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PRECEDENT OF THE TTAB

Mailed: July 30, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Ernest Everett James

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Serial No. 87905550

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Mark Borghese of Borghese Legal, Ltd.,
for Ernest Everett James.

Caroline L. Moran, Trademark Examining Attorney, Law Office 125,
Heather Biddulph, Managing Attorney.

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Before Rogers, Chief Administrative Trademark Judge; and
Lynch and Coggins, Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

Ernest Everett James (“Applicant”) seeks registration on the Principal Register of the mark LIQUOR SLINGER DISTILLING (in standard characters, with LIQUOR and DISTILLING disclaimed) for “liquor,” in International Class 33.¹

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, as applied

¹ Application Serial No. 87905550 filed on May 3, 2018, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce.

to the goods identified in the application, so resembles the mark SLINGER for “drinking glasses; shot glasses,” in International Class 21,² on the Principal Register as to be likely to cause confusion, to cause mistake, or to deceive. After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

I. Evidentiary Issue

The Examining Attorney submitted for the first time with her brief a definition of “shot glass” from OXFORD DICTIONARIES and a request that the Board take judicial notice thereof.³ Applicant did not object to the request. *See* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 710.01(c) (Oct. 2018). While the better practice would have been for the Examining Attorney to ensure that the relevant definition was included in the record prior to appeal, it is well-established that the “Board may take judicial notice of definitions from printed dictionaries that were not made of record prior to appeal, and may do so either sua sponte or upon request of the . . . examining attorney.” *Id. See also In re Premiere Distillery LLC*, 103 USPQ2d 1483, 1448 n.2 (TTAB 2012) (judicial notice taken of definition submitted with examining attorney’s brief after appeal filed); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1208.04 (June 2019). In view of this established practice we grant the Examining Attorney’s request and will consider the definition of “shot glass.”

² Registration No. 5083798, issued November 15, 2016.

³ Brief, unnumbered p. 7, n.1 (6 TTABVUE 8).

II. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“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.”).

A. Similarity of the Goods, Channels of Trade, and Classes of Customers

We start, as Applicant did in its brief, by considering the second and third *du Pont* factors, the similarity of the goods, channels of trade, and classes of customers. We must make our determinations under these factors based on the goods as they are identified in the application and cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Applicant's goods are "liquor," and Registrant's goods are "drinking glasses; shot glasses." There is an inherent, complementary relationship between the parties' goods: liquor is served in and drunk from drinking glasses and shot glasses. Indeed, a shot glass is defined as "[a] small glass used for serving liquor."⁴ We find that the goods are related on their face and would be used by the same consumer, one who drinks or serves liquor.

The Examining Attorney argues that it is "common for a distillery selling liquor to also sell drinkware and shot glasses under the same mark." Brief, unnumbered p. 10 (6 TTABVUE 11). In support of her argument, she submitted web evidence of distilleries that offer both liquor and drinking or shot glasses. These include, among others, Woodford Reserve Distillery (liquor and julep cup), Watershed Distillery (liquor and rocks glass), Crown Valley Distillery (liquor and shot glass), and Evan Williams Distillery (liquor and shot glass).⁵ Applicant counters that the goods are distinct and that the glassware in the Examining Attorney's evidence "appear to be promotional items." Brief, p. 3 (4 TTABVUE 6). In addition to the obvious and definitional relationship between liquor and shot glasses, the Internet evidence supports a finding that the goods are related, and complementary, and that the relevant consumers may expect to find both liquor and either drinking glasses or shot glasses offered together from a single source.

⁴ OXFORD DICTIONARIES (en.oxforddictionaries.com/definition/us/shot_glass); exhibit to Examining Attorney's Brief, 6 TTABVUE 13.

⁵ August 27, 2018 Office Action at TSDR 7-20; November 14, 2018 Office Action at TSDR 6-19. Citations to documents contained in the TSDR database are to the downloadable .pdf versions of the documents.

The Examining Attorney's Internet evidence also shows that liquor and shot glasses travel in some of the same channels of trade to some of the same classes of consumers. Applicant argues that liquor is "tightly controlled by state regulators and may only be purchased by consumers over the age of 21," Brief, p. 3 (4 TTABVUE 6), and the "channels of trade for liquor . . . are through a highly regulated three-tiered system" while glassware is sold in "stores selling home goods." *Id.*, p. 4 (4 TTABVUE 7). We have considered Applicant's evidence from the Park Street website of a brief article on the alcoholic beverage industry and the "three-tier system."⁶ However, nothing in the article suggests that liquor and shot glasses could not have some overlap in their trade channels or classes of consumers. Even assuming that liquor is "tightly controlled," there are no limitations in either the cited registration or the application as to the channels of trade or classes of purchasers. Specifically, there is no restriction in the cited registration limiting the channels of trade of drinking and shot glasses to "stores selling home goods" or limiting the classes of purchasers to people under 21 years of age or to those who do not drink or serve liquor. The Examining Attorney's Internet evidence demonstrates that liquor and drinking and shot glasses are commonly sold by the same entity (e.g., distilleries) to some of the same consumers, even if the environment might be, as Applicant argues, tightly controlled. In view thereof, the second and third *du Pont* factors favor finding a likelihood of confusion.

⁶ October 25, 2018 Response to Office Action at TSDR 7-9 (parkstreet.com).

B. Similarity of the Marks

We next consider the first *du Pont* likelihood of confusion factor, which focuses on “the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). “The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quotation omitted). Consumers may not necessarily encounter the marks in close proximity and must rely upon their recollections thereof over time. *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1468 (TTAB 1988). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014); *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009). Here, the average purchaser of Applicant’s goods includes ordinary consumers who drink or serve liquor.

Our analysis is not predicated on dissection of the involved marks. *Stone Lion*, 110 USPQ2d at 1161. Rather, we are obliged to consider the marks in their entirety. *Id.*; see also *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered

piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). Nonetheless, 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 a consideration of the marks in their entireties. *Stone Lion*, 110 USPQ2d at 1161. For instance, as the Federal Circuit has observed, “[t]hat a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Registrant’s mark is SLINGER. Applicant’s mark is LIQUOR SLINGER DISTILLING. The marks share the identical term SLINGER, which comprises the entirety of Registrant’s mark and the dominant portion of Applicant’s mark. To the extent that both Applicant’s and Registrant’s marks contain the identical term SLINGER, the marks are similar in sound and appearance. *See In re Dixie Rests.*, 41 USPQ2d at 1533-34.

The term LIQUOR is the generic designation of Applicant’s goods, *see Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1045 (Fed. Cir. 2018) (“A generic term ‘is the common descriptive name of a class of goods or services.’”) (quoting *H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986)), and the term DISTILLING is at least descriptive of the goods. *See In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2014 n.4 (TTAB 1988) (“By its disclaimer . . . applicant has conceded that the term is merely descriptive as used in connection with applicant’s goods.”). Applicant’s mark adds the generic or

descriptive terms LIQUOR and DISTILLING to Registrant's mark, and consumers are less likely to focus on such terms to indicate source.

Applicant argues that the term SLINGER in Registrant's mark "brings to mind an ancient soldier," but that same term in its own mark has the "commercial impression of a proprietor of liquor" when it is preceded by LIQUOR. Brief, pp. 5-6 (4 TTABVue 8-9). Applicant submitted no evidence to suggest that LIQUOR SLINGER is a recognized term or would otherwise be perceived by the relevant public as a term with any particular meaning, or, more generally, that SLINGER as used in Applicant's mark would have a different connotation or commercial impression than Registrant's mark. We conclude that the term SLINGER is likely to have the same connotation and commercial impression in each mark, particularly where that term is used on complementary goods. The consuming public, which is prone to shortening marks, could easily regard Registrant's mark SLINGER as a shortened version of Applicant's mark LIQUOR SLINGER DISTILLING. *See In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) ("ML is likely to be perceived as a shortened version of ML MARK LEES when used on the same or closely related skin care products.").

We find the marks to be overall more similar than not. Because the terms LIQUOR and DISTILLING are at least descriptive and have been appropriately disclaimed by Applicant, they are less likely to make an impact in the minds of consumers. *See In re Dixie Rests.*, 41 USPQ2d at 1533-34 (disclaimed matter that is descriptive of or generic for a party's goods is typically less significant or less

dominant when comparing marks); *see also In re Nat'l Data Corp.*, 224 USPQ at 752. The term SLINGER is common to each mark. As Applicant points out, there are differences between the marks when viewed on a side-by-side basis, but as stated *supra*, this is not the proper test. *Coach Servs. v. Triumph Learning*, 101 USPQ2d at 1721. We find that when considered in their entireties, and against the backdrop of complementary goods, the cited mark SLINGER and Applicant's mark LIQUOR SLINGER DISTILLING are similar in appearance, sound, and connotation, and convey a similar commercial impression, and those similarities outweigh the differences identified by Applicant. Accordingly, the first *du Pont* factor also favors finding a likelihood of confusion.

C. Summary

We have considered all of the arguments and evidence of record, and all relevant *du Pont* factors. We have found that the marks at issue are similar; and that Applicant's and the Registrant's goods have an inherent, complementary relationship, move in overlapping trade channels, and are offered to the same class of relevant purchasers. In view thereof, the relevant factors favor a finding of a likelihood of confusion.

III. Decision

The refusal to register Applicant's mark LIQUOR SLINGER DISTILLING is affirmed.