks to be substantially similar in sound, appearance, connotation and commercial impression. As regards appearance, not only do both marks arguably share the word "Lemon" as applicant suggests, but they share the first seven letters. More precisely, applicant's mark incorporates the entirety of opposer's mark. Likelihood of confusion has frequently been found where one mark incorporates the entirety of another mark. See Johnson Publishing Co. v. International Development Ltd., 221 USPQ 155, 156 (TTAB 1982) (EBONY for cosmetics and EBONY DRUM for hairdressing and conditioner); and In re South Bend Toy Manufacturing Company, Inc., 218 USPQ 479, 480 (TTAB 1993) (LIL' LADDY BUG for toy doll carriages and LITTLE LADY for doll clothing). The only difference between applicant's mark and registrant's mark is the addition of the letter "a" to the end of applicant's mark. Contrary to applicant's contention, this additional letter is not likely to be remembered by purchasers when seeing these marks at different times and thus does not serve to distinguish them.

As regards the similarity in sound, applicant argues that its mark has four syllables and the cited mark three, that its mark has an implied accent on the "EL" whereas

"the cited registration gives no clue as to where the accent should be (LEM-oh-nell; Lem-OH-nell; lem-oh-NELL"⁴; and that its mark has an Italian or Spanish sound while the cited registration is indecipherable as to origin. (Brief, p. 2). However, as there is no correct way to pronounce a particular trademark⁵, and because there is nothing in the record as to how the public pronounces registrant's mark, the public may, in fact, pronounce the LEMONEL mark in a manner consistent with applicant's asserted pronunciation of its mark, i.e., in a manner that highlights the "EL" portion.

As regards the connotation and commercial impressions of the marks, as pointed out by applicant,

[i]t is of critical importance to note that both of these marks [LEMONELA and LEMONEL] are *contrived* words (they are not in the dictionary). Both have no obvious meaning and hence *each* has to be viewed as having an inherently distinctive quality (emphasis in original).

(Brief, p. 4). While we agree that both applicant's mark and the cited mark are arbitrary for liqueurs, we nonetheless find that the connotation and commercial

⁴ (Brief, p. 2).

⁵ See e.g., *Kabushiki Kaisha Hattori Tokeiten v. Scutto*, 228 USPQ 461 (TTAB 1985).

impressions of the marks are similar due to their similarity in appearance and sound.

Due to the similarities in appearance, sound, connotation and commercial impression, the *du Pont* factor of similarity of the marks favor a finding of likelihood confusion.

Before leaving this discussion, we address applicant's contention that there is no likelihood of confusion because its applied-for mark, LEMONELA, is part of a family of marks owned by applicant. Applicant bases this claim on its ownership of applications for the marks LIMONELA and ORANGELA which have been approved for publication. We find this claim unavailing. Mere ownership of an application does not show that the public is familiar with the use of the marks shown therein, and there is no evidence in the record that demonstrates that applicant has a family of marks. Compare *J & J Snack Foods Corp. v. McDonald's*, 932 F.2d 1460, 18 USPQ2d 1899 (Fed. Cir. 1991). Moreover, even if applicant had proven the existence of a family of marks, this appeal involves the registrability of applicant's particular mark, LEMONELA. Applicant's ownership of other marks that resemble its applied-for mark is not relevant to the specific likelihood of confusion issue involving the registered mark LEMONEL. See, *Hornblower & Weeks Inc. v.*

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Hornblower & Weeks Inc., 60 USPQ2d 1733, 1737 (TTAB 2001); Baroid Drilling Fluids v. Sun Drilling Products, 24 USPQ2d 1048, 1052 (TTAB 1992); and In re Lar Mor International, Inc., 221 USPQ 180, 183 (TTAB 1983).

Applicant also asserts that there are at least 55 "Lemon" trademarks which have been applied for and registered in Class 33 and that "[t]he bottom line seems to be that an abundance of 'Lemon' trademarks can peacefully coexist on the *Federal Register*⁶ in Class 33 so long as there is some - however minor - distinguishing feature." (Brief, p. 8). We presume by this that applicant is arguing that "Lemon" is so frequently used in trademarks for distilled spirits and liqueurs that its use in both the LEMONEL and LEMONELA marks is not likely to lead to consumer confusion. In support of its position, applicant submitted, with its response to the Office Action issued April 18, 2007, a list of third-party applications and registrations (consisting of the serial and registration numbers, the mark, and whether the application is "Live" or "Dead") for marks containing the word "Lemon" in Class 33 obtained from the TESS database of the United States Patent and Trademark Office (USPTO). Although this evidence is in

⁶ We assume that applicant is referencing the Principal Register.

an improper format, because the examining attorney did not object to the list or advise applicant that copies of the registrations were necessary, we will consider the list as being of record. TMBP § 1208.02 (2d ed. rev. 2004), and the authorities cited therein. However, a mere listing of third-party registrations which include the mark and the registration number, without any accompanying indication of the goods and/or services associated therewith, has virtually no probative value. See TBMP § 1208.02 (2d ed. rev. 2004). Further, the expired registrations and pending and abandoned applications have no value in this appeal. *Action Temporary Services Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) ("[A] cancelled registration does not provide constructive notice of anything"), and the applications show only that they have been filed. See *Interpayment Services Ltd. v. Docters & Thiede*, 66 USPQ2d 1463 (TTAB 2003).

Nonetheless, we note that even if "LEMONEL" was considered to be weak due to an asserted degree of common usage of marks including "lemon," even weak marks are entitled to protection where confusion is likely. See *Matsushita Electric Company v. National Steel Co.*, 442 F.2d 1383, 170 USPQ 98, 99 (CCPA 1971) ["Even though a mark may be 'weak' in the sense of being a common word in common use

as a trademark, it is entitled to be protected sufficiently to prevent confusion from source arising"]. Here, notwithstanding any alleged weakness in the registered mark, it is still similar in sound, appearance, connotation and commercial impression to applicant's mark. We accordingly find this *du Pont* factor is neutral.

One final argument made by applicant must be addressed. Applicant contends that:

One must enter into an examination of this application with a foreknowledge that consumers will be reasonably sophisticated. If one is seeking a bottle of LEMONEL fruit liqueur, he or she will not mistakenly grab a bottle of LEMONELA (or vice versa).

(Brief, pp. 5-6). Applicant also contends that "[a]fter dinner tipplers [drinkers] are generally more knowledgeable about their likes or dislikes." (Brief, p. 5). There is nothing in the record to show that either applicant's liqueurs or registrants distilled spirits and liqueurs will be purchased by consumers who will exercise more than ordinary care in making their purchases. However, even if these consumers exercise some degree of care in their purchasing decisions, even careful purchasers of goods can be confused as to source under circumstances where substantially similar marks are used on identical or closely related goods. See *In re Research Trading*

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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).

We conclude that purchasers familiar with registrant's distilled spirits, distilled spirits containing fruit; liqueurs and lemon liqueurs, sold under the mark LEMONEL would be likely to believe, upon encountering applicant's mark LEMONELA for liqueurs, that the goods originate from or are associated with or sponsored by the same source.

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