

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

*Decision Mailed:
June 17, 2008
GDH/gdh*

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Sociedade Quinta do Portal, SA

Serial No. 78829368

Paulette R. Carey of Buchman Law Firm, LLP for Sociedade Quinta do Portal, SA.

Sally Shih, Trademark Examining Attorney, Law Office 106 (Mary I. Sparrow, Managing Attorney).

Before Hohein, Grendel and Zervas, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Sociedade Quinta do Portal, SA has filed an application to register on the Principal Register in standard character form the mark "Quinta do Portal" for "alcoholic beverages, namely, wine" in International Class 33.¹

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its goods, so resembles the mark "QUINTA DO PORTO," which is registered on the Principal

¹ Ser. No. 78829368, filed on March 4, 2006, which is based on use of the mark in commerce. The foreign wording in the mark translates into English as "Estate of Door."

Register in standard character form for "port wine" in International Class 33,² as to be likely to cause confusion, or to cause mistake, or to deceive.

Applicant has appealed and briefs have been filed.³ We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). See also In re Majestic

² Reg. No. 1,845,836, issued on July 19, 1994, which sets forth a date of first use anywhere of 1971 and a date of first use in commerce of August 1981; renewed. As stated in the registration: "The mark may be translated into English as 'vineyard estate of the port.'" The term "PORTO" is disclaimed.

³ Applicant, in its brief, states that it "attaches a copy of on line translations from info.babylon.com and online.ectaco.co.uk and requests that the Board take judicial notice of the translation" of the term "Quinta" as "a Portuguese term which translates as estate or farm." Similarly, applicant also states that it "attaches hereto The Beverage Alcohol Manual §5-8[,] issued by the Department of Treasury Alcohol Tobacco and Trade Bureau, and requests that the Board take judicial notice of the definition of Porto" as "a generic term for grape wine containing 7-24% alcohol by volume produced in Portugal." We decline to do so. Applicant offers no reason for its failure to submit such evidence prior to appeal and, in any event, the evidence does not appear to be proper subject matter for judicial notice. In particular, as to the latter, Fed. R. Evid. 201(b) provides that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Plainly, unlike a major dictionary, encyclopedia or other standard reference work which is widely available to the general public, the information in the Treasury Department manual which applicant requests that the Board take judicial notice of does not appear to be generally known nor, especially in the case of evidence taken from the Internet, can its accuracy not be reasonably questioned, given the well known changeability of websites. We hasten to add, however, that even if such evidence were to be treated as part of the record herein, it is basically cumulative of other types of evidence and hence would make no difference in the outcome of this appeal.

Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). However, as indicated in *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity or dissimilarity in the goods at issue and the similarity or dissimilarity of the respective marks in their entireties.⁴ See also *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). Here, applicant admits in its response to the initial Office action that it "uses the mark 'Quinta do Portal' on several of its wines, including port wine, table wine, and muscatel" and that it "sells alcoholic beverages, including table and port wines all over the world, including the US." In view thereof, and inasmuch as it is obvious that, as identified, applicant's "alcoholic beverages, namely, wine" encompass registrant's "port wine,"⁵ the primary

⁴ The court, in particular, pointed out that: "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." 192 USPQ at 29.

⁵ While we note that the Examining Attorney in her brief takes strong exception to the statement by applicant in its brief that "the examiner's reliance on the fact that the respective goods are similar or even identical is immaterial," there is no question that the overlap or identity in part of the goods at issue is a materially relevant *du Pont* factor which strongly weighs in favor of a finding of a likelihood of confusion and that applicant's statement is in essence a concession thereof, given its position (which will be explained in detail later in this opinion) that:

This Board has repeatedly held that a single *du Pont* factor may be dispositive on the issue of likelihood of confusion, especially when that single factor is the dissimilarity of the marks. *Kellogg Co. v. Pack'Em Enterprises [Inc., aff'd, Kellogg Co. v. Pack'em Enterprises Inc.]*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991)]. The dissimilarity of the marks outweighs all other factors even though the goods are similar or identical. *Champagne Louis Roederer [S.A.] v. Delicato Vineyards[,]* 148 F.3d 1373, 47 USPQ2d 1459 (Fed. Cir. 1998). The Federal Circuit has

focus of our inquiry is accordingly on the similarities and dissimilarities in the respective marks, when considered in their entirety, along with, as applicant also asserts, the additional *du Pont* factor of the number and nature of similar marks in use on similar goods.

