

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB

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Paper No. 9

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Caves Acacio Vinhos de Portugal, Lda.

Serial No. 76/076,673

Lawrence E. Abelman of Abelman, Frayne, & Schwab for Caves
Acacio Vinhos de Portugal, Lda.

Gi Hyun An, Trademark Examining Attorney, Law Office 101
(Jerry Price, Managing Attorney).

Before Simms, Walters and Chapman, Administrative Trademark
Judges.

Opinion by Simms, Administrative Trademark Judge:

Caves Acacio Vinhos de Portugal, Lda. (applicant), a
Portuguese corporation, has appealed from the final refusal
of the Trademark Examining Attorney to register the mark
ACACIO for rose wine.¹ The Examining Attorney has refused
registration under Section 2(d) of the Act, 15 USC
§1052(d), on the basis of Registration No. 2,340,488,

¹ Application Serial No. 76/076,673, filed June 23, 2000, based upon
applicant's allegation of a bona fide intention to use the mark in
commerce.

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issued April 11, 2000, for the mark ACACIA for wine.

Applicant and the Examining Attorney have filed briefs but no oral hearing was requested.

We affirm.

First, we deal with a procedural matter. In its appeal brief, applicant requested that the description of goods in its application--"rose wine"--be amended to "green wine." Applicant argues that this amendment is a narrowing of the original description of goods. While the Examining Attorney should have made some comment about applicant's proposed amendment, the Examining Attorney made no reference at all to this proposed amendment, but stated throughout her brief that applicant's goods are rose wine. In the absence of any approval or disapproval of this amendment, we must assume that applicant's goods are rose wine. In any event, we would reach the same result even if applicant's goods were considered to be amended to "green wine."

Applicant argues that the marks ACACIA and ACACIO are visually and phonetically distinct and also differ in commercial impression, the registered mark being a type of tree from a tropical or warm area while applicant's mark is a family name. According to applicant, ACACIA used on wine may suggest wine from an exotic locale having a stimulating

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or sweet aroma. Applicant also argues that wine drinkers are generally sophisticated and knowledgeable purchasers who would not be confused by these marks.

We agree with the Examining Attorney, however, that confusion is likely. While the marks differ in the final letter, this slight difference in appearance and in possible pronunciation is not sufficient to avoid likelihood of confusion. When verbalized, these marks are virtually identical. Moreover, the slight difference in connotation or meaning (a tree versus an arbitrary word or a family name) does not overcome the similarities in the marks. Furthermore, as the Examining Attorney has observed, a side-by-side comparison of the marks is not the proper test, and we must consider the fallibility of memory of the average purchaser as well as the fact that the purchaser normally retains a general rather than a specific impression of a trademark. See, for example, *Spoons Restaurants, Inc. v. Morrison, Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd.*, No. 92-1086 (Fed. Cir. June 5, 1992); and *Puma-Sportschuhfabriken Rudolf Dassler KG v. Roller Derby Skate Corporation*, 206 USPQ 255, 259 (TTAB 1980).

With respect to the goods, it has been repeatedly held that, in determining the registrability of a mark, this Board is constrained to compare the goods and/or services

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as identified in the application with the goods and/or services as identified in the registration. See *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); *Octocom Systems Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and *Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Registrant's wine is broadly identified and could encompass applicant's specific type of wine. Moreover, registrant's and applicant's wine may be sold to the same class of purchasers through the same channels of trade.

Finally, while applicant argues that wine purchasers are sophisticated, there is simply no evidence in this case that wine purchasers are knowledgeable or sophisticated. In fact, the Board has observed on a previous occasion that:

wine is a commonly purchased product ranging in price from a few dollars a bottle to thousands of dollars for a rare bottle. At the lower and middle range of the price spectrum, wine may be purchased by ordinary adult consumers for a variety of reasons, such as for parties, to drink as an accompaniment to a meal and the like.... Accordingly, we conclude that the highly sophisticated purchaser argument propounded by applicant is not supported by the record and that it is

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the average ordinary adult wine consumer who must be looked at in determining likelihood of source confusion in this case.

In re Bercut-Vandervoort & Co., 229 USPQ 763, 765 (TTAB 1986).

Applicant's other arguments are likewise unpersuasive.²

Decision: The refusal of registration is affirmed.

² The fact that applicant may have owned a registration, covering the applied-for mark, which co-existed with the cited registration is irrelevant. The issue before us is whether applicant's mark for its wine is likely to cause confusion with the cited mark for wine. See *In re Wilson*, 57 USPQ2d 1863, 1871 (TTAB 2001). See also *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).