

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

Mailed:
December 14, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Q4X, LLC

v.

Desert Hills, LLC

Opposition No. 91168584
to application Serial No. 78326156
filed on November 11, 2003

Gregory N. Owen of Owen, Wickersham & Erickson, P.C. for
Q4X, LLC

Patrick H. Ballew of Stratton Ballew PLLC for Desert Hills,
LLC

Before Seeherman, Grendel and Kuhlke, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Q4X, LLC has opposed the application of Desert Hills,
LLC to register FIVE VINES, with VINES disclaimed, as a
trademark for wine.¹ As grounds for opposition opposer has
alleged that since June 1, 1998, prior to the filing date of

¹ Application Serial No. 78326156, filed November 11, 2003,
based on Section 1(b) of the Trademark Act (intent-to-use).

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applicant's application or any date of first use upon which applicant can rely, opposer has used the mark FOUR VINES in connection with wine; that opposer is the owner of a federal trademark registration for this mark; and that applicant's FIVE VINES mark so resembles opposer's previously used FOUR VINES mark as to be likely, when applied to applicant's identified goods, to cause confusion or mistake or to deceive.

Applicant has denied the salient allegations of the notice of opposition, and has asserted affirmatively that confusion is not likely because the only common element of the two marks, VINES, is a generic term for grapes or wine, and that both opposer's and applicant's rights in their respective marks are of a narrow scope because of the existence of third-party registrations for marks which include the word FOUR or FIVE.

In addition to the pleadings and the file of the opposed application, which are of record by operation of the Trademark Rules, the only evidence is a status and title copy of opposer's pleaded registration, which opposer made of record by notice of reliance. The registration is No. 2906723, issued November 30, 2004, for "Four Vines," in standard characters, with VINES disclaimed, for "alcoholic beverages, in particular wine." Only opposer filed a brief.

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Opposer has established its standing by its registration, thereby showing its direct commercial interest. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). Also, in view of that registration, priority is not in issue. *King Candy Company v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Our determination of the issue of likelihood of confusion is based on an analysis of all of 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 Co., 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 services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

The identification of goods in opposer's registration and applicant's application both include "wine." Thus, the goods must be deemed to be legally identical, and to travel in the same channels of trade to the same classes of

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consumers. These du Pont factors favor a finding of likelihood of confusion. Moreover, the consumers for "wine" are the general public, including those who are not particularly sophisticated about wine, and those who would buy wine on impulse and without the exercise of care. These du Pont factors, too, favor a finding of likelihood of confusion.

We now turn to a consideration of the marks, keeping in mind that when marks would appear on virtually identical goods or services, as they do here, 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). Opposer's mark is FOUR VINES; applicant's mark is FIVE VINES. Both marks, of course, contain the word VINES. However, contrary to the position asserted by applicant in its answer to the notice of opposition, the descriptive word VINES is not the only point of similarity between the marks. Both marks begin with a number that modifies the word VINES, and the numbers themselves are similar: both begin with the letter "F", contain four letters, and one follows the other in numerical order. When the marks are compared in their entirety, they convey very similar commercial impressions. Under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side

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comparisons between marks, and must rely upon their imperfect recollections. *Dassler KG v. Roller Derby Skate Corporation*, 206 USPQ 255 (TTAB 1980). Purchasers of wine are not likely to remember whether a mark is FOUR VINES or FIVE VINES. Moreover, even if purchasers were to remember the specific number FOUR in opposer's mark FOUR VINES, if they were to encounter the mark FIVE VINES, they would be likely to regard FIVE VINES as a variation of the FOUR VINES mark, rather than as an indicator of wine having a different source. Accordingly, the du Pont factor of the similarity of the marks favors a finding of likelihood of confusion.

There is no evidence regarding any other du Pont factor, and we therefore treat them as neutral.

Considering all of the du Pont factors as to which there is evidence, we find that applicant's mark FIVE VINES for wine is likely to cause confusion with opposer's mark "Four Vines" for wine.

Decision: The opposition is sustained.