Turning, therefore, to consideration of the similarities and dissimilarities in the respective marks, we note as a preliminary matter that, "[w]hen marks would appear on virtually identical goods . . . , the degree of similarity [of the marks] 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), *cert. denied*, 506 U.S. 1034 (1994). See also *ECI Division of E-Systems, Inc. v. Environmental Communications Inc.*, 207 USPQ 443, 449 (TTAB 1980). Applicant, in its brief, nonetheless contends that "[i]n the present case, the dispositive *du Pont* factor is the similarity [or dissimilarity] of the respective marks." Applicant "submits that when the registered mark is accorded the appropriately narrow scope of protection, and the different meanings of the respective marks are considered, the marks are not similar" and confusion is therefore not likely.

upheld the Board's determination that the more important fact for resolving the issue of likelihood of confusion is the dissimilarity in commercial impression. *See Keebler Co. v. Murray Bakery Products* [, 866 F.2d 1386,] 9 USPQ2d 173[6] (Fed. Cir. 1989) in which Pecan Sandies was found not confusingly similar to Pecan Shorties for use on cookies.

Therefore, the examiner's reliance on the fact that the respective goods are similar or even identical is immaterial.

Specifically, applicant maintains that while the term "Quinto do," which means "Estate of" in English, "is common to both marks," such term "is highly suggestive when used in connection with wines." According to applicant:

Wines are often produced on estates; therefore, when used in connection with wines, the term Quinta or estate is so highly suggestive of the goods so as to have little or no commercial impact on the consumer. The TESS record submitted with Applicant's response to the first office action reveals that thirty-six registered marks in class 33 include the term Quinta as part of the mark. Clearly, consumers are accustomed to encountering marks for use on wine which include Quinta and are capable of distinguishing among them. Even without reference to third[-]party registrations, it is axiomatic that marks must be considered in their entireties. The mere presence of a common, highly suggestive portion is usually insufficient to support a finding of likelihood of confusion. *Tektronix, Inc. v. Daktronics, Inc.* [, 534 F.2d 915,] 189 USPQ 693, 694 (CCPA 1976). Thus the presence of the highly suggestive Quinta do in both marks does not support a finding of likelihood of confusion.

Applicant further argues that "the remaining term, Porto, in the registered mark is too descriptive or generic when used in connection with port wine to convey trademark significance," as evidenced by the disclaimer thereof. Applicant consequently urges that "[c]onsumers will recognize Porto as a generic term for the goods and will not attribute any source-indicating significance" thereto. Thus, applicant insists, the combination of terms forming registrant's mark "QUINTA DO PORTO" "is highly suggestive and not entitled to a broad scope of protection."

In addition, applicant asserts that the meanings of the respective marks differ, noting that registrant's mark "translates as 'Vineyard Estate of the Port,' or more colloquially 'the Port Estate', [and] thus the connotation is that of a vineyard or estate where port wine is produced." By contrast, applicant contends that the meaning of "Portal" in its "Quinta do Portal" mark is "that of a doorway" or door, a meaning which "clearly differs from the generic term Porto in the registered mark." Moreover, applicant maintains that "the term Portal is incongruous when combined with the term Quinta (Estate), resulting in the connotation of 'Estate of the Doorway' or the 'Doorway Estate.'" Applicant argues that "[b]ecause of the incongruous effect, the word Portal has a stronger impact than the suggestive term Quinta," thereby distinguishing its mark from registrant's mark.

The Examining Attorney, on the other hand, contends that the marks at issue are likely to cause confusion when used in connection with identical goods such as port wines. As to applicant's argument that the term "QUINTA DO" is highly suggestive and that the record shows that there are thirty-six (36) third-party registrations for marks covering goods in International Class 33 which include the term "QUINTA,"⁶ the Examining Attorney correctly notes in her brief that:

⁶ A review of the list, which applicant submitted with its response to the initial Office Action, of marks which incorporate either the terms "QUINTA DO" or "QUINTA" actually shows, however, that out of a total of just twenty (20) applications to register such marks for undisclosed goods or services, only fourteen (14)--rather than the thirty-six (36) claimed by applicant--matured into registrations, including the registration cited herein under Section 2(d) as a bar to

Third-party registrations, by themselves, are entitled to little weight on the question of likelihood of confusion. *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *In re Hub Distributing, Inc.*, 218 USPQ2d 284 (TTAB 1983). Third-party registrations are not evidence of what happens in the marketplace or that the public is familiar with the use of those marks. *In re Comexa Ltda*, 60 USPQ2d 1118 (TTAB 2001); *National Aeronautics and Space Admin. v. Record Chem. Co.*, 185 USPQ 563 (TTAB 1975); TMEP §1207.01(d)(iii). Further, existence on the register of other confusingly similar marks would not assist applicant in registering yet another mark which so resembles the cited registered mark that confusion is likely. *In re Total Quality Group Inc.*, 51 USPQ2d 1474 (TTAB 1999).

Nonetheless, while the list submitted by applicant with its response to the initial Office action plainly is not evidence with respect to the *du Pont* factor of the number and nature of similar marks in use on similar goods, it is still the case that third-party registrations may be given some weight to show the meaning of a mark in the same way that dictionaries are used. See, e.g., *Tektronix, Inc. v. Daktronics, Inc.*, supra at 189 USPQ 694-95. However, as the Examining Attorney properly points out, even if the subsisting third-party registrations which are listed were considered as establishing that for wines the term "QUINTA DO" is weak because it would be regarded by consumers as highly suggestive of such goods due to its meaning of "ESTATE OF," it is still the case that even a weak mark is "entitled to protection against registration by a subsequent user of the same or similar

applicant's application, and of those only twelve (12) were currently subsisting.

mark for the same or closely related goods," citing *Hollister Inc. v. Ident A Pet, Inc.*, 193 USPQ 439, 442 (TTAB 1976).

As the Examining Attorney further correctly notes in her brief:

[T]he test of likelihood of confusion is not whether the marks [at issue] can be distinguished when subjected to a side-by-side comparison. The question is whether the marks create the same overall commercial impression. *Recot[] Inc. v. M.C. Becton*, 214 F.[3]d 1322, 54 USPQ2d 1894, 189[9] (Fed. Cir. 2000); *Visual Information Inst., Inc. v. Vicon Indus. Inc.*, 209 USPQ 179 (TTAB 1980). The focus is on the recollection of the average purchaser who normally retains a general rather than specific impression of trademarks. *Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537 (TTAB 1979); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975); TMEP §1207.01(b).

Here, the respective marks essentially create the same overall commercial impression since we agree with the Examining Attorney that, when considered in their entirety, applicant's mark "Quinta do Portal" and registrant's mark "QUINTA DO PORTO" are "essentially phonetic equivalents" and are substantially "similar in appearance." Such similarities, as the Examining Attorney notes, basically outweigh any arguable differences in meaning or connotation of the marks.

In particular, while speakers of Portuguese may, as argued by applicant, be able to distinguish the differences in connotation of the respective marks due to the term "Portal" in applicant's mark meaning "Door" or "Doorway" while the term "PORTO" in registrant's mark signifying "PORT," the same is not necessarily true for consumers who speak English. Although, as to the latter group of purchasers, some may regard the terms

"Portal" and "PORTO" as cognates for, respectively, a "portal" or doorway and a "port" variety of wine, a not insubstantial number of those consumers may not readily discern such a connection, especially if casually or impulsively buying a bottle of wine, given that such terms sound substantially alike and appear after the virtually identical terms "Quinta do" and "QUINTA DO."

Moreover, as a whole, applicant's mark "Quinta do Portal" and registrant's mark "QUINTA DO PORTO" are not only substantially similar in appearance but, inasmuch as each is presented in standard character form, could also be displayed even more similarly as "QUINTA DO PORTAL" in the case of applicant's mark and "Quinta do Porto" in the case of registrant's mark. See, e.g., Phillips Petroleum Co. v. C. J. Webb, Inc. 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971) [a mark in typed or standard character form is not limited to the depiction thereof in any special form]. When so displayed, applicant's "QUINTA DO PORTAL" mark is virtually identical to and nearly indistinguishable in appearance from registrant's "QUINTA DO PORTO" mark and registrant's "Quinta do Porto" mark is likewise essentially the same as and almost indistinguishable from applicant's "Quinta do Portal" mark. Because such similarities in appearance and sound predominate over differences in meaning or connotation which are not discernable to average, English speaking consumers, we find on balance that applicant's mark and registrant's mark are so substantially similar as to project essentially the same overall commercial impression when used in connection with port wines. See, e.g., Recot Inc. v. M.C.

Becton, supra ["[a]ll relevant facts pertaining to appearance, sound, and connotation must be considered before similarity as to one or more of those factors may be sufficient to support a finding that the marks are similar or dissimilar"; where "the Board only considered the connotation of part of the marks--FRITO having a different connotation than FIDO--before concluding that the marks were very dissimilar, and had different commercial impressions," was error since by "not consider[ing] the appearance or overall sound of the marks," the Board committed "a conspicuous oversight given the similar block capital letter of the FIDO LAY mark and two of the Recot [FRITO LAY] marks"].

Accordingly, we conclude that purchasers who are familiar or otherwise acquainted with registrant's "QUINTA DO PORTO" mark for "port wine" would be likely to believe, upon encountering applicant's substantially similar "Quinta do Portal" mark for "alcoholic beverages, namely, wine," that such identical in part and otherwise commercially related goods emanate from, or are sponsored by or affiliated with, the same source.

Decision: The refusal under Section 2(d) is affirmed